AN

APPENDIX

TO

BACON'S

NEW ABRIDGEMENT

OF THE

LAW,

ALPHABETICALLY DIGESTED UNDER PROPER TITLES.

BY

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APPENDIX.

LEGACIES.

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(A) What a Legacy properly is.

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(*A donatio Causâ*) In considering the doctrine of donations *mortis causâ*, one cannot help remarking how closely the decisions of the courts of this country have followed the Imperial Constitutions. Bracton in treating of this subject uses the very language of the Roman law. Lib. 2. c 26. It seems therefore not to be altogether improper, or to be digressing too far from the limits of our work, to enter into a short comparison of the Imperial and English law upon this subject.

A donation *mortis causâ* is described in the Institutes, "*Cum quis ita donat, ut si quid humanitus ei contigisset, haberet is, qui accipit; sin autem supervixisset is, qui donavit, reciperet; vel, si eum donationis pœnituisset, aut prior decesserit is, cui donatum sit.*" And in another part, "*Cum magis se quis velit habere, quam eum, cui donat, magisque eum, cui donat, quam hæredem suum.*" So with us, a donation of this kind must have relation to the death of the donor, is perfected by his death, and until his death is merely conditional, liable to be defeated by the death of the donee in the lifetime of the donor, by the revocation of the donor; and as Bracton states it, by the donor's recovery, or escape from the danger he apprehended himself to be in, and see acc. Lawson v. Lawson, 1 P. Wms. 441. but see Hill v. Chapman, 2 Br. Ch. Rep. 612. *semb. contr.* And as with us, if it be not made with reference to death, if it be to take effect presently, if it be revocable, it is then, not a donation *mortis causa*, but a donation *inter vivos*, and therefore cannot have place between husband and wife; (and a proper donation *mortis causâ* may, like a legacy, pass between persons in that relation,) Tate v. Hilbert, 2 Vez. jun. 111, 4 Br. Ch. Rep. 286. S. C. Lawson v. Lawson, 1 P. Wms. 441. Miller v. Miller. 3 P. Wms. 356.; so, by the Imperial law, "*Ubi ita donatur mortis causâ, ut nullo casu revocetur,* [MORS] (which must be supplied) *causa donandi magis est, quam mortis causâ donatio; et ideo perinde haberi debet, atque alia quævis inter vivos donatio; ideoque inter viros et uxores non valet.*" D. L. 39 tit. 6. l. 27.—By both laws a donation of this kind may be made by a person *in periculo mortis* not only from sickness, but from whatsoever other cause. D. L. 39 tit. 6. l. 3, 4, 5, 6. Bract. Lib. 2. c. 26. And as by the English law, it is subject to the debts of the donor, and fraudulent as against creditors, Drury v. Smith 1 P. Wms. 406. so by the Imperial law, "*Sicuti legata non debentur, nisi deducto ære alieno, aliquid superfit; nec mortis causâ donationes debebuntur; sed infirmantur per æs alienum. Quare, si immodicum æs alienum interveniat, ex re mortis causâ sibi donatâ nihil aliquis consequitur.* D. L. 35. tit. 2. l. 66. § 1. *Et si debitor consilium creditorum fraudandorum non habuisset, avelli res mortis causâ ab eo donata debet. Nam cum legata ex testamento ejus qui solvendo non fuit, omnimodo inutilia sint; possunt videri etiam donationes mortis causâ factæ rescindi debere, quia legatorum instar obtinent.*" D. L. 39. tit. 6. 17.——Whether, by the Imperial law, a delivery either actual or symbolical of the subject of the donation were absolutely necessary, no where distinctly appears, and hath indeed been a matter of controversy among civilians. Whether, by our law, an actual delivery *be in all cases* requisite, hath not yet been adjudged; in general, it certainly is so. Ashton v. Dawson, Sel. Ca. in Can. 14. Drury v Smith, 1 P. Wms. 404. Hedges v. Hedges, Pr. Ch. 269. Ward v. Turner, 2 Vez. 441. And a mere symbolical delivery will clearly be of no effect; unless indeed the symbol be such as enables the party to come at the possession of the thing which it represents, such as the key of a trunk which contains the thing given. Jones v. Selby, Pr. Ch. 300. 2 Vez. 443. Hence it hath been determined, that the delivery of a promissory note, not payable to bearer, Miller v. Miller, 3 P. Wms. 357. and of receipts for *S. S.* annuities,

Ward v. Turner, 2 Vez. 439 is not a ſufficient delivery to effectuate a gift of this kind of the money due on the note or of the annuities, the property neither in the note nor in the ſtock, paſſing thereby; and yet the delivery of a bond, though a *choſe in action*, hath been holden to amount to a gift (*mortis cauſâ*) of the debt itſelf Snellgrave v. Bailey, 3 Atk. 214. But ſee 3 P. Wms. *ubi ſupra*.—That a donation *mortis cauſâ* was good without delivery, where it was evidenced by writing, was admitted by the Imperial law.—QUIDAM (which muſt be ſupplied) *avunculo ſuo debitori mortis cauſâ donaturus quæ debebat, ita ſcripſit.* TABULÆ, VEL CHIROGRAPHA TOT, UBICUNQUE SUNT, INANES ESSE; *neque eum ſolvere debere. Quæro, an hæredes, ſi pecuniam ab avunculo defuncti petant, exceptione doli mali tueri ſe poſſint? Marcellus reſpondit, poſſe: nimirum enim contra voluntatem defuncti hæres petit ab eo.* D. L. 39. tit 6. l 28. And with us in a late caſe. Lord Chancellor Loughborough, in ſpeaking on this ſubject is reported to have ſaid, "It is not neceſſary in this caſe to "diſcuſs, whether delivery is neceſſary in all caſes. Perhaps, it might not be difficult to conceive "that ſuch a gift might be by deed or by writing. It is clear it could not be by mere parol; be- "cauſe ſaying '*I give*,' without an act, does not transfer the property. So far I concur with the "reaſoning of Lord Hardwicke, in Ward v. Turner. It might be conſidered, if the caſe ſhould "ariſe, whether there would be any objection to a formal deed. I ſhould think it not within the "juriſdiction of the eccleſiaſtical court, and that the property ſo given is not to be poſſeſſed by the "executor." Tate v. Hilbert, 2 Vez. jun. 120. And an inſtance of ſuch a gift by deed occurs in the caſe of Johnſon v. Smith, 1 Vez. 314. Indeed a deviſe of lands ſeems to be nothing elſe but a conveyance or diſpoſition *mortis cauſâ*. 1 Burr. 429.—A delivery to a third perſon to hold in truſt for the donee, to be given to him in the event of the donor's death, was allowed to be ſufficient by the Imperial law, D. L. 39. tit. 6. l 8. § 2.: but it may be doubted, whether it would be ſo by our law, by reaſon of the maxim, *donatio perficitur poſſeſſione accipientis*, Jenk. 109. ca. 9. whence gifts with us have the ſemblance of contracts.——To effectuate gifts of this kind the Emperor Juſtinian required the teſtimony of five witneſſes, Cod. Lib. 8. tit. 57. l. 4. a caution which hath been thought reaſonable, and in ſome degree followed by our own courts, Ward v. Turner, 2 Vez. 438.; though it muſt be admitted, that ſuch a gift has been ſupported upon the teſtimony of only one witneſs. Hill v. Chapman, 2 Br. Ch. Rep 612.—By the Roman law, every thing was capable of being the ſubject of a donation *mortis cauſâ* but by our law the neceſſity of delivery excludes all thoſe things, the property wherein does not or cannot paſs by delivery, 3 P. Wms. 357. 2 Vez. 436-7.; though, if, according to the inclination of Lord Loughborough's opinion, *ſupra*, ſuch a donation may be effectual by deed or writing without livery, it ſeems to follow, that even thoſe things which are of too complex a nature to paſs by delivery, ſuch as the whole, or reſidue of perſonal eſtate, may be ſo diſpoſed of.

(B) Where a Legacy ſhall be ſaid to be well given: And herein,

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(*As, if a*) If a teſtator *deſire* his executor to give another 200*l.* without preſcribing any time of payment, it is a good bequeſt. Breſt v. Offley, 1 Ch. Rep. 246. For where the property and the perſon are aſcertained, *recommendatory* bequeſts are conſidered as *imperative* Harding v. Glyn, 1 Atk. 469. Richardſon v. Chapman, 1 Burn's E. L. tit. Biſhops, p. 220, 5 Br. P. C. 400. Earl of Bute v. Stuart, 5 Br. P. C. 534. Palmer v. Scribb, 2 Eq. Ca. Abr. 291. Harland v. Trigg, 1 Br. Ch. Rep. 142. Wynne v. Hawkins, *Id.* 179. Nowlan v. Nelligan, *Id.* 489. Pierſon v. Garnet, 2 Br. Ch. Rep. 45. 230. Malim v. Keighley, 2 Vez. jun. 333. 529.

Nowlan v. Nelligan, 1 Br. Ch. Rep. 489.

A teſtator made a teſtamentary paper in the following words: "I give "and deviſe unto my loving wife *H. N.* all my real and perſonal eſtate; I "make no proviſion expreſsly for my dear daughter (the plaintiff), know- "ing that it is my dear wife's happineſs, as well as mine, to ſee her com- "fortably provided for; but in caſe of death happening to my ſaid wife, in "that caſe, I hereby requeſt my friends *S.* and *H.* to take care of, and ma- "nage to the beſt advantage, for my lovely daughter *H. N.*, all and what- "ſoever I may die poſſeſſed of." The executors proved this teſtamentary paper, and got in the perſonal eſtate of the teſtator, to the amount of 7,947*l.* 10*s.*, with which they purchaſed 11,000*l.* 4 *per cent.* annuities. On a bill filed by the daughter, praying, that the whole of theſe annuities might be transferred, and ſecured to the uſe of the plaintiff, ſubject to the life-eſtate of her mother, and be declared to belong, ſubject to ſuch life-intereſt, to the

he plaintiff, Lord *Thurlowe* directed the whole fund to be transferred to the Accountant-general, the whole annual produce to be paid to the defendants (the mother and her ſecond huſband) ſo long as they ſhould continue to maintain the plaintiff, with liberty to her to apply, if they ſhould diſcontinue ſuch maintenance.

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(*If a man*) Alexander v. Alexander, 2 Vez. 640. Menzey v. Walker, Ca. temp. Talb. 72. P.

A teſtator gave the reſidue of his perſonal eſtate to his wife, "deſiring "her to provide for his daughter *A.* out of the ſame, as long as ſhe, his "wife, ſhould live, and at her deceaſe to diſpoſe of what ſhall be left among "his children, in ſuch manner as ſhe ſhall judge moſt proper." It was decreed, that here was not an abſolute truſt for the children after the death of the wife. It is an abſolute gift to the teſtator's wife of any part of the property to any uſe ſhe might think fit, cloathed only with a truſt for his daughter *A.* Puſhman v. Filliter, 3 Vez. jun. 7.

A reſidue of perſonal eſtate was bequeathed to the teſtator's brother *H.* and *all* his children, to be divided amongſt them, ſhare and ſhare alike: *H.* had ſeveral children; the teſtator dies; and ſix months afterwards another child is born. Lord *Talbot* held, that this child could not take. Webb v. Webb, Hil. 1735, cited in 1 Vez. 112.

A teſtator bequeathed 2000*l.* to all the children of his nephew *J. H.*, who ſhould be living at the death of *A*, and afterwards bequeathed the moiety of the reſidue of the perſonal eſtate to all the children of *J. H.*, payable at 21 or marriage. The queſtion was, Whether children born after the death of the teſtator could take? And the court were of opinion that as to the 2000*l.* they ſhould, if born before the death of *A.* upon the particular words of the will; but as to the reſidue, thoſe only who were living at the death of the teſtator could take. Hale v. Hale. 6 Geo. 2. cited *ibid.*

A teſtatrix deviſed lands to truſtees in truſt to ſell for payment of her debts, and gave all the reſidue ariſing by ſuch ſale, and all her perſonal eſtate among all the children reſpectively, male or female, of her brother and ſiſter *H.* They had only four children at the time of making the will, and after the death of the teſtatrix, another was born. Lord C. B. *Parker*, ſitting for Lord Chancellor, held, that this after-born child was not entitled to any ſhare under the will. Heath v. Heath, 2 Atk. 121.

A teſtator gave a legacy of 3000*l.* to his daughter *J.* wife of *C.* for the uſe of her younger children, to be by her diſtributed among them in ſuch manner, ſhares, and proportions, as ſhe ſhould think fit; and if no appointment ſhould be made by her, then equally to be divided between her younger children, and to ſurvive, if any of the children died under age or unmarried. The queſtion was, Whether the legacy ſhould be for thoſe younger children only, whom the teſtator's daughter had at that time by that huſband; or, whether the younger children by any future huſband could alſo take? By Lord *Hardwicke*, As to any children that may be born of a ſecond marriage, they could not be intended: for the daughter having four children by *C.* at the making of the will, if after his death ſhe married a ſecond huſband, having a great eſtate ſettled on the eldeſt ſon of that marriage, that ſon within the deſcription of a younger child would be contrary to the intent. But the words could not take in the children born ſubſequent to the making or death of the teſtator, being a preſent legacy. It might be different had he given it to her for life, and afterwards to her younger children; becauſe then it would be contingent, and a deviſe over: but here it is preſent; and the ſame as if he had ſaid, equally to be divided, Coleman v. Seymour, 1 Vez. 209.

unleſs ſhe appoints; being a veſted intereſt and immediate gift to them, ſubject to the power of variation given to the mother. Nor does the clauſe of ſurvivorſhip make any difference, being ſtill veſted. This legacy then, both in the intent and words, is preſent to them, and not to be extended to thoſe born after his death; and it can only mean children living at the making of the will; or, at fartheſt, at the death of the teſtator.

Horſley v. Chaloner, 2 Vez. 83.

W. H. bequeathed 200*l.* to the younger child of his ſon *W.*, or, if more than one, then to ſuch younger children, equally to be divided, and to be paid at their reſpective ages of 21, and if any die before 21, then to ſurvive to the others; and for want of ſuch younger child or children, or their not attaining 21, then the 200*l.* to go to the eldeſt child of his ſon *W.*, to be paid at 21. Two of the daughters were born in the life of their grandfather, and both came of age; and the queſtion was, Whether a daughter born after the teſtator's death ſhould be let in for a third equally with them? And the Maſter of the Rolls held, that ſhe ſhould not, for that in this caſe, the proviſion was expreſsly appointed to be paid at 21, and therefore it muſt be conſtrued to be veſted in thoſe living at the death of the teſtator, and cannot go farther.

Iſaac v. Iſaac, Ambl. 348.

A teſtator, after ſeveral legacies gave to the children of his niece *A. I.* the remainder and reſidue of his eſtate, which he directed to be paid into a bank or ſtock, and the intereſt to be paid yearly for ſuch learning as that ſum would defray, and at the age of 20 years to be divided equally between them, and if ſhe had only one child, it ſhould have the whole; but if his niece had no children, the intereſt was to be paid to her or her huſband during the term of ſeven years, and then the whole ſum was to be delivered to her or her huſband. *A. I.* had four children living at the death of the teſtator, and after his death, had a fifth child born. Lord *Camden* was clear of opinion, that the intereſt veſted at the death of the teſtator, being given *per verba de præſenti*; and that the after-born child was excluded.

Roberts v. Higman, 1 Br. Ch. Rep. 532. note.

A teſtator deviſed all his goods and chattels to *J. C.* and *J. H.* to be ſold to pay his debts, and the overplus (if any) to be employed to the beſt uſe of their children begotten by the teſtator's daughters *M. C.* and *E. H.* equally to be divided between them. The Chancellor held, that the diviſion was to take place at the teſtator's death, and therefore that all children born in the lifetime of the teſtator took, but not thoſe born after his death.

Singleton v. Singleton, 1. Br. Ch. Rep. 542. note.

E. P. gave her real eſtates to truſtees for 500 years, upon truſt, for raiſing 200*l.* for better ſecuring her debts and other purpoſes, with remainder to truſtees for 1000 years, in truſt, to repay the 200*l.* and raiſe annuities, and ſubject to the terms ſhe gave the eſtate to *all and every the child and children* of her brother *T. G.* and the heirs of the body and bodies of ſuch child or children, as tenants in common, if more than one, in equal proportions; and in caſe of failure of iſſue of the bodies of ſuch child or children whoſe iſſue ſhould ſo fail, to every the remaining child or children of the ſaid *T. G.* and to the heirs of the body and bodies of all and every ſuch child and children, if more than one, to take as tenants in common; and if there ſhould be a failure of iſſue of all ſuch children, or if there ſhould be but one ſuch child, then to ſuch remaining or only child; in default of ſuch iſſue, to her brother *T. G.* for life, with remainders over. And ſhe directed the remainder of her perſonal eſtate to be placed at intereſt, and ſubject to annuities, ſhe gave it to all and every the child and children of her brother *T. G.* who ſhould live to attain 21, ſuch children, if more than one, to take equally, if only one, then ſuch only child; and if there

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ſhould be no ſuch children, or none who ſhould attain 21, then ſhe deſired her perſonal eſtate, and the rents and profits of her real eſtate, to be diſtributed amongſt her next of kin. *T. G.* had two children, *R.* and *E.*, born before the death of the teſtatrix, and three children, *S.*, *T.*, and *E.*, born after her death. A bill was brought by the daughter of *S.*, one of the after-born children, who died before 21, claiming the benefit of her mother's ſuppoſed ſhare of the real eſtate of the teſtatrix, as heir of the body of her mother. Lord *Thurlowe* was of opinion, that there was no point of time in this caſe to which the words, *all and every the child and children of* T. G. could be confined, except the death of the teſtatrix, and therefore determined, that the plaintiff's mother *S.*, who was born after the death of the teſtatrix, could have no ſhare.

G. L. bequeathed to his wife *M. L.* the reſidue of his real and perſonal eſtate for life; and after her death, he gave the ſame to the children of Mr. *John Ayton* and his wife *Jane*, to be equally divided between them the ſaid *Jane Ayton*'s children, and not any children of any other marriage by either party. At the death of the teſtator and his widow, *J. A.*, *S. A.*, and *M. A.*, (ſince dead) were the only children of *John* and *Jane Ayton*, then born; but they had afterwards three other children. Sir *L. Kenyon* declared, that the intereſt in the reſidue of the teſtator's perſonal eſtate veſted abſolutely in the three children of *John* and *Jane Ayton*, who came into eſſe during the life of *M. L.*, and that thoſe born after were not entitled to a ſhare. Ayton v. Ayton, *ibid.*

A teſtator diſpoſed of a reſidue upon truſt to apply the rents and profits of his houſes in, *&c.* and the dividends of his money in the publick funds, and all other his perſonal eſtate for the maintenance and education of all the children of his three daughters, until the youngeſt of ſuch children ſhould attain 21; and in caſe of the death of any of them before the youngeſt ſhould attain 21, who ſhould have been married, and ſhould have at his or her deceaſe a child or children, he directed, that ſuch child or children ſhould be entitled to the ſame ſhare which their deceaſed parents would have received in caſe they had reſpectively lived till the youngeſt of ſuch child or children ſhould have attained 21; and when ſuch youngeſt child ſhould have attained 21, then teſtator gave one full and proportionable ſhare of the capital thereof, to the proper uſe of ſuch his ſaid grandchildren as ſhould be then living, and the child or children of ſuch as ſhould be dead. The queſtion was, Whether the plaintiffs, who were the children of teſtator's three daughters born at the time of his deceaſe, were to take excluſively of the defendants, who were born after death? Lord *Thurlowe* held, that the gift was confined to the death of the teſtator. Hughes v. Hughes, 3 Br. Ch. Rep. 352.

A teſtator gave a legacy to the children of his *late ſiſter M. C.* At the date of the will, there were three children of *M. C.* living, but one of them afterwards died in the lifetime of the teſtator. It was contended, that one-third of the legacy given to the children of *M. C.* lapſed into the reſidue. But the Maſter of the Rolls, Sir *R. P. Arden*, was of opinion, that by the words children of *M. C.* were meant ſuch perſons as ſhould be children at the death of the teſtator, though *M. C.* was dead at the date of the will, and decreed accordingly. Viner v. Francis, 2 Br. Ch. Rep. 658.

T. H. gave a legacy of 500*l.* to be paid to his grandſon *T. P.*, the ſon of *M. P.*, if he lived to be 21, and in caſe he ſhould die before, then to the other child or children of his daughter, equally, arriving at ſuch age. *T. P.* the grandſon died under the age of 21 years, and there being no child or children of *M. P.* living at the teſtator's death, it was inſiſted, that the Haughton v Harriſon, 2 Atk, 329.

the 500*l.* ought not to be raiſed for after-born children, but ſunk into the *reſiduum* of the teſtator's eſtate for the benefit of the reſiduary legatee. But by Lord *Hardwicke*—It is plain the grandchildren born after the teſtator's death are entitled, for as they were not *in eſſe* in his lifetime, the teſtator muſt have had in his view future children of his daughter.

Maddiſon v. Andrew, 1 Vez. 57.

A teſtator gave a legacy of 300*l.* to the children of his ſiſter *S.* to be paid by his executor, and equally divided, ſhare and ſhare alike, at their reſpective ages of 21 or marriage, with intereſt at 4 *per cent.*, and failing the ſhare of any, to the ſurvivors; and failing the ſhare of all, to his ſiſter *G.* The queſtion was, In whom this legacy ſhould veſt, whether in the only child of *S.* alive at the making of the will, or alſo in thoſe ſince born or to be born? Lord *Hardwicke* thought it was meant for the benefit of all the children *S.* ſhould have; for the teſtator knowing ſhe had but one then, has yet given it to children, and has pointed out ſurvivors; and gives it over to another branch of the family; which he could not mean, till all failed.

Elliſon v. Airey, 1 Vez. 111.

A woman deviſed to the ſon and two daughters of her nephew *F. E.* 10*l.* a-piece by name; then gives 300*l.* to *E. P.* to be paid at her age of 21, or marriage; and intereſt in the mean time for her maintenance and education: but if ſhe died before 21 or marriage, then to the younger children of her nephew *F. E.*, equally to be divided between them. Some of the younger children were born before, ſome after the making of the will, and ſome after the death of the teſtatrix. Lord *Hardwicke* thought, that the teſtatrix meant that the legacy ſhould be divided when it veſted, and therefore ſhould go to ſuch as ſhould be younger children at the death of *E. P.* before 21 or marriage.

Bartlett v. Holliſter, Ambl. 334. 1 Br. Ch. Rep. 530. note, S. C.

W. A. deviſed his real eſtate to truſtees and their heirs to the uſe of *H.* his daughter, for life, with remainder to the heirs of her body; and after her deceaſe without iſſue, in truſt to ſell, and to divide the money equally between all and every the children of his ſiſter *E.* the wife of *B.*, and of his ſiſter *M.* the wife of *J.*, at their reſpective ages of 21. The ſiſters had each of them ſeveral children born in the lifetime of the teſtator; and *E.* had a daughter born about eleven months after the teſtator's death, but in the lifetime of *H.* his daughter, who afterwards died without iſſue. The queſtion was, Whether ſuch after-born daughter was entitled to a ſhare of the money? And Sir *Tho. Clarke*, Maſter of the Rolls, ſeemed very clearly of opinion, that ſhe was entitled. He obſerved, that all caſes of this kind depend upon their own peculiar circumſtances: that this is the caſe of a truſt, where the court will be more liberal in making a conſtruction, than in the caſe of a legal eſtate: that as the children are not named, there does not appear to be any predilection: that the teſtator deſcribes his ſiſters as then being wives: that the words uſed are as general as poſſible, *viz.* all and every the children: and that this is to be conſidered as a deviſe of money, and nothing could veſt at the teſtator's death, but it is a diſpoſition of a remote intereſt, after the death of *H.* without iſſue.

Baldwin v. Karver, Cowp. 309.

A teſtator deviſed the reſidue of all his real and perſonal eſtate to truſtees for the uſe of the heirs male of *J. A.*; in default of ſuch iſſue to the uſe of the heirs male of *R. A.*, and in default of ſuch iſſue male, to the uſe of all and every the grandchildren of *J. A.* and *S. M.* as tenants in common. By a codicil of the ſame date with the will, he directed the truſtees to pay the intereſt and produce of his real and perſonal eſtate to his wife *S. A.* and to the ſaid *J. A.* and *S. M.* during their lives, with ſurvivorſhip. Eight grandchildren were alive at the date of the will: a ninth was born before the teſtator died: twelve more were born after his deceaſe; and all in the lifetime of *R. A.*, who died without iſſue. It was holden, that as the

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twenty-one grandchildren were all alive at the death of *R. A.*, all were equally entitled.

A teſtatrix, having given by her will ſeveral annuities, gave, after the deceaſe of the annuitants, 50*l.* each, to the children of *D. R.*—*D. R.* had then ſeven children, and he had alſo a daughter born after the death of the teſtatrix, but in the lifetime of the ſurviving annuitant. Lord *Thurlowe* decreed, that this after-born child muſt be let in to take. Attorney-General v. Criſpin, Ambl. 386.

A. N. deviſed her real eſtate to truſtees, upon truſt to permit her nephew *T. C.* to receive the rents for his life, and after his death to ſell the eſtate, and divide the money among all and every the child and children of *T. C.* at the age of 21. She alſo gave her perſonal eſtate to the ſame truſtees, in truſt to divide the ſame between all the children of her ſaid nephew at the age of 21; ſhe directed her nephew to maintain the children out of the rents and profits, and gave the truſtees power to apply any part of the intereſt of the perſonal eſtate for the maintenance of the children. The queſtion being, Whether a child born after the death of the teſtatrix was entitled to a ſhare of her eſtate? Sir *T. Sewell* held that ſhe was: he ſaid that this is the caſe of a truſt; that there is nothing to confine it to children born in the lifetime of the teſtatrix, and the intereſt is a future one. Here is no direction what is to become of the intereſt of the perſonal eſtate; but there is a direction to apply any part for maintenance. This is a ſtrong addition to the caſe of *Bartlett* v. *Holliſter* (*ſupra*); the perſonal is immediately the property of the children, though not immediately given to them; if it were a power to apply, the intereſt would be unneceſſary. The children are to have the intereſt with the principal, except what is applied under the power. Congreve v. Congreve, 1 Br. Ch. Rep. 530. N. B. Lord Thurlowe ſays, that this caſe ſeems a very ſtrange determination; becauſe when the firſt child attained twenty-one, the diviſion muſt be made. 3 Br. Ch. Rep. 355.

S. D. gave 5000*l.* to purchaſe ſtock, the intereſt to *M.* for life, then to the teſtator's brother *W. E.*, at his deceaſe, to the teſtator's godſon *S.*; *and at his deceaſe, if before he is of age, to be divided among his brothers equally.* *S.* the teſtator's godſon died in the lifetime of his father *W. D.* and in the lifetime of the teſtator, leaving at the time of his death two brothers, who were the two only ſons of *W. D.* at the date of the will, and at the time, of the teſtator; but he had another ſon *A. D.* born ſome time afterwards. Lord *Thurlowe* was of opinion, that he was obliged to ſay the words in the bequeſt of 5000*l.* to the brothers of *S.* were not confined to thoſe who were his brothers at the time of making the will: that the teſtator muſt have had in contemplation other ſons coming into being; that his intention appeared to be to make an aggregate deſcription of a part of the family of *W.* by the name of brothers of *S.* as if he had uſed the words male children of *W.*; that he made uſe of the word *brothers* merely by relation to the antecedent, the name of *S* uſed in the former part of the bequeſt, and that he could not otherwiſe have deſcribed the ſons of *W.* but by a circumlocution. He therefore declared that *A.*, being born before the time of the diſtribution of the fund, was entitled to a ſhare of the 5000*l* Deviſme v. Mello, 1 Br. Ch. Rep. 537.

A teſtator gave to the children of his ſiſter *J. G.* wife of *T. G.* 350*l.* with intereſt for the ſame, to be paid them reſpectively in equal ſhares and proportions as they ſhould reſpectively attain 21; and in caſe any of them ſhould die under 21, then their ſhare ſhould go to the ſurvivors and ſurvivor. At the death of the teſtator, *J. G.* had two children, the plaintiffs; ſhe had afterwards another child: the plaintiffs were both infants; and the court was of opinion, that the youngeſt child, being born during the infancy Gilmore v. Severn, 1 Br. Ch. Rep. 582.

the 500*l.* ought not to be raiſed for after-born children, but ſunk into the *reſiduum* of the teſtator's eſtate for the benefit of the reſiduary legatee. But by Lord *Hardwicke*—It is plain the grandchildren born after the teſtator's death are entitled, for as they were not *in eſſe* in his lifetime, the teſtator muſt have had in his view future children of his daughter.

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twenty-one grandchildren were all alive at the death of *R. A.*, all were equally entitled.

A teſtatrix, having given by her will ſeveral annuities, gave, after the deceaſe of the annuitants, 50*l.* each, to the children of *D. R.*—*D. R.* had then ſeven children, and he had alſo a daughter born after the death of the teſtatrix, but in the lifetime of the ſurviving annuitant. Lord *Thurlowe* decreed, that this after-born child muſt be let in to take. Attorney-General v. Criſpin, Ambl. 386.

A. N. deviſed her real eſtate to truſtees, upon truſt to permit her nephew *T. C.* to receive the rents for his life, and after his death to ſell the eſtate, and divide the money among all and every the child and children of *T. C.* at the age of 21. She alſo gave her perſonal eſtate to the ſame truſtees, in truſt to divide the ſame between all the children of her ſaid nephew at the age of 21; ſhe directed her nephew to maintain the children out of the rents and profits, and gave the truſtees power to apply any part of the intereſt of the perſonal eſtate for the maintenance of the children. The queſtion being, Whether a child born after the death of the teſtatrix was entitled to a ſhare of her eſtate? Sir *T. Sewell* held that ſhe was: he ſaid that this is the caſe of a truſt; that there is nothing to confine it to children born in the lifetime of the teſtatrix, and the intereſt is a future one. Here is no direction what is to become of the intereſt of the perſonal eſtate; but there is a direction to apply any part for maintenance. This is a ſtrong addition to the caſe of *Bartlett* v. *Holliſter* (*ſupra*); the perſonal is immediately the property of the children, though not immediately given to them; if it were a power to apply, the intereſt would be unneceſſary. The children are to have the intereſt with the principal, except what is applied under the power. Congreve v. Congreve, 1 Br. Ch. Rep. 530. N. B. Lord Thurlowe ſays, that this caſe ſeems a very ſtrange determination; becauſe when the firſt child attained twenty-one, the diviſion muſt be made. 3 Br. Ch. Rep. 355.

S. D. gave 5000*l.* to purchaſe ſtock, the intereſt to *M.* for life, then to the teſtator's brother *W. E.*, at his deceaſe, to the teſtator's godſon *S.*; *and at his deceaſe, if before he is of age, to be divided among his brothers equally.* *S.* the teſtator's godſon died in the lifetime of his father *W. D.* and in the lifetime of the teſtator, leaving at the time of his death two brothers, who were the two only ſons of *W. D.* at the date of the will, and at the time, of the teſtator; but he had another ſon *A. D.* born ſome time afterwards. Lord *Thurlowe* was of opinion, that he was obliged to ſay the words in the bequeſt of 5000*l.* to the brothers of *S.* were not confined to thoſe who were his brothers at the time of making the will: that the teſtator muſt have had in contemplation other ſons coming into being; that his intention appeared to be to make an aggregate deſcription of a part of the family of *W.* by the name of brothers of *S.* as if he had uſed the words male children of *W.*; that he made uſe of the word *brothers* merely by relation to the antecedent, the name of *S* uſed in the former part of the bequeſt, and that he could not otherwiſe have deſcribed the ſons of *W.* but by a circumlocution. He therefore declared that *A.*, being born before the time of the diſtribution of the fund, was entitled to a ſhare of the 5000*l.* Deviſme v. Mello, 1 Br. Ch. Rep. 537.

A teſtator gave to the children of his ſiſter *J. G.* wife of *T. G.* 350*l.* with intereſt for the ſame, to be paid them reſpectively in equal ſhares and proportions as they ſhould reſpectively attain 21; and in caſe any of them ſhould die under 21, then their ſhare ſhould go to the ſurvivors and ſurvivor. At the death of the teſtator, *J. G.* had two children, the plaintiffs; ſhe had afterwards another child: the plaintiffs were both infants; and the court was of opinion, that the youngeſt child, being born during the infancy Gilmore v. Severn, 1 Br. Ch. Rep. 582.

fancy of the other two, though after the death of the teſtator, might be entitled to a ſhare.

Bennett v. Honywood, Ambl. 708. A teſtator left 20,000*l.* to his executors, in truſt to diſpoſe thereof in ſuch proportions, *&c.* as they ſhould think fit, amongſt ſuch of the teſtator's relations as ſhould not be worth 2000*l.*, and ſhould apply within two years after his (the teſtator's) death. A claim was made on behalf of a child born after the death of the teſtator, who was of conſanguinity; but ſuch child, though *in ventre ſa mere* at the teſtator's death, was holden not to be within the deſcription.

Cooper v. Forbes, 2 Br. Ch. Rep. 63. Clarke v. Blake, *Id.* 329. So, it was determined by Sir *L. Kenyon*, when Maſter of the Rolls, that a child, *in ventre ſa mere*, ſhould not take under a bequeſt to the children of *A.* living at the death of the teſtator. But in a ſubſequent caſe of a ſimilar deviſe, Lord *Thurlowe* ſaid, that though he admitted the child not to be within the ſtrict meaning of the words; yet, the ſolid ground of conſtruction is to conſider whether ſuch a child is not within the intention of the teſtator to provide for all the children of *A.*? His lordſhip added, he would talk to his Honour on the ſubject, and if he perſiſted in his opinion, the queſtion muſt go to law. It is to be preſumed that his Honour did perſiſt in his opinion, for the queſtion did go to law, and the court of Common Pleas determined in favour of the poſthumous child.

2 H. Bl. 399. and 2 Vez. jun. 673.

One deviſed the ſurplus of his eſtate to his children and grandchildren. It was holden, that a grandchild *in ventre ſa mere* at the teſtator's death ſhould not take; but it was at the ſame time ſaid, that if a deviſe were to my children and grandchildren living *at my death*, a child *in ventre ſa mere* might, in ſuch caſe, be ſo far regarded as to be looked upon as living.

Northey v. Strange, 1 P. Wms. 341. That a poſthumous child is within a proviſion in a ſettlement for ſuch children of the marriage as ſhould be living at the death of the father; ſee Miller v. Turner, 1 Vez. 85. Beale v. Beale, 1 P. Wms. 244.

Burdet v. Hopegood, 1 P. Wms. 486. So, where one deviſed his eſtate, *in caſe he ſhould leave no ſon at the time of his death, to* F. H., and died leaving his wife *privement enſient* with a ſon; this poſthumous ſon was adjudged to be a ſon living at the death of *F. H.*, and therefore the deviſe to *F. H.* did not take place.

Blackler v. Webb, 2 P. Wms. 383. A teſtator bequeathed the ſurplus of his perſonal eſtate equally to his ſon *James* and to his ſon *Peter*'s children, to his daughter *Traverſe* and to his daughter *Webb*'s children, and his daughter *Man*. At the making of the will the teſtator's ſon *Peter* was dead, leaving ſeveral children, the teſtator's daughter *Webb* was living, but her huſband was in low circumſtances, and had been twice a bankrupt, and therefore the teſtator by his will made ſome proviſion for her ſeparate uſe. The queſtion was, How theſe children and grandchildren ſhould take, whether *per ſtirpes* or *per capita?* Lord *King* at firſt ſeemed inclinable that the grandchildren ſhould take *per ſtirpes* only: yet at length he decreed, that the teſtator's ſon *James*, and the children of the teſtator's deceaſed ſon *Peter* and his daughter *Traverſe*, and the children of his daughter *Webb*, and his daughter *Man*, (being in all fourteen in number,) ſhould each of them take *per capita*, as if all the grandchildren had been named by their reſpective names; and that the grandchildren could not take according to the ſtatute, or in alluſion thereto, foraſmuch as the teſtator's daughter *Webb* was living, and ſo her children could not repreſent her; and to determine that the grandchildren ſhould take *per ſtirpes* would be to go too much out of the will, and contrary to the words, when the meaning of the teſtator might be according to the words, and that meaning a reaſonable and ſenſible one.

One

One *Hole* bequeathed 500*l.* to the relations of *E. H.*, to be divided *equally* between them. Although this bequeſt is confined to ſuch relations as would take by the ſtatute of diſtributions; yet Lord *King* determined, that, as the teſtator had directed the 500*l.* to be divided *equally* between them, he would not direct an unequal diſtribution, and accordingly decreed them to take *per capita*. Thomas v. Hole, Ca. temp. Talb. 251. The word *equally* applied to the next of kin, and re-

ſtions under the ſtatute of diſtributions, cauſes a diviſion *per capita*, Phillips v. Garth, 3 Br. Ch. Rep. 64. Butler v. Stratton, *Id.* 367. for though the ſtatute furniſhes the rule as to the objects of the bequeſt, yet it does not determine in what proportions thoſe objects ſhall take; that muſt depend upon the directions of the teſtator. Green v. Howard, 1 Br. Ch. Rep. 31. Rayner v. Mowbray, 3 Br. Ch Rep. 234.

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(*money*) So, on the contrary an eldeſt daughter, where there has been a ſon, or where the eſtate by ſettlement goes all to a remainderman, has, in equity, been deemed a younger child. Beale v. Beale, 1 P. Wms. 244. And even *an eldeſt ſon unprovided for* has been conſidered as a younger child. Duke v. Doidge, 2 Vez. 203. note For the court will indulge this latitude of conſtruction in caſes of portions, for the ſake of providing for all branches of the family. Chadwick v. Doleman, 2 Vern. 528. Heneage v. Hunlocke, 2 Atk. 456. Lord Teynham v. Webb, 2 Vez. 198. But the ſame conſtruction is not applicable in other caſes. Lord Teynham v. Webb, *ubi ſupra*. Powell v. Hewer, Ambl. 203.

A teſtatrix gave and bequeathed unto the *two* ſervants that ſhould live with her at the time of her death 100*l.* new *S. S.* ſtock, to be equally divided between them. In fact, the teſtatrix had but two at the time of making the will; and afterwards took another, who lived with her at the time of her death. Adjudged, that this third ſervant was entitled to an equal ſhare with the other two. Sleech v. Thorington 2 Vez. 560.

So, where the teſtator gave to the three children of his ſiſter 50*l.* each; the ſiſter had *four* children, and they were all let in. Tomkins v. Tomkins, (cited) 2 Vez. 564.

A teſtatrix gave the reſidue of 3 *per cent.* annuities in truſt to pay the ſame unto and between the *two daughters* of *T. S.*, in equal ſhares and proportions during their lives, and if *either* of them ſhould die, then to pay the whole to the ſurvivor during life; and in caſe *both* ſhould depart this life, then the whole was to fall into the reſidue. The maſter of the Rolls, Sir *L. Kenyon*, yielding to the authority of the caſes, but not the reaſoning of them, felt himſelf compelled to declare, that all the daughters ſhould take. Stebbing v. Walker, 2 Br. Ch. Rep. 85.

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(*But notwithſtanding*) So, Carr v. Bedford, 2 Br. Ch. Rep. 77. Anon. 1 P. Wms. 327. Thomas v. Hole, Ca. temp. Talb. 251. Harding v. Glyn, 1 Atk. 469. Attorney-General v. Buckland, (cited) Ambl. 71. Edge v. Saliſbury, Ambl. 70. Whithorne v. Harris, 2 Ves. 527. Croſsley v. Clare, Ambl. 397. Iſaac v. Deſriez, *Id.* 595. Widmore v. Woodroffe, *Id.* 636. Green v. Howard, 1 Br. Ch. Rep. 31. Hands v. Hands, (cited) 3 Br. Ch. Rep. 69. Phillips v. Garth, *Id.* 64. Rayner v. Mowbray, *Id.* 234. And the rule will be the ſame, though the word "*poor*" be prefixed to "relations." Brunſden v. Woolredge, Ambl. 507 Iſaac v. Deſrieze, *Id.* 595. Widmore v. Woodroffe, *Id.* 636. But if the bequeſt be to the teſtator's deſcendants, or to the deſcendants of *A.*, the neceſſity of referring to the ſtatute of diſtributions does not ariſe, for ſuch deſcendants are capable of being aſcertained. Croſsley v. Clare, Ambl. 397. Butler v. Stratton, 3 Br. Ch Rep. 367. And we have ſeen above, that where the court does reſort to the ſtatute of diſtributions for the purpoſe of limiting the objects of the bequeſt to relations, it does not conſider itſelf bound to adopt the proportions preſcribed by the ſtatute; but diſtributes *per capita*, and in ſuch ſhares as any particular expreſſions of the bequeſt may call for. Carr v. Bedford, 2 Ch. Rep. 77. Griffith v. Jones, *Id.* 179. Thomas v. Hale, Ca. temp. Talb. 251. Green v. Howard, 1 Br. Ch. Rep. 31.

A. compounded with his creditors, and paid 10*s.* in the pound: his widow by her will charged her eſtate with the reſidue of the debt to the compounding creditors, or *their perſonal repreſentatives*. The adminiſtratrix *de bonis non* of a deceaſed creditor is entitled beneficially under this bequeſt; Evans v. Charles, Anſtr. 128.

bequeſt; and not the reſiduary legatees under the will of ſuch creditor, or her next of kin at the time of her death, or her next of kin at the time of the death of the firſt mentioned teſtatrix.

Jennings v. Gallimore, 3 Vez. Jun. 146.

Money was ſettled in truſt to be paid according to the appointment of *A.*, and in default thereof to his legal repreſentatives according to the courſe of adminiſtration. *A.* by will in purſuance of the power appointed to his legal repreſentatives according to the courſe of adminiſtration, and made a reſiduary legatee, whom he appointed one of his executors. *Upon the will* the next of kin are entitled.

Bridge v. Abbot, 3 Br. Ch. Rep. 224.

A teſtatrix bequeathed the reſidue of her eſtate to certain perſons, and if they ſhould die in her lifetime, to their *legal repreſentatives*. One of thoſe perſons died in the teſtatrix's lifetime. His ſhare of the reſidue will go to his next of kin, not all thoſe who may be living at the time of his death, but thoſe who may be alive at the death of the teſtatrix.

(*Godolphin ſays*) The rule muſt certainly depend upon the particular expreſſion of the bequeſt, as where the teſtator gives a ſpecifick thing as being then in his poſſeſſion, and which in its nature is not fluctuating, and he gives it by a particular appellation. Thus, if he bequeaths the leaſes which he now has, or all the horſes now in his ſtable, or the arrears of an annuity now due, in ſuch caſes, ſubſequent leaſes, or after-purchaſed horſes, or arrears afterwards accrued due will not paſs. 1 P. Wms. 597. Attorney-General v. Bury, 1 Eq. Ca. Abr. 201. Baugh v. Read, 1 Vez. jun. 260.

(*But where*) See *acc.* Cook v. Oakley, 1 P. Wms. 302. Timewell v. Perkins, 2 Atk. 103. Cornforth v. Boon, 2 Vez. 279. Cavendiſh v. Cavendiſh, 1 Br. Ch. Rep. 467.

All Souls College v. Coddrington, 1 P. Wms. 597.

Colonel *Coddrington* deviſed to *All Souls* College in *Oxford* in theſe words, *viz. I deviſe my library of books, now in the cuſtody of Mr.* Carſwell, *to* All Souls *College in* Oxford; and in the ſame will he deviſed to the College 4000*l.* more to augment their library. The teſtator afterwards bought ſeveral books of value, which were placed in the ſaid library. It was decreed, that the after-bought books ſhould paſs; the word *now* not relating to the books which were in the library at the time of making the will, but merely pointing out where the library was.

Dean of Chriſt-church v. Barrow, Ambl. 641.

General *Guiſe*, by his will, gave all his pictures, drawings, and prints to *Chriſt Church* College in *Oxford*, to be kept, and none of them to be ſold, they being a good collection. He lived ſeveral years afterwards, and after making his will, parted with ſome of the pictures, and acquired above one hundred new ones. Lord *Camden* ſaid, he was clear, that the pictures which the General added to his collection after making his will paſſed by the deviſe to *Chriſt Church* College, upon this principle, that the perſonal eſtate is conſidered as fluctuating. It would be ſo in caſe of a deviſe of all a man's perſonal eſtate generally. The ſame rule holds in caſe of a deviſe of the whole of any ſpecies of his perſonal eſtate. Caſes have gone ſo far as to extend the rule to the deviſe of a flock of ſheep. The caſe of *All Souls College* v. *Coddrington* confirms this rule. The caſe of *Gayre* v. *Gayre* is in point.

Anon. Pr. Ch. 8. But if there be nothing in a will demonſtrating an intention to reſtrict the general import of the words "goods and chattels," money, if not an extraordinary ſum, and juſt received, will paſs. Chapman v. Hart, 1 Vez. 273.

A teſtator bequeathed his wife 1200*l.* in money, and all the goods and chattels, *&c.* in and belonging to his houſe in *N.*, in which houſe there was 400*l.* in money; and the queſtion was, Whether this 400*l.* ſhould paſs by the will? The court held, that it ſhould not; for 400*l.* is a conſiderable ſum, and the teſtator could not be ſuppoſed to be ignorant of its being in the houſe: therefore, had he intended to paſs it, he would not have couched it under general words, but would at firſt have given his wife 1600*l.*

There

There was a bequeſt of all the teſtator's houſehold goods, and other goods; and there was alſo a bequeſt of the reſidue; which bequeſt of the reſidue would have been fruſtrated, had the words "other goods" been held to carry all the perſonal eſtate. The court therefore held, that the words "other goods" muſt be intended to ſignify things of the like nature with houſehold goods. Woolcombe v. Woolcombe, 3 P. Wms. 112.

If *J. S.* bequeaths all his houſehold goods and furniture which ſhould be in his houſe at *R.* at his death to his wife, and afterwards going beyond ſea, his ſteward gets the head landlord of the houſe to accept of a ſurrender of the leaſe of the houſe, and removes the goods to another houſe, and writes an account of this to *J. S.*, who approves of it, the goods will not paſs by the will to the wife: otherwiſe, if they had been removed by fraud to defeat the legacy, or by any tortious act without the privity of the teſtator. 2 Vern. 747. Gilb. Eq. Rep. 172. decreed between the Earl and Counteſs of Shafteſbury.

So, if a man bequeaths to his ſon the furniture of his houſe at *D.*, and two years afterwards orders goods which he had bought in *London* to be carried to his houſe in *D.*, and agrees with carriers for that purpoſe, but dies before the goods are removed from *London*, theſe goods ſhall not paſs by the will as part of the furniture of the houſe at D. 2 Vern. 739. decreed between the Duke of Beaufort and Lord Dundonald. Lord Hardwicke alluding to this caſe ſays, "there was very little oppoſition, being between a mother and a ſon, "and I lay no ſtreſs upon it." 3 Atk. 202.

If a man who has debts due to him by bond, and who is likewiſe poſſeſſed of a term for years, bequeaths one moiety of his perſonal eſtate to his wife, and afterwards ſeveral legacies to other perſons, and the reſidue to *J. S.*, the wife ſhall have one complete moiety, if the other is ſufficient to pay the debts, and ſhe ſhall have a moiety of the leaſe, though it was objected that a leaſe was not uſually reckoned perſonal eſtate. Chan. Ca. 10. Lee and Hale.

If a man poſſeſſed of a leaſe for years bequeaths ſeveral legacies of plate and other goods to ſeveral perſons, and after deviſes all the reſidue of his goods to his wife, his debts and legacies being paid, and makes her ſole executrix; by this will, the leaſe paſſes to her as legatee; for though by a grant of *omnia bona* a leaſe paſſes not, yet, by the civil law, *bona* including all chattels, and this being a legacy, the judges of the common law in this caſe ought to be guided by that law. Portman v. Willis, Cro. Eliz. 387. But ſee Godolph. 392.

If a man bequeaths 1200*l.* to *J. S.*, and by general words gives all his goods, chattels, and houſehold-ſtuff in and about his houſe to the ſaid *J. S.*, money in the houſe will not paſs, he having a particular legacy deviſed to him. 2 Chan. Rep. 190.

A bequeſt of all the teſtator's goods has been holden to paſs a bond, unleſs there be ſome words in the will which demonſtrate an intent to the contrary (*a*). But bonds, as a ſpecies of choſes in action, not admitting of locality, will not paſs under a bequeſt of goods and chattles in a particular place (*b*). Neither will debts due by bond under a bequeſt of all the teſtator's moveable goods (*c*). Anon. 1 P. Wms. 267. Ryall v. Rolle, 1 Atk. 180. 1 Vez. 362. S. C.

(*a*) Woolcombe v. Woolcombe, 3 P. Wms. 112. note in Cox's Ed. (*b*) Chapman v. Hart, 1 Vez. 271. Moore v. Moore, 1 Br. Ch. Rep. 127. Green v. Symonds. *Id.* 129. note. (*c*) Sparke v. Denne, Sir W. Jones, 225

Plate (*d*) and jewels will not paſs by a bequeſt of utenſils, but (*e*) by a bequeſt of houſehold goods plate will paſs. (*d*) Dyer, 59. (*e*) Lilcot v. Compton, 2 Vern. 638. This was formerly denied, Jeſſon v. Eſſington, Pr. Ch. 207. but it ſeems now ſettled, agreeably to this caſe of Lilcot v. Compton, that plate will ſo paſs, where it appears, that

that the teſtator was in the habit of uſing plate, or was of a rank in life which rendered it an article ſuitable to his domeſtick eſtabliſhment. Maſters v. Maſters, 1 P. Wms. 425. Nicholls v. Oſborn, 2 P. Wms. 419. Snelſon v. Corbet, 3 Atk. 369. Kelly v. Pawlett. Ambl. 605. S. C.

Danvers v. Manning, 2 Br. Ch. Rep. 18.

If a teſtator miſcalculate a reſidue, or a debt which he bequeaths, the real reſidue or debt will nevertheleſs paſs.

Williams v. Williams, *Id.* 87.

Owen, 124. Earl of Northumberland's caſe, S. C. cited in Style, 289.

If a nobleman poſſeſſed of a collar of SS, and of a garter of gold, and a buckle annexed to his bonnet, and many other buttons of gold and precious ſtones annexed to his robes, and of many other chains, bracelets, and rings of gold and precious ſtones, bequeath all his jewels to his wife, and die, the garter and collar of SS paſs not, becauſe they are not properly jewels, but enſigns of honour and ſtate; and the buckle in his bonnet and buttons paſs not, becauſe annexed to his robes; but all the other chains, rings, bracelets, and jewels paſs.

Abr. Eq. 200. Mich. 1705. Franklin and Earl of Burlington. 2 Vern. 502. S. C. ill reported. Pre. Ch. 251. S. C.

J. S. by will deviſes thus: *Item*, my will and pleaſure is, that the furniture and pictures in my houſes at *A.*, *B.*, and *C.* ſhall always remain there, and not in the power of my executors to diſpoſe of, but ſhall go with my ſaid houſes to ſuch of my grand-children as ſhall be in the poſſeſſion thereof, and then appoints that the plate gilt with gold, belonging to his chapel at *A.*, together with the ornaments thereof, ſhould remain to the perpetual uſe of the ſaid chapel, and makes *D.* executor, to whom he gives all his perſonal eſtate, except what is before bequeathed, of what nature or kind ſoever, for his own proper uſe; and the queſtion was, if the plate the teſtator conſtantly uſed, and removed with him when he went from one houſe to another, ſhould go to the executor by the laſt clauſe, or belong to the houſes under the word *furniture?* And my Lord Keeper was of opinion, that furniture in a large ſenſe takes in plate, but not here, becauſe he diſtinguiſhes the chapel plate from the furniture; and the plate of ordinary uſe that was carried with him could no more be ſaid the furniture of one houſe than of the others, and he meant only the particular furniture of each houſe; ſo the plate went to his executors, and was liable to plaintiffs who were creditors.

Bridgeman v. Dove 3 Atk. 201.

A library will not paſs under the deſcription of furniture.

Kelly v. Powlett, Ambl. 605.

Abr. Eq. 201. Moſeley, 41. S. C. S. P. Hunt and Berkley 2 Chan. Ca. 198. Martin and Clerk.

If a man deviſes his ſilver tea-kettle and lamp, with the appurtenances, nothing ſhall paſs but the kettle and lamp, and the box wherein the lamp was placed, and not the ſilver tea-pot, milk-pot, tongs, ſtrainer, or caniſters.

If a man deviſes 40*l.* to be paid to *J. S.*, by him to be diſpoſed of in ſuch manner as the teſtator ſhould by a private note acquaint him with, and dies without ſuch appointment, this is a good bequeſt to the party.

(C) What ſhall be an Ademption or Extinguiſhment of a Legacy.

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(*Sowhere a man deviſes*) Lord Camden, in ſpeaking of this caſe of Orme v. Smith, ſays, "the payment was clearly voluntary. The counſel laid hold of the diſtinction between a voluntary and compulſory

ompulsory payment, but the court does not appear to have decreed upon the distinction " But in Crockat, v. Crokat, 2 P. Wms. 164. and Rider v. Wager, *Id.* 328. the distinction is taken notice of by the court. And in Partridge v. Partridge, Ca. temp. Talb. 326. it is recognized by Lord Talbot, and in Lawson v. Stitch, 1 Atk. 508 by Lord Hardwicke. At the same time it must be observed, that the decree of the court is founded upon other points in every of these cases. In Earl of Thomond v. Earl of Suffolk, 1 P. Wms. 467, Lord Macclesfield over-ruled the distinction, and the same was done by Lord King in Ford v. Fleming, *infra*. In Ashton v. Ashton, 3 P. Wms. 386, Lord Talbot declares his idea, that the distinction has no weight in it. Its existence is denied by Lord Camden in Attorney-General v. Perkin, Ambl. 566; and that opinion is adopted by Lord Thurlowe, in Ashburner v. Macguire, 2 Br. Ch. Rep. 109. Other judges admit the distinction, but not as a rule of determination in all cases. They consider the testator's calling for payment not to be *of itself* sufficient evidence of an intention to adeem, (and ademption must always depend upon intention,) but at the same time they regard it as a questionable act requiring explanation. Drinkwater v. Falconer, 2 Vez. 623, Hambling v. Lister, Ambl. 401. Coleman v. Coleman, 2 Vez. jun. 639.

A testator gave his sister *S. C.* 550*l.* which was then in Mr. *E.*'s hands, and died soon after the making of his will. It appeared, that the testator, before the making of his will, had left in Mr. *E.*'s hands 550*l.*, for which Mr. *E.* had given a note to the testator, payable to him or order, and the testator had, before the making of the will, drawn some bills on *E.* ordering him to pay several sums of money, which, in all, had reduced the 550*l.* to 430*l.* The testator had left assets for the payment of all his legacies, including the whole legacy of 550*l.* to his sister S. *C.* It was insisted, that *S. C.* should have no more than 430*l.* of her legacy of 550*l.* there being no more than 430*l.* left in Mr. *E.*'s hands. But the Master of the Rolls held, that she should have the whole 550*l.* legacy. These payments out of the 550*l.* in the hands of Mr. *E.* having been all ordered by the testator before the making of the will, this cannot be said to be an ademption of the legacy, but is an express indication of the testator's intention, that as the note for the full sum of 550*l.* was still standing out, notwithstanding he had ordered the payment in part of the note, yet he renounced all those payments, and willed that the whole 550*l.* should be the legacy which he gave to his sister *S. C.* His Honour therefore decreed the plaintiff *S. C.* the whole 550*l.* note, and interest from the time of filing the bill. Crockat v. Crockat, 2 P. Wms. 164.

A. having a debt due to him from *D.* bequeathed 500*l.* part thereof to *B.* the second son of *D.*, and the residue thereof to the younger children of *D.* to remain in *D.*'s hands until the children should be capable of receiving it; the share of any of them dying before such time to go to the survivors or survivor. *A.* calls in, and receives the whole debt in his lifetime; and *B.* dies in the lifetime of *A.* Then *A.* died in the lifetime of the younger children. Lord *King* said, that it could not be intended the survivor should take, unless *B.* the legatee should have survived the testator, so that the right to the legacy became vested in him; but that *B.* dying in the lifetime of the testator, as nothing could ever vest in him, so neither could it survive from him. His lordship admitted, that where a devise is to *A.* for life, remainder to *B.*, and *A.* dies in the testator's lifetime, *B.* shall take presently; or if a devise be to *A.* and *B.*, and *A.* die in the testator's lifetime, and then the testator die, there, *B.* shall have the whole; for these cases seem to be within the plain intent of the testator: but that, in the principal case, it was quite a strain to support a legacy given out of a fund which the testator had by his own voluntary act put an end to; for which reason he declared, that these legacies to the younger children were extinct, and should not be made good. Rider v. Wager, *Id.* 328.

A. bequeathed 1000*l.* capital *S. S.* stock to *B.* At the time of making his will he had 1800*l.* of such stock, and afterwards by sale reduced it to 200*l.*, Partridge v. Partridge, Ca.

temp. Talb. 226. 200*l.*, but afterwards increaſed it to 1600*l.*, and died. Between the making of his will and his death, the act took place which changed three-fourths of the capital *S. S.* ſtock into annuities. Lord *Talbot* held, that this legacy was not adeemed or impaired either by the ſale or the act of parliament. Not by the former, for all caſes of ademption ariſe from a ſuppoſed alteration of the intention of the teſtator; and if the ſelling out of the ſtock is an evidence to preſume an alteration of ſuch intention, his buying in again is as ſtrong an evidence of his intention that the legatee ſhould have it again. It was not the particular ſtock he was poſſeſſed of that he gave; but the deviſe was only deſcribing the nature of the thing he gave, of which he had ſufficient to anſwer ſuch legacy at the time of his death. If the teſtator after ſuch legacy ſells out part, and dies, ſuch ſale would afterwards be looked upon as an ademption *pro tanto*. If he deviſes ſo much ſtock, and at the time of ſuch deviſe has not any ſuch ſtock, it is a direction to the executor to procure ſo much for the legatee. It would be very hard in this caſe to conſider the ſelling as an ademption, becauſe he might ſell out for ſome particular purpoſe, and as ſoon as that purpoſe was anſwered he might buy in again —It was not affected by the act of parliament, for it would be extremely hard to ſay, that this alteration of ſtock by parliament ſhould work an ademption, when it cannot be preſumed the teſtator's intent was particularly aſked, or that he concurred or agreed to ſuch law in any other manner than what every other perſon is ſuppoſed to do. His Lordſhip added, If an obligee were to deviſe a legacy of 1000*l.* ſecured by bond from *A. B.*, and he ſhould afterwards compel *A. B.* by due courſe of law to pay it him, this would be an ademption of the legacy; but it was never thought, if *A. B.* ſhould pay in the money voluntarily, it would be an ademption, becauſe the obligee is bound to receive it.

Bronſdon v. Winter, Ambl. 57 S. P.

Earl of Thomond v. Earl of Suffolk, 1. P. Wms. 461.

A. and *B.* (afterwards Counteſs of *Suffolk*, and ſince deceaſed) were each indebted to *J. S.* in 2000*l.* ſecured by bonds. *J. S.* bequeaths theſe two ſums of 2000*l.* and 2000*l*, and all intereſt due for the ſame to her grand-daughter C., and deviſes away the ſurplus of her eſtate, with a proviſo, "that in caſe all or any part of theſe ſums ſhould be paid in before "the teſtatrix's death, then ſhe gives to the ſaid *C.* 4000*l.* or ſo much "money as the principal money ſo paid in ſhould amount unto, as the "caſe ſhould fall out." Afterwards, the teſtatrix in her lifetime, releaſed to *A* the 2000*l.* due upon his bond without having received any part of the money, and died; and *C.* died inteſtate; upon which the ſaid *A*, who was her brother, adminiſtered to her, and demanded the 2000*l.* releaſed to himſelf upon his bond, and alſo the 2000*l.* due upon *B.*'s bond. With reſpect to the former (the only one material to notice in this part) it was objected, that the releaſe of the bond to *A.* was a revocation, or ademption of the legacy *pro tanto*, it being the voluntary act of the teſtator. But by Lord *Parker*, the teſtatrix intends by this will (amongſt other things) to make a proviſion of 4000*l.* for her grand-daughter *C.*; and though ſhe has ſhewn her kindneſs to her grandſon (one of theſe bonds being given by him for 2000*l.*), yet this noways imports an alteration or diminution of her kindneſs to her grand-daughter. I cannot approve of the diverſity, that if the teſtator gives away a debt by his will, and afterwards calls it in, this muſt be a revocation; *ſecùs*, if it be paid in to the teſtator unaſked for; for ſuppoſe the teſtator called in that debt, fearing it might be loſt, and not liking the ſecurity; is there any reaſon that this ſhould deprive the legatee of his legacy? And the caſe of *Orme* and *Smith* proves that the teſtator's receiving

ceiving in the debt is no revocation or ademption of the legacy. As to he matter of the releaſe, that ſurely implies payment and ſatisfaction of a ebt, being tantamount to the teſtator's receiving it, and giving it back ain; and in the preſent caſe, it is the ſame, as if the will had ſaid, *if eſe debts be paid or diſcharged.*

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(*One by will*) 2 P. Wms. 469. S. C. 2 Str. 823. S. C.

A teſtator enumerates mortgages, bonds, and notes due to him; and gives out of the intereſt an annuity to *A.* for life, and after her death, directs the ſecurities to be veſted in truſtees for charitable uſes. After the making of the will ſome of the ſecurities are paid off, (whether voluntarily, or not, did not appear,) and new ones taken. Lord *Camden* held, that this was a money legacy, a bequeſt of ſo much money as was equal to the money owning to the teſtator on the ſeveral ſecurities: that where the intention of the teſtator was to give a money legacy, there could be no reaſon to ſupport the diſtinction between a voluntary and a compulſory payment; and that therefore the receipt of the money on the ſecurities could not be conſtrued to be an ademption of it. Attorney-General v. Parkin, Ambl. 566.

E. being entitled to 840*l.* lent upon mortgage in truſtees' names, bequeathed to the plaintiff 100*l.* to be paid by the truſtees out of the mortgage money, as ſoon as the ſame ſhould be received; and gave him 100*l.* more to be paid out of the ſaid mortgage, when the ſame ſhould be received. After making the will, there being a conſiderable arrear of intereſt upon the mortgage, and the principal and intereſt amounting to 1250*l.* the teſtatrix agreed to a compoſition, and accepted 1000*l.* for the whole that was due; and within a ſhort time afterwards laid out the money which ſhe had received upon other ſecurities. On a bill by the plaintiff to be paid his legacy out of the aſſets, the queſtion was, Whether the receiving of the mortgage money was an ademption? The Maſter of the Rolls ſaid, that (to be ſure) an alienation of a legacy, if there is nothing elſe in the caſe, is an ademption, and equity will not ſet it up again: that the inference he drew from the caſes was, that there muſt be an indication of change of mind to work an ademption. A debt given ſpecifically, and called in, and no account appearing why it was called in, is an ademption; but if any account is given, it is otherwiſe. It is the intention that governs. It was ſo in the *Roman* law. *Juſt. Inſt.* 2. 20. 12. The receiving of the money in the preſent caſe is accounted for: the debt was increaſed from 840*l.* to 1250*l.*, it was in ſo much danger, that the teſtatrix took 1000*l.* for it. He did not agree, he ſaid, to the diſtinction taken in ſome of the caſes between voluntary payment and being called in, as laid down *generally:* at the ſame time he did not go ſo far as Lord *Talbot*, in *Aſhton* and *Aſhton*, 3 *P. Wms.* 384., and ſay, that the calling in a debt by the teſtator is not an ademption, becauſe it might be from an apprehenſion of ſuch debt being in danger; but if there is proof that it was called in for any other reaſon than an intention to adeem, he thought it not an ademption. His Honour therefore decreed the legacy and intereſt to be paid to the plaintiff out of the money which was received in, and laid out on other ſecurities. Hambling v. Liſter, Ambl. 401.

A. bequeathed a moiety of two-thirds of the reſidue of his *South Sea* ſtock, *India*, Bank, and Orphan ſtock, leaſes, *Eaſt India*, and *South Sea* bonds, mortgages, and other his perſonal eſtate to *B.*, who, before he received his legacy, made his will, and deviſed this moiety to truſtees, to ſell and pay 200*l.* thereout to C., and the reſidue of the money to *D.* Birch v. Baker, Moſ. 373.

Afterwards

Afterwards *B.* and the legatee of the other moiety came to an account with the executor of *A.*, and their ſhares are ſet out and received, and the ſtock and bonds are allotted to *B.*, who ſells part of them in his life-time, without keeping an account of the produce. It was decreed, that this was an ademption of the legacy to *D. pro tanto.* But the bare receipt of his ſhare by *B.* it was ſaid, was no ademption, for it did not ſhew any change of his mind, but was done in concert with the other legatee, to aſcertain their moieties, and prevent ſurvivorſhip.

Blackwell v. Child, Ambl. 260.

One partner by his will gives to his partners one ninth of one-twelfth of the profits reſerved by him by the terms of the deed of co-partnerſhip. He afterwards, on the expiration of the partnerſhip, enters into freſh articles with the ſame partners, under which they take a greater intereſt than they had under the former articles. Lord *Hardwicke* held, that the renewal of the articles was no ademption.

Aſhburner v. Macguire. 2 Br. Ch. Rep. 108.

A teſtator bequeathed *(inter alia)* as follows: "*Item*, I bequeath to "my ſiſter *J. A.* the intereſt ariſing from her huſband *W. A.*'s bond to "me for principal 3500*l.* ſterling during her life, independent of her pre-"ſent, or any future huſband, amounting to 175*l.* ſterling *per annum*. "*Item*, I bequeath the principal of the ſaid bond, on the deceaſe of my "ſaid ſiſter *J. A.* to her four daughters (naming them) to be equally di-"vided among them or the ſurvivors of them. *Item*, I bequeath to Mr. *W. B.* my capital ſtock of 1000*l.* in the *India* Company's ſtock." *W. A.* the debtor became a bankrupt after the making of the will, and in the teſtator's lifetime, and the teſtator proved his debt under the commiſſion, and received a dividend thereon. After the teſtator's death, another dividend was made to the bankrupt's creditors. The teſtator, at the time of making his will, was poſſeſſed of 1000*l. E. I.* ſtock, and no more; but ſold out the whole of it before his death. Lord *Thurlowe* held, that the bond was given as a ſpecifick legacy; that the receiving the dividend upon it under the commiſſion was no ademption of it, and directed that the bond ſhould be delivered up to the legatees, that they might receive the dividend not received by the teſtator, and whatſoever elſe might be thereafter payable out of the bankrupt's eſtate in reſpect of that debt. But as to the legacy to *W. B.* he held, that that was clearly adeemed: that it was a ſpecifick legacy, and the teſtator having ſold the ſtock after making the will, it was as if it had never exiſted.

Badrick v. Stevens, 3 Br. Ch. Rep. 431.

A teſtatrix bequeathed ſeveral ſums of money to different perſons, to be paid within three months after her deceaſe out of a bond-debt due to her; the obligor in the bond, who was one of the legatees, paid the debt with intereſt and took up the bond in the lifetime of the teſtatrix; but whether voluntarily, or upon demand, did not appear. The legacies were holden to be adeemed by this payment.

Savile v. Blacket, 1 P. Wms 777.

Sir *E. B.* by his will gave to his two daughters 2000*l.* a-piece, to be paid in the manner therein mentioned, that is, 500*l.* part thereof he directed to be charged upon, and raiſed out of premiſes compriſed in his marriage ſettlement, on which he declared by his will he had power to charge 1000*l.* The teſtator had joined with his ſon in a recovery of theſe premiſes, and had thereby (according to the opinion of the court, on a queſtion raiſed in the cauſe) extinguiſhed his power to charge. Lord *Macclesfield*, upon the hearing, for further directions, notwithſtanding theſe ſums had been charged on a fund which failed, decreed them to be paid out of the teſtator's perſonal eſtate.

Coleman v. Coleman,

A. by his will gave the intereſt of a bill of exchange for the ſum of 1500*l.* on the *Eaſt India* Company to his wife for life, and directed, that after

after her death the bill ſhould be ſold, and the money ariſing thereby divided between his nephews and nieces, with benefit of ſurvivorſhip. After making his will, the teſtator received from the *E. I.* Company the ſaid ſum of 1500*l.* due on the ſaid bill, and he lent it upon perſonal ſecurity. Some time after he called in 100*l.* which he lent to *J. H.* who became inſolvent. The remaining 1400*l.* remained due at the death of the teſtator from the perſon to whom it was lent. It appeared that this bill conſtituted the bulk of the teſtator's fortune. The payment of the bill was decreed to be no ademption. 2 Vez. jun. 639.

But if two legacies of equal ſums are given to the ſame perſon, the one by the will, the other by a codicil, the ſecond bequeſt is conſtrued *primâ facie*, a duplication. Ridges v. Morriſon, 1 Br. Ch. Rep. 389. Though this difference between the legacies being in the ſame will, and being one in the will, the other in a codicil is mentioned as a ſtrange diſtinction by Mr. J. Aſton, in his learned argument in Hooley v Hatton, 1 Br. Ch. Rep. 390. note. Yet he ſeems afterwards to admit it as ſettled. But notwithſtanding the legacies are in different inſtruments, yet if they be not given ſimply but for a reaſon expreſſed, which reaſon is the ſame both in the will and codicil, it denotes the intention of giving but one bequeſt and ſuch intention muſt prevail. Duke of St. Alban's v. Beauclerk, 2 Atk. 640. 1 Br. Ch. Rep. 392. note. On the other hand, if the wording of the gift in the codicil be varied from that in the will, and mark the legatee as an object of the teſtator's peculiar favour, this corroborates the *primâ facie* preſumption of law, that the latter ſhould be an additional legacy. 1 Br. Ch. Rep. 393. And this ſeems to hold where there is but one inſtrument. 2 Br. Ch. Rep. 528.

So, if the ſums in the will and codicil be unequal, whether the latter be the greater or the ſmaller of the two, they ſhall be taken accumulatively. Maſters v. Maſters, 1 P. Wms. 423. Curry v. Pile, 2 Br. Ch. Rep. 225. Extrinſick evidence of intention may be taken into the account in theſe caſes; for the ambiguity of preſumption, whether a legatee ſhall have two legacies, does not ariſe ſimply from the conſtruction of words; but is a preſumption *donec probetur in contrari.* 2 Br. Ch. Rep. 526-7. Hence an increaſe of fortune to the teſtator after the making of the will, and before the date of the codicil, has been conſidered as a circumſtance that he intended additional bounties. 1 P. Wms, 424.

So, where a teſtator bequeathed 300*l.* to be paid to the child he ſhould have at his death, and if he ſhould have none, then to his ſiſter; and afterwards, having three children born, he gave by a codicil 200*l.* to each of them, to be paid at their reſpective ages of 21 years; it was decreed, that the latter bequeſt being without words ſignifying the ſame to be for their portions, or any thing either to revoke or affirm the former gift, it ſhould be taken by way of accumulation, and the children ſhould equally divide both legacies. Pit v. Pidgeon, 1 Ch. Ca. 301.

But where a teſtator having made a codicil containing ſeveral legacies, afterwards made a ſecond preciſely to the ſame effect, with the addition of only one pecuniary legacy, his intention was thought to appear, that there ſhould be but one codicil, and the latter only was decreed to ſtand. Coote v. Boyd, 2 Br. Ch. Rep. 521.

(D) Where a Legacy ſhall be preſumed to be a Satisfaction of a Debt or Duty owing from the Teſtator.

SO, where a term was created by a marriage ſettlement to raiſe 3000*l.* for daughters' portions, within 12 months after the death of the ſurvivor of huſband and wife, and there being one daughter, the father deviſed the truſt eſtate to make good his wife's jointure, and to raiſe 3000*l.* for his Bruen v. Bruen, 2 Vern. 439.

his daughter's portion; it was holden, that the will ſhould be taken as relative to the ſettlement, and conſtrued for the better ſecuring the 3000*l.* by the ſettlement, and not as another deviſe of 3000*l.*

Elken Head's caſe, cited in 2 Vern. 257.

So, where a teſtator bequeathed 1000*l.* a-piece to each of his five daughters, and after legacies paid, gave the ſurplus of his lands equally amongſt his five daughters, and afterwards gave 1000*l.* portion with one of them in marriage, ſhe was excluded from the 1000*l.* intended by the will.

Copley v. Copley, 1 P. Wms. 147.

J. S. ſettled his eſtate on himſelf for life, remainder to his firſt &c. ſon in tail male, with a proviſo, that if *B.* his ſon ſhould die without iſſue male, and leave a daughter, the truſtees ſhould raiſe out of part of the premiſes 5000*l.*, to be paid to ſuch daughter within a year after her marriage, or at her age of twenty-one, which ſhould firſt happen. *B.* on his marriage ſettled the ſaid eſtate (including the premiſes charged with the 5000*l.*,) on himſelf for life, remainder to his firſt &c. ſon in tail male, remainder to truſtees for 200 years, in truſt to raiſe 8000*l.* for daughters' portions (if no iſſue male), payable at eighteen (*a*), if then married, or at any time after, when married. *B.* having no iſſue male, deviſed all his lands to *C.* in tail male, chargeable with his legacies, and bequeathed to *E.* his daughter for her portion 8000*l.* *viz.* 4000*l.*, part of it to be paid at her age of 18 years, and 4000*l.* reſidue thereof, within a year after marriage, or in all events at 21; and bequeathed to her 120*l.* *per ann.* until 18, and afterwards 200*l.* *per ann.* for her life. *E.* the daughter brought her bill for the recovery of all thoſe ſums of 5000*l.*, 8000*l.*, and 8000*l.*, inſiſting that none of them being given in ſatisfaction of the other, and it being the caſe of an heir at law, and theſe ſums payable at different times, ſome leſs beneficial than others, therefore all theſe portions, or at leaſt the 5000*l.* given by the grandfather, and the 8000*l.* given by the father, ſhould be paid her: but Lord *Harcourt* decreed, that ſhe ſhould have but one 8000*l.*, but that, when of age, ſhe might elect which of the portions ſhe pleaſed.

(*a*) The time of payment does not appear in Reg. Lib. though much inſiſted upon in argument.

Johnſon v. Smith, 1 Vez. 314.

J. S. by deed-poll aſſigned all his ſecurities to the value of 7000*l.* to a natural daughter, but afterwards treats them as his own, not having delivered the deed to her. About ſix months before he died, he executed and delivered to her a bond for 10,000*l.* payable in three months after his deceaſe. He afterwards made his will, and deviſed to her his real eſtate, provided ſhe married *W. J.*, but in caſe of her refuſal, he gave it to *W. J.* He likewiſe bequeathed her all his perſonal eſtate, and made her executrix. She refuſed to marry *W. J.* It was decreed, that the daughter was not entitled to the benefit of the deed of aſſignment and the bond, but muſt make her election.

Baugh v. Reed, 3 Br. Ch. Rep. 192.

The teſtator *James Reed* the elder had ſix children, *James*, *Sarah*, *Mary*, *William*, *Thomas*, and *Charlotte*, who were entitled under the will of their grandfather, upon their attaining their reſpective ages of 23 years, to two ſums of 5000*l.* each, which had been paid into the Bank under an order of the court of Chancery, and laid out in the purchaſe of 11, 315*l.* 8*s.* 4*d.*, 3 *per cent.* Bank annuities, which being divided into ſix parts, came to 1885*l.* 18*s.*, and a fraction of a penny each. Such of the children as had attained their ages of 23 before the teſtator made his will, *viz.* *James*, *Sarah* (now *Sarah Jones*), and *Mary* (late *Fydell* deceaſed), had applied for their ſhares, which had been transferred to them; and *James Reed*, the eldeſt ſon, transferred his ſixth, the 4th *September* 1783, to the teſtator his father; *Sarah*, the eldeſt daughter, on the 8th *February* 1784, execu-

ted

ted a power to the houſe of *Eſcot*, *Reed*, and Co., for transferring her ſixth of the ſaid ſtock; but the ſame was a general power to accept, receive dividends, and transfer, not naming to whom. The daughter *Mary* and her huſband *R. Fydell*, by their marriage articles, dated 24th *March* 1784, covenanted, that her ſixth ſhould become the property of her father; and in *April* following, it was transferred into his name. *William* the next ſon, 4th *Auguſt* 1784, transferred his ſixth into the name of his father. On the 30th of *July* 1784, the teſtator (being then poſſeſſed of 32,771*l.* 16*s.* 2*d.* Bank 3 *per cents.*) made his will, and *(inter al.)* gave to truſtees three ſums of 8114*l.* 1*s.* 11*d.* in the ſame ſtock, part of the capital theerin, in truſt for his ſon *Thomas*, and his daughters *Sarah* and *Charlotte*, and their reſpective children and grandchildren. The queſtion was, Whether the 1885*l.* 18*s.* which continued to ſtand in the name of *Sarah* (now Mrs. *Jones*) was her property, or the property of her father? As to which a great deal of evidence was read, particularly that of *James* her brother, who ſwore, that the power of attorney was given for the purpoſe of a transfer to the father, which had not been made by miſtake, but he had received the intereſt till his father's death, and carried it to his account. On the contrary, evidence was read to ſhew, that at the time Mrs. *Jones* executed the power of attorney, ſhe was very ill, and ſcarcely knew what ſhe did, and that ſhe received no conſideration for it. Under all theſe circumſtances it was inſiſted, that Mr. and Mrs. *Jones* muſt elect between the ſum of 1885*l.* 18*s.* and the legacy. But Lord Chancellor ſaid, he thought the evidence was not ſatisfactory to drive Mr. and Mrs. *Jones* to an election. He thought it not ſufficient to enable him to pronounce, that the teſtator did not mean ſhe ſhould have both.

R. S. Byde having iſſue by a former wife one ſon, upon marrying a ſecond wife, ſettled lands on himſelf and his wife for their lives, remainder to truſtees to ſell the ſame to his ſon, by the former marriage for 5000*l.* for a proviſion for the children by the ſecond marriage. Afterwards, having three children, and his wife being enſient, he, by will, gave 1000l. to each of the three children of the ſecond marriage by name, and 1000*l.* to the child, of which the wife was enſient, and charged his lands with theſe portions. After his death, the ſon paid the 1000*l.* portions, and accepted the purchaſe, and the wife dying, after her deceaſe, the plaintiff, the only ſurviving child of the marriage, filed a bill to have the purchaſe completed, and to be paid the 5000*l.* over and above his portion under the will. Lord *Northington* thought the teſtator meant to give each child an election, and that by accepting the legacies, they had made their election to take under the will, and therefore diſmiſſed the bill without coſts. Byde v. Byde, 1 Br. Ch. Rep. 309. note.

Sir *E. Seymour* and Mr. *Webb*, the paternal and maternal grandfathers of the plaintiff, upon the marriage of the plaintiff's father, entered into articles of agreement, dated *March* 2, 1716, whereby Sir *E. S.* agreed to ſettle the eſtates at *B.* on the plaintiff's father, chargeable with the following portions for younger children, namely, 4000*l.* each for one or two, or 12,000*l.* equally to be divided between three or more children, payable at 21 or marriage, which ſhould firſt happen after the death of the father. Beſides this, he agreed to advance 1600*l.* to be laid out in lands as an additional jointure for plaintiff's mother.—Sir *E. S.* died in 1740, whereupon plaintiff's father, the laſt duke of *Somerſet*, took under the marriage articles; and he alſo died in 1757, leaving the plaintiff, his eldeſt ſon, and the defendants, his widow and younger children. But plaintiff's father by his will made freſh proviſion for every branch of his family, and bequeathed to Duke of Somerſet v. Dutcheſs of Somerſet, 1 Br. Ch. Rep. 309. note.

his three younger ſons 5000*l.* each, and to his daughters the third part of his *W.* eſtate, or 8000*l.* in lieu thereof, with croſs bequeſts between his ſons and daughters, in caſe of any of them dying under age, and charging the whole upon his eſtates at large, which he deviſed to the plaintiff, his eldeſt ſon, with remainders over to his younger ſons, ſucceſſively in tail male. The plaintiff filed his bill, praying, among other things, that his younger brothers and ſiſter's huſband might elect to take under the articles or will. And the Lord Chancellor directed them to make their election.

Hartop v. Whitmore 1 P. Wms. 681.

J. W. by his will (he having at the time of making it four ſons and ten daughters) deviſed conſiderable real eſtates to each of his ſons, and to every one of his daughters (except *F.* the eldeſt, to whom he had given a full portion on her marriage, and his daughter *D.*, on whoſe portion the queſtion aroſe, and his daughter *D.*, who had diſobliged him by turning Roman catholick) he gave the ſum of 500*l.*, if they married with their mother's conſent; otherwiſe, but 300*l.* a-piece. He then gave his wife the reſidue of his perſonal eſtate in truſt for the performance of his will. He then gave his daughter *D.* 300*l.*, if ſhe ſhould be living at her age of 23 years, and unmarried, or married by and with her ſaid mother's full conſent firſt had and obtained in writing; but if married when it was thereby appointed to be paid her, and that without her mother's full conſent as aforeſaid, then and in ſuch caſe he gave her 200*l.* only, and that to be paid at her age of 23 years; and he appointed *S. W.* his wife ſole executrix. It appeared, that at the time of making the will *S. W.* was under her father's diſpleaſure, and then in *London* with a milliner, but upon one *T. T.*'s paying his addreſſes to her, the father and mother were informed of it by a Mr. *F.* by letter; that they thereupon offered to give 200*l.* as a portion, and no more; that *T.* for ſome time refuſed to marry her without a larger portion, but they were afterwards married without the conſent of father or mother. Afterwards, upon *T.*'s applying to the father for *D.*'s portion, the father offered him 200*l.*, and the mother at that time ſaid, that if ſhe ſurvived her huſband, and had it in her power, ſhe would add another 100*l.* *T.* would not then accept the 200*l.*, but afterwards wrote a letter to the father for it, who thereupon paid it to *F.* for the uſe of *T.*, and took a receipt for it from *F.* The teſtator lived two years afterwards, without revoking or altering his will. *T.* became a bankrupt, and his aſſignee brought a bill againſt *S. W.* the executrix, and *T.* and his wife for the legacy of 300*l.* By Lord Chancellor *Parker*.—If a father gives a daughter a portion by his will, and afterwards gives to the ſame daughter a portion in marriage, this, by the laws of all other nations as well as of *Great Britain*, is a revocation of the portion given by a will; for it will not be intended, unleſs proved, that the father deſigned two portions to one child. And as to his having lived ſo long after giving the portion to his child on her marriage, without ever revoking that part of his will, there could be no need for the father to revoke that legacy which he before had done by giving the portion in his lifetime, ſince that would be but revoking the ſame will twice. And this demand is the harder, inaſmuch as it is made by the aſſignee of the commiſſioners of bankruptcy againſt the huſband, ſo that the wife, whoſe portion this is ſaid to be, would be never the better for it.

Ward v. Lant, Pr. Ch. 182.

J. S. had four daughters, *A.*, *B.*, *C.*, and *D.*, and by his will deviſed to *A.* 1000*l.*, and by the ſame will deviſed to them 1500*l.* a-piece for their portions, which ſeveral ſums of 1500*l.* were to be raiſed out of a real eſtate deviſed by his will for that purpoſe. *A.* married in the teſtator's life-

time,

time, and he gave her 4000*l.* portion. By Lord Keeper *Wright.*—This 4000*l.* portion muſt be taken to be a ſatisfaction of the 1500*l.* given *A.* by the will for her portion, and a revocation of the will *pro tanto:* but as to the 1000*l.*, that being a general legacy, *A.* muſt have that, notwithſtanding the 4000*l.* given her for her portion.

In the marriage ſettlement of *J. B.* the father, there was a proviſion of 8000*l.* for younger children, with a proviſo that if the father ſhould in his lifetime, or at the time of his death, give to any of his daughters or younger ſons ſo entitled to portions or proviſions under that truſt, money or lands, for or in advancement in marriage, or otherwiſe, the value thereof ſhould be deducted from the portion, unleſs he ſhould by writing declare the contrary. *J. B.* the father, by his will, gave a ſum of 4000*l.* in the funds to his wife for life, and after her deceaſe to his ſecond ſon *J. B.* jun. and alſo gave him the reſidue of his perſonal eſtate, and made him executor of his will.—It appeared from the Maſter's report, that the reſidue was conſiderably greater than the 8000*l.* charged upon the eſtate by the ſettlement. Lord *Thurlowe* decreed, that it was a ſatisfaction of the portion. Rickma v. Morgann 1 Br. Ch. Rep. 63. 2 Br. Ch. Rep. 394. S. C.

Felix Deveſe in 1768, covenanted by marriage articles, that in caſe *B.*, his then intended wife ſhould ſurvive him, and there ſhould be no iſſue of the marriage, that his heirs, executors, or adminiſtrators, ſhould, within nine months after his death, pay her 800*l.* to be for her own proper uſe and benefit, and at her own diſpoſal; but in caſe there ſhould be any child or children born of the ſaid marriage, that the intereſt thereof ſhould be paid to her for her life, and after her deceaſe that the principal ſhould be paid or divided to and among ſuch child or children, *&c.* *F. D.* in 1781 made his will; and thereby (*inter al.*) after bequeathing ſeveral ſpecific articles to his wife *B.* directed, that all the debts due to the buſineſs which he then carried on ſhould be collected as ſoon as poſſible; that the ſtock in trade and houſehold goods ſhould be valued, and the money that ſhould be in the publick funds, and the produce of all being collected, he deſired that it ſhould be divided into equal ſhares; the one *to be the property of his dear beloved wife* B., *for her to be diſpoſed of as ſhe pleaſed*; the other to be devolved to his dear beloved brother *P. D.*, (ſince deceaſed), appointing him his heir general. The teſtator died ſome time after without iſſue. A bill being filed by the widow of *P. D.* againſt the teſtator's widow, and other neceſſary parties, the queſtion was, Whether the diſpoſition under the will ſhould be held as a performance or ſatisfaction of the covenant in the marriage articles? The Maſter of the Rolls held, that it was not a ſatisfaction, there being no expreſs evidence, or even a ſtrong preſumption, that the teſtator intended it as ſuch, and it having been repeatedly ruled that an aliquot part of a reſidue ſhall not be deemed a ſatisfaction. Dereſe v. Pontet, Nov. 15, 1785, Finch's Ed. of Pr. Ch. 240. note.

A., previouſly to his marriage, covenanted to ſecure to his wife an annuity of 1000*l.* a-year, iſſuing out of lands, for her jointure and in bar of dower. He afterwards by his will deviſed to his wife certain parts of his real and perſonal eſtate of conſiderable value. It was holden, that ſhe was entitled both to the eſtates deviſed, and to her annuity, and that the one was not to be intended to be a ſatisfaction for the other. Broughton v. Erington, 7 Br. P. C. 12.

In a ſettlement, a term was created for raiſing 10,000*l.* for daughters' portions, with a proviſo, that if the father by deed or will ſhould give or leave the ſum of 10,000*l.* to his ſaid daughters, it ſhould be a ſatisfaction. The father leaves lands to the daughters of the value of 10,000*l.* Adjudged to be no ſatisfaction. Chaplin v. Chaplin, 3 P. Wms. 245.

A. being

Chancey's case, 1 P. Wms. 408. S. C. by the name of Chancy v. Wootton, Sel. Caſ. Ch. 44. (*a*) So. Cranmer's caſe, 2 Salk. Fowler v. Fowler, 3 P. Wms. 355. Thomas v. Bennet, 2 P. Wms. 343.

A. being indebted to his maid-ſervant, who lived with him for a conſiderable time, gave her a bond for 100*l.* as for wages, and afterwards by will gives her 500*l.*, which was mentioned in the will to be for her long and faithful ſervices. The Maſter of the Rolls obſerved, that the bond was *for ſervice*, and the 500*l.* legacy alſo *for ſervice*, ſo that it is a greater reward and ſatisfaction for the ſame thing; and ſo decreed. But he held clearly, that ſuch a legacy is not a ſatisfaction for ſervice done to the teſtator after the making of the will (*a*). But this decree was afterwards reverſed by Lord *King*; for that the teſtator had by the expreſs words of his will directed, that all his debts and legacies ſhould be paid; and as this bond was then a debt, and the 500*l.* a legacy, it was as ſtrong as if he had directed that both the bond and legacy ſhould be paid: that when the teſtator gave a bond for the arrears of wages, it was the ſame thing as paying them; and as, if he had actually paid them, and had afterwards given the legacy of 500*l.*, the executor could not have fetched back the 500*l.*, and made the defendant refund, ſo neither ſhould the bond in this caſe be ſatisfied by the legacy. His Lordſhip added, that the executor did not himſelf take this 500*l.* legacy to be a ſatisfaction of the bond, as appeared by his having voluntarily paid the 100*l.* He therefore decreed the ſervant both her debt and legacy.

Eaſtwood v. Vinke, 2 P. Wms. 613.

A. on his marriage gave a bond to his wife's truſtee in the penalty of 4000*l.*, conditioned, that if he at any time within four months ſhould ſettle and aſſure freehold lands of 100*l. per annum* on his wife for her life, or if his heirs, executors, or adminiſtrators ſhould, within the ſpace of four months after his death, pay unto his ſaid wife 2000*l.*, then the bond ſhould be void. The huſband, ſoon after the marriage, made his will, deviſing thereby freehold and copyhold lands of 88*l. per annum* to his loving wife and her heirs, having ſurrendered all his copyhold to the uſe of his will, and died within four months after the marriage. The wife claimed to retain theſe lands of 88*l. per annum*, and as her huſband had not ſettled the 100*l. per annum* for her life, ſhe alſo inſiſted that ſhe was at liberty to elect the 2000*l.* out of his aſſets. The Maſter of the Rolls decreed, that this 88*l. per annum* ſhould not be taken in part of the 100*l. per annum*; but only as a benevolence: and this decree was, on an appeal, affirmed by Lord Chancellor *King*.

Meredith v. Wynn, Pr. Ch. 314.

A. had two daughters, *M.* and *N.* A legacy of 100*l* was left to *M.* by *J. S.*, and another of 50*l.* by *W. R.*, and both legacies were in the father's hands as executor of *J. S.* and *W. R.* Afterwards *A.* by will, by virtue of a power, charges his lands with 2000*l.* and alſo left *M.* and *N.* 250*l.* a-piece. Adjudged, that this was not a ſatisfaction of the legacies.

Stanway v. Styles 2 Eq. Ca. Abr. tit. Deviſes, pl. 21.

R. S. borrowed of his wife 100*l.* which ſhe had ſaved out of the money allowed her for houſekeeping, and by his will gave her a pecuniary legacy of 30*l.*, and alſo 40*l.* a-year during the life of her mother, and all his houſehold-goods for her life, and gave the reſidue of his eſtate to her three ſiſters. In a croſs bill brought by the widow for the 100*l.* and the legacies, the executors inſiſted, that the legacies and annuity ſhould be looked upon as a ſatisfaction of the debt. But Lord *Talbot* held, that the 30*l.* could not be a ſatisfaction, becauſe a leſs ſum; and as to the ſpecifick things deviſed, and the annuity of 40*l.* a-year, theſe ſorts of deviſes were never held to be in ſatisfaction of a debt, unleſs ſo expreſſed in the will; and his Lordſhip decreed accordingly.

A father

A father gives legacies to his children, and makes his wife executrix: ſhe not having paid the legacies, by her will gives the children legacies likewiſe; one of which was the ſame ſum, and the other a greater. It was decreed, the children ſhould not have both, and the latter was a ſatisfaction of the former. Barkham v. Dorwine, Vin. Abr. tit. Deviſe (T. c), pl. 37.

Huſband, on his marriage, ſettled 100*l. per annum* pin-money in truſt for his wife, for her ſeparate uſe, which became in arrear; and then the huſband by will gave the wife a legacy of 500*l.*; after which there was a further arrear of the pin-money; and then the huſband died. This legacy being a greater ſum than the debt, was decreed, even in the caſe of a wife to be a ſatisfaction of the arrears of the pin-money due before the making of the will, though not of thoſe incurred after the date of the will. Fowler v. Fowler, 3 P. Wms. 353.

W. L., to reward the ſervices of *A.*, who has lived with him a great number of years, gave her a bond in 1728 for payment of 300*l.* and intereſt, on a day fixed; and in 1731 paid her 100*l.*, part of the 300*l.*, and all intereſt. In 1736 he made his will, and thereby (*inter al.*) gave to *B.* all his meſſuages, lands, *&c.* in *C.*, to hold to him, his executors, *&c.* for two hundred years, upon truſt out of the rents, *&c.*, by mortgage or ſale, to levy, raiſe, and pay to *A.* within two years after his death 200*l.*, and ſubject to this term he deviſed the ſame premiſes to the plaintiff and his heirs; he alſo gave other lands to the ſame truſtee for 300 years, upon truſt, to pay 200*l.* to *A.* within one year after his death. In other parts of his will he gave her plate, linen, *&c.*, and other perſonal legacies. The executor of *W. L.* paid off ſome part of the bond to *A.* in her lifetime. A bill was filed againſt the defendant, her repreſentative, praying, that the legacies bequeathed by the will of *W. L.* to *A.* might be decreed a ſatisfaction of the bond; and that the defendant might be directed to refund ſuch ſums as he had received in part payment of the ſaid bond from the executor of *W. L.* But the Maſter of the Rolls held theſe to be contingent legacies, and if the legatee had died before the days of payment, they would have ſunk into the land, for the benefit of the plaintiff: and as the rule of ademption had never been carried ſo far, as to take in a contingent legacy, he decreed for the defendant, that the legacies of 200*l.* and 200*l.* were not a ſatisfaction of the bond. Nicholls v. Judſon, 2 Atk. 300.

An annuity of 10*l. per annum*, charged on a particular eſtate, was granted by deed to *A.* by her huſband's father for 99 years, on condition that ſhe maintained her ſon: another annuity of 6*l. per annum* was given her by bond by the ſame perſon, during her widowhood: and he gave her a third annuity of 10*l. per annum* by his will charged generally. The annuity given by the will cannot be conſidered as a ſatisfaction for both the other annuities, not being equal to them; nor as a ſatisfaction for the annuity of 10*l. per annum*, becauſe out of different funds; the one being out of a particular eſtate, the other charged on the general fund of real and perſonal; but it is a ſatisfaction of the annuity of 6*l. per annum*, for that is nothing more than a debt upon the teſtator's eſtate. Graham v. Graham, 1 Vez. 262.

A huſband entered into a bond on his marriage to leave to the wife, in caſe ſhe ſhould ſurvive him, 300*l.* (which was her fortune), payable in a month after his deceaſe. By will, he gave to his wife 500*l.*, payable within ſix months after his deceaſe: he gave her alſo a houſe in fee, and ſeveral other ſpecifick legacies. Lord *Thurlowe* held this to be no ſatisfaction by reaſon of the different times of payment of the bond and legacy. Haynes v. Mico, 1 Br. Ch. Rep.

G R. by his marriage articles covenanted to pay to his wife, in caſe ſhe ſhould ſurvive him, 200*l.* free of all deductions in the name of a jointure, Richardſon v. Fl. hu-

and

ſtone, 2 Vez. jun. 463.

and the ſum of 50*l.* to provide herſelf with a houſe, yearly during her life, to commence at *Whitſunday* or *Martinmas*, which ſhould firſt happen after his deceaſe. Afterwards, by his will he directed his debts to be paid, and gave his wife for life the capital meſſuage at *P.* in *C.* with the houſehold goods, plate, linen, and china therein; and deviſed an eſtate to his eldeſt ſon when he ſhould attain 21. Then reciting articles into which he had entered to aſſociate captains of *India* ſhips, he gave certain directions relative thereto; and then gave all the reſidue to truſtees upon truſt to inveſt the ſame in ſtock, and to permit his wife and her aſſigns to receive 100*l.* *per ann.* during her life. He then gave annuities to his children, ſiſters, and uncles; and declared, that the ſeveral annuities, as well to his wife and children as to his ſiſter and and uncles, ſhould be payable half-yearly, and commence from the day of his death. The Maſter of the Rolls, Sir *R. P. Arden*, thought the proviſions in the will were not intended as a ſatisfaction of the covenant; for if the teſtator had had the articles in contemplation, it was abſurd to ſuppoſe, he ſhould give a real eſtate in ſatisfaction for half, and an annuity payable and commencing at different times for the other half, proviſions ſo extremely different, without expreſſing it to be a ſatisfaction.

Cantle v. Morris, 1 Br. Ch. Rep 132. note.

Harry Merryweather and *Ann* his wife ſeiſed in fee-ſimple (in the right of *Ann* of a moiety of lands in *H.* and *N.* in the county of *S.*) by indenture, *Oct.* 4th, 1740, covenanted with truſtees to levy a fine to enure to the uſe of *H. M.* for life, remainder to *A.* for life, remainder to *Rachael Coles* (ſiſter to *A.*) for life, remainder to truſtees for a term of 1000 years, remainder to the right heirs of the ſurvivor of *H. M.* and *R. C.* The truſts of the term were to raiſe 1000*l.* to be paid to ſuch of the relations, *&c.* of *A.*, and at ſuch times and in ſuch proportions as the ſurvivor of *H. M.* and *R. C.* ſhould by deed or will appoint, and in default of appointment to the next heir or coheirs of *R. C.* The fine was levied: *H. M.* and *A.* both died in the lifetime of *R. C.*, who thereby became entitled to the inheritance of the moiety compriſed in the indenture, ſubject to the term of 1000 years. She was at the ſame time, and at the time of the execution of the indenture, ſeiſed in fee of the other moiety. She died in 1769, having made her will bearing date the 26th *Nov.* 1756, by which ſhe gave annuities to the father of the plaintiff *Mills*, and to the mother of the defendant *Veale*; and after their deceaſe, ſums of 100*l.* to be divided between the children of the annuitants, charged on lands not compriſed in the ſettlement, and an annuity to the mother of the plaintiff *Litman*; and after her deceaſe, a ſum of 100*l.* to be divided between the children of the plaintiff *Litman*, charged upon *H.* eſtate, (one moiety of which was compriſed in the indenture); and, having given other legacies charged on *H.*, deviſed the premiſes to a truſtee for the term of 100 years to raiſe the ſame: and ſhe gave all her meſſuages, *&c.* whatſoever, in *H.* and *N.* (charged with the payment of the annuities and legacies,) to defendant *Morris* for life, with the remainder to truſtees to preſerve, *&c.*; remainder to his firſt and other ſons in tail general; remainder to his daughters in tail general; remainder to defendant *Veale*, with like remainders; remainder to *J. Litman*, ſon of plaintiff *Litman*, in fee. And out of her perſonal eſtate the teſtatrix gave ſeveral legacies, and gave the reſidue to *J. Morris*. She made no other appointment of the 1000*l.* The plaintiffs *Cantle*, *Mills*, and *Elizabeth Litman*, wife of *William Litman*, (father and mother of plaintiff *Litman*, both ſince deceaſed,) were her heirs at law, and filed their bill, inſiſting that they were entitled to have the 1000*l.* raiſed. The defendant ſet up three defences: 1ſt, That *R. C.* having become entitled to the inheritance in fee of the moiety compriſed in the term,

the

e term ſunk into the inheritance. 2d, That the will operated as an ap-
ointment, and the deviſees of the eſtate, being relations of *Ann*, were capa-
le of taking as appointees. 3d, That the legacies and other charges were
tisfactions *pro tanto*; and therefore, (if they were wrong upon the other
oint,) only the reſidue of the 1000*l.* ſhould be raiſed. But lord Chancellor
dered the whole of the 1000*l.* to be raiſed for the plaintiffs, and upon ap- June 12. 1782.
al to the Houſe of Lords, this decree was affirmed.

J. S., on his marriage, made a ſettlement of ſome exchequer annuities Bellaſis v. Uthwait, 1 Atk. 426.
r 99 years, to the amount of 300*l. per ann.* in truſt for himſelf for life,
mainder to his wife for life, remainder to his children, in ſuch manner
he ſhould appoint, and if no children, to his executors, adminiſtrators,
d aſſigns. By this marriage there was only one child, *B.* *J. S.* being
kewiſe ſeiſed of a conſiderable real perſonal eſtate, afterwards deviſed all
s real and perſonal eſtate to his wife and her heirs, charged with the pay-
ent of 10,000*l.* as a portion for his daughter, payable at the age of 18
ars; and in caſe his wife ſhould marry again, that then the eſtate ſhould
nd charged with a further ſum of 5000*l.* for his daughter. One point
the cauſe was, whether the 10,000*l.* bequeathed by the father to *B.*
ould be taken to be in ſatisfaction of the annuities under the ſettlement,
d ſo the annuities be conſidered as part of the father's perſonal eſtate
hich he had a right to diſpoſe of by his will? And Lord *Hardwicke* was
opinion, that it could not be taken to be in ſatisfaction, but that *B.* was
itled to both as a double portion: for though the annuities and the lega-
are both of the ſame nature, both perſonal eſtates; yet the legacy of
,000*l.* is ſubject to a contingency, and not payable, unleſs *B.* ſurvived
e age of 18 years: beſides, *B.* might have lived till the annuities were
n out, as ſeveral of the years were already gone; and as the legacy
ght never have become payable, it would be hard to ſay, that a mere
ntingency ſhould take away a portion abſolutely veſted, eſpecially in the
e of an only child. If indeed the father had diſpoſed of thoſe annui-
s to any other perſon, it might have been a queſtion, his Lordſhip ad-
d, whether, the 10,000*l.* ſhould not be taken to be in ſatisfaction, and
ether, upon thoſe circumſtances, *B.* ought to be allowed to inſiſt upon
h demands?

A freeman of *London*, having a wife and ſix children, by his will gives Farnham v. Phillips, 2 Atk. 215.
wife her widow's chamber, and the third of his eſtate, which ſhe was
itled to by the cuſtom of *London*; and to his ſix children one third
ich they were entitled to by the cuſtom; and as to the third which he
a power to diſpoſe of, he directed a debt of 100*l.* to be paid out of
and the reſidue to be equally divided between the wife and children.
ter making his will he married one of his daughters to the plaintiff,
gave her 1000*l.*, which in the marriage articles was called her por-
or proviſion. On the death of the teſtator, a bill was brought by the
band and wife, for their ſeventh part of their teſtamentary third. For
defendants, the other children, it was inſiſted, that the portion was
tisfaction for the whole, and that as the plaintiffs did not offer to
g the 1000*l.* into hotchpot, to make all the children equal, they ought
claim this 1000*l.* (which was more than their teſtamentary third, the
le eſtate being only 10,500*l.*) and the ſhare of the teſtamentary part
by which they would have 290*l.* more than the other children; that
will intended an equality among all the children, and as they refuſed
ring in this 1000*l.*. they claimed under the will as far as it makes
them, and againſt the will, when it makes againſt them, which equity
ld not permit. But Lord *Hardwicke* ſaid, that though it be true,

that

that where a father, after making his will, advances his child with a portion as great or greater than the legacy given by the will, ſuch proviſion has been always holden an ademption; yet, there was no caſe where the deviſe has been of a reſidue (that is uncertain, and at the time of the teſtator's death may be more or leſs,) in which a ſubſequent portion given has been held to be an ademption; that this was not a deviſe of one third, but of a reſidue after payment of a debt charged on that third: that here was likewiſe ſomething to which this portion might be properly applied as a ſatisfaction, *viz.* the orphanage part; and the teſtator calls this a portion or proviſion in the marriage articles, which ſeems as if he then conſidered this as an advancement in his lifetime in bar of the cuſtom: that there was no declaration in the will, that he intended all equal; but what he has ſaid of equality is of the reſidue, which is a part of the eſtate remaining after what was given away in the teſtator's lifetime. His Lordſhip decreed accordingly.

Spinks v. Robins, 2 Atk. 491.

J. S. by a codicil, without any date, gives 1000*l.* a-piece to *M.* and *S.*, (the daughters of Mrs. *R.* a widow, with whom he lived for ſeveral years till the time of his death,) and if either of them ſhould die before their legacies were paid, then he gave the whole to the ſurvivor, and directed that each of the ſaid legacies ſhould remain in the hands of his executors, till the legatees attained the age of 21. He afterwards enters into two bonds, one to *M.* and the other to *S.*, reciting, that for divers good cauſes and conſiderations, he is deſirous of making a proviſion for and towards their maintenance. Each of the bonds was in penalty of 4000*l.* for ſecuring 2000*l.* a-piece to them, provided they ſhould marry in his lifetime, with his conſent, or in caſe they ſhould ſurvive him. It was inſiſted, that the bonds were to be conſidered as given in ſatisfaction of the legacies under the will: but Lord *Hardwicke* held, that they were not; for that he did not remember in any caſe between ſtrangers, where a man firſt gives a legacy by will, and afterwards a different ſum to the ſame perſon by bond, that the one has been held to be in ſatisfaction of the other; that in this caſe it weighed with him very ſtrongly, that the money given by the bond was upon a contingency, and therefore wholly uncertain whether one ſhilling of the principal ſum would become due or not; and that in the conſtruction upon double portions, it had always been of weight, that they were both certain.

Shudal v. Jekyll, 2 Atk. 516.

A bill was brought againſt the executors of Sir *Joſeph Jekyll* for a legacy of 1000*l.*; Sir *J.*'s will was dated the 4th of *May* 1738: ſoon afterwards Mr. *S.*, the plaintiff's late huſband, made his addreſſes to her, and applied in *July* following to Sir *J.*, who was her uncle, for his approbation; who, being ſatisfied with the match, ſaid, he would give him 500*l.*, but as it was not convenient to let him have the money, he would draw a note payable to him on 25th of *March* 1739, and lodge it in Mr. *Hill*'s hands to be delivered to Mr. *S.* after the marriage was had, (which he did accordingly); and alſo ſaid, that he would leave ſomething to his niece by will, but that he would not be put under any obligation of doing it. Upon the 19th of *Auguſt* 1738, Sir *J.* died without revoking his will, and the very next day the plaintiff and Mr. *S.* were married. The queſtion was, Whether the legacy under the will was ſatisfied by the 500*l.* given in the teſtator's lifetime? Lord *Hardwicke* decreed, that it was not: that there was nothing done by Sir *J. J.* afterwards in his lifetime that induced a preſumption of ſatisfaction; and farther, that even if a father had given his daughter a portion in his lifetime, and accompanied it with ſuch declaration

rations as uſed by the teſtator in this caſe, a portion ſo given would not ve been an ademption of the legacy; *a fortiori* in this caſe, it could , where the teſtator was only a remote collateral relation, the plaintiff's at-uncle, and did not even ſtand *in loco parentis*, for the plaintiff's fa- r was living.

The plaintiff's wife was entitled to the reſidue of her grandmother's ate, under her will, and likewiſe was left executrix, & *durante minori te*, her father was adminiſtrator. At the time of her marriage with the intiff, he was, by agreement, to have 800*l.* from the father, which in ſettlement was mentioned to be for a portion, and in conſideration of ural love and affection. It was inſiſted for the plaintiff, that he is en- ed to an account of the grandmother's eſtate from the repreſentative of wife's father, and that the 800*l.* paid by her father, upon her marri- , was not in ſatisfaction of this reſidue, eſpecially as it is expreſſed to given for natural love and affection: and as the father, at the time of marriage, was worth at leaſt 8000*l.* and had only this daughter and ſon, the counſel argued, it was not probable he meant it as a ſatisfac- n; that conſtructive ſatisfactions muſt be drawn from circumſtances; t there is no caſe to be produced, where a father is indebted to a child account of a demand under the will of a collateral relation, and that be- e the demand is liquidated, his giving a ſum as a portion to this child, been held a ſatisfaction: and for this purpoſe were cited *Chidley* v. *Lee*, . *Ch.* 228., and *Barnham* v. *Phillips* (*ſupra*), before Lord *Hardwicke* 1741.—The counſel for the defendant reſted chiefly upon the parol de- rations of the plaintiff and his wife, ſoon after the marriage, that the ol. was intended both as a portion and a ſatisfaction likewiſe as to the re- ue of the grandmother's eſtate; and the depoſitions of ſix or ſeven wit- ſſes were read, which were very full to this point. To encounter this, the plaintiff's ſide, was read the evidence of the father's declarations fore and after the marriage; that he ſaid his mother had left 500*l.* at ſt to his daughter; and that he would give *John Wood* (the plaintiff) ool. and make a man of him; and not above ſix weeks before his death, d to the plaintiff, "Thou knoweſt I owe thee a great deal of money, and thou ſhalt not be wronged of a farthing." Lord *Hardwicke* refuſed decree an account of the grandmother's perſonal eſtate, ſhe having been ad twenty years, and there being no grounds to think that the reſidue der her will was more than the fortune given the plaintiff's wife in mar- ge, it being admitted, that 500l. was the utmoſt amount of it.

Wood v. Briant, 2 Atk. 521.

In the caſe of Chidley v. Lee, the facts were theſe, viz. Mr. *L.* was father to the plaintiff's wife, and had in his hands a legacy of 150*l.* which had been given him by a collateral anceſtor. On her marriage with the plaintiff,

defendant, her father, gave her 1000*l.* portion, and after ſettled a church leaſe on the plaintiff's d maintained them 14 or 15 years at his own houſe, and no notice was ever taken of the legacy. r, for aught appeared, did the huſband know any thing of it; yet after ſome difference between m and a bill brought, the legacy was decreed with intereſt and coſts; and the Maſter of the lls ſaid, he could not diſcharge it, though he diſliked the ſuit.—Lord Hardwicke, in ſpeaking this caſe, ſays, the ground Sir John Trevor went upon was, that the huſband knew nothing of legacy to the wife from the collateral anceſtor, and therefore held it was not ſatisfied by the por- n, though it was a much larger ſum than the legacy: but his Lordſhip added, he thought this extremely hard caſe, and he believed he ſhould have been inclined to determine it otherwiſe. Atk. 523.

On a bill by the plaintiff, as adminiſtrator to his wife, one of the ughters of *W. Bradford*, which daughter was entitled to a fifth part of egacy of 520*l.*, left to her and her four ſiſters by the will of *T. Tindall* eir grandfather; the caſe was as follows, *viz.* *Tindall* made the wife of radford executrix. *Bradford*, as her huſband, poſſeſſed himſelf of the rſonal eſtate of *Tindall*; mixed the effects with his own; applied them

Seed v. Bradford, 1 Vez. 501,

to

to his own buſineſs; and continued ſo till his death. Upon a treaty for the marriage of the plaintiff in 1740, with one of his daughters, *Bradford* agreed to give 400*l.* as a marriage portion, as it was ſworn by the plaintiff's father, one of the parties to the agreement. On the wedding day, *Bradford* went up and fetched the 400*l.* which was put by for the huſband's uſe; one witneſs ſwearing, that *Bradford* ſaid, "there is the money, but that is not all;" another, that he ſaid, "there is what I give "my daughter, but that is not all;" and both added, "or words to that "effect. It appeared, that the daughter was privy to the right ſhe had to this fifth part. It did not appear (but rather the contrary) that her huſband knew of it at that time; but he knew of it a year after the marriage, yet never made any demand of it in the life of his wife, who died in 1742, nor in the life of *Bradford*, who died in 1746. The court principally upon the ground of the long acquieſcence by the plaintiff, decreed the 400*l.* to be an implied ſatisfaction of the 104*l.*, the fifth part of the legacy of 520*l.*

Mackdowell v. Halfpenny, 2 Vern. 484.

A. deviſed his real and perſonal eſtate to *B.* his ſon, charged with 500*l.* to *B*'s daughter, payable at 21 or marriage. *B.* married this daughter to *C.* her firſt huſband, after the teſtator's death, and gave her 1500*l.* as a portion, but no mention was made of the 500*l.* legacy, nor was any releaſe or diſcharge taken for it. Twenty-one years afterwards, the daughter and her ſecond huſband, brought their bill againſt the father for the 500*l.* legacy. But the bill was diſmiſſed, it being to be preſumed, that the 1500*l.* portion was intended in ſatisfaction of the legacy, eſpecially after ſuch a length of time.

Clerk v. Sewell, 3 Atk. 96.

E. G. by his will gives a legacy of 2000*l.* to truſtees, in truſt to pay the intereſt thereof, to his wife for life, and after her death the benefit of the principal to his ſon; but if he dies before 21, then he gives it over to his daughters, and makes *J. S.* and two more perſons executors. The ſon attained 21, and became entitled to the 2000*l.* The directions in the will were, that the executors ſhould carry on the teſtator's trade of a brewer; and in compliance with this, they ſuffered the 2000*l.* as well as the reſt of the teſtator's eſtate to continue in the trade. The ſon, after he had attained his age of 21, ſtill carried on the trade on the foot of the ſame ſtock which was left by his father. The ſon afterwards makes his will without any reference at all to his father's, and gives a legacy of 10,000*l.* upon different truſts from what his father had done of the 2000*l.*; for after the intereſt of the 10,000*l.* to his mother for life, he gives the principal to his ſiſter *S.*'s children, and charges it upon all his real and perſonal eſtate, and to be paid to truſtees *in a month after his death.* Upon the death of the ſon, the plaintiff, as deviſee of the mother, inſiſted both on the intereſt of the 2000*l.* and the intereſt of the 10,000*l.* Lord *Hardwicke* held him entitled to both; that in the caſe of portions, it is true, the court always leans againſt incumbering eſtates twice over; and will overlook little circumſtances of time; as to the payment of two ſums to children, if it appears to be a double portion and a double proviſion for younger children; but that this has never been the rule in regard to debts, where the funds for payment are appointed by different perſons: that the intereſt of the 2000*l.* was part of the proviſion and livelihood of the mother, and a debt upon the eſtate of the father in the hands of the ſon: that the mother might have lived till within a day of the time which was to be the commencement of the payment of the intereſt of the 10,000*l.* to her, and yet not have been entitled to it, and therefore it could be no ſatisfaction; for there

re is no caſe to make a ſatisfaction of a debt, when the legacy is not e at the time of the teſtator's death, but is made contingent, and to take ce at a future day.

J. B. being by the will of *J. P.*, to whom he was executor, to pay ol. to his aunt *M. P.*, deviſes the reſidue of his eſtate to his mother his aunt *M. P.* for life. It was adjudged, that this deviſe of the iety of the reſidue for life was not a ſatisfaction of the annuity; for it is a eral rule of ſatisfactions, that the thing given in ſatisfaction ſhould be tly of the ſame nature, and equally certain; but that here it was nei- r: the firſt being a clear annuity of 300*l.*, the laſt being the moiety of reſidue of the perſonal eſtate, whether more or leſs: that when a le- y has been preſumed a ſatisfaction, it has been for a debt by the ſame tator. Barret v. Beckford, 1 Vez. 519.

A ſon was entitled under the marriage articles of his mother to have oo*l.* laid out in land to his ſole benefit after the death of his father and ther. The mother died; the father by a ſecond marriage had a daugh- and having made a proviſion for her by a ſettlement, he, by his will, iſed other parts of his eſtate to his daughter and her heirs, and the reſi- in truſt for his ſon for life, and then to the daughter, with particular itations and declarations of that truſt; and all his perſonal eſtate, except h as was given to the daughter, he gave to the ſame truſtees to pay all juſt ts and legacies, and then to his ſon for life, with a bequeſt over to the ghter and her family. It was inſiſted, that this deviſe to the ſon was a faction for the 1500*l.* But Lord Chancellor ſaid, there was no au- rity that ſuch a bequeſt as this of the reſidue of real and perſonal eſtate, r payment of juſt debts, to teſtator's eldeſt ſon and heir for life only, ld be conſtrued a ſatisfaction for the 1500*l.* he was entitled to under mother's marriage articles. If the ſon died in the lifetime of the father, ing ſeveral children, there was no proviſion for them. So, if he ſur- d, as he did, and had iſſue afterwards: the 1500*l.* therefore muſt be ſidered as a debt by ſpecialty on the teſtator's eſtate, to be retained by defendant his ſon. Alleyn v. Alleyn, 2 Vez. 37.

Mr. *Pelham*, having four daughters, by his will appointed a ſum of ooo*l.*, over which he had a power under his marriage ſettlement among daughters, excepting Lady *Lincoln* (whom he had advanced); he then cted his *Nottinghamſhire* eſtate to be ſold after the death of the Duke *Newcaſtle*, and the money to be divided among all his daughters, ex- ing Lady *Lincoln*; and alſo gave his perſonal eſtate among his daugh- , excepting Lady *Lincoln*, and the reſidue of his real eſtate to all the ghters without exception. By a codicil he charged his eſtate at *Eſher* 5000*l.* to each of his younger daughters who ſhould not be entitled he houſe and park at *Eſher*. His daughter *Grace* afterwards married *Watſon*; and Mr. *Pelham* gave her 20,000*l.*, by applying part of the oo*l.* and other means, for her fortune: and the queſtion was, Whe- the legacy given by the will was ſatisfied by the portion? Lord *Hard-* held, that the 20,000*l.* advanced to *Grace* in Mr. *Pelham*'s lifetime, ch by her marriage ſettlement was recited to be in full of her portion or ne, was a ſatisfaction of what ſhe could claim under the will or ſet- ent of her father by way of portion; but as to the deviſe of the one- of the perſonal eſtate, and the fourth of the reſidue of the real eſtate, Lordſhip thought it was no ſatisfaction. Watſon v. Earl of Lincoln, Ambl. 325. 1 Br. Ch. Rep. 66. note. S. C.

T. C. entered

Jeacock v. Falkener, 1 Br. Ch. Rep. 295.

T. C. entered into a bond to truſtees, reciting, that he was deſirous of providing for one of the defendants *T. C.* his natural ſon, then about four years old, and conditioned that his executors ſhould, ſix months after his deceaſe, pay the ſum of 5000*l.* to the truſtees for the uſe of the ſaid *T. C.*, the intereſt to be applied for his maintenance and education till 21, and the principal then to be paid him; but if he ſhould die, living the father, or under 21, then not to be paid.—*T. C.* afterwards made his will, whereby he gave the defendants, the truſtees, all his eſtates in truſt to pay legacies, and to lay out 15,000*l.* upon ſecurities, and to apply 200*l. per ann.* to the education of his natural ſon *T. C.*, till 25, and then to pay him the 15,000*l.*; but if he ſhould marry between 22 and 25, and ſhould die, to pay the whole to his iſſue; and if he ſhould die unmarried before 25, the whole over. Lord *Thurlowe* decreed, that the bond was not ſatisfied by the legacy; and his Lordſhip's decree was affirmed by the Lords Commiſſioners *Loughborough*, *Aſhburſt*, and *Hotham*.

Grave v. Earl of Saliſbury, 1 Br. Ch. Rep. 425.

The Earl of *Saliſbury* left a legacy of 10,000*l.* to *James Cecil Grave*, ſuggeſted, but not proved to be his natural ſon. The bill was filed to eſtabliſh the will, and for an account of the perſonal eſtate: but the defendant's anſwer ſtating that the teſtator had in his lifetime advanced money to *J. C. Grave*, which it was inſiſted ought to be taken in ſatisfaction *pro tanto* of his legacy, the Lord Chancellor referred it to the Maſter to inquire into the circumſtances of ſuch advancements, and to report them to the court. The Maſter found, that the teſtator had granted to *J. C. Grave*, a leaſe for 99 years of a farm called *T.*, at the rent of 40*l.* a-year, which farm he found had before been let at 142*l.*, and was reported to be worth to be let at 180*l. per ann.* He calculated the difference between the reſerved rent and the real value, at 20 years purchaſe, to be 2800*l.*; and alſo found that the teſtator had paid the former tenant of the premiſes 1200*l.* for a ſtanding crop, dead ſtock, and farming utenſils, and alſo 400*l.* for repairs; making together the ſum of 4400*l.* The queſtion was, Whether this ſum of 4400*l.* ſhould be conſidered as a ſatisfaction for ſo much of the legacy of 10,000*l.*? Lord *Thurlowe* was of opinion it was not to be ſo conſidered, and ordered the legacy to be paid.

Holmes v. Holmes, 1 Br. Ch. Rep. 555.

Holmes the father, who was a jeweller, by his will gave his ſon 500*l.* and 2000*l.* to four unmarried daughters; then gave his ſon the utenſils of his trade, (which were of trifling value); and gave the reſidue his perſonal eſtate to his wife for life; and after her death, he gave further legacies to his daughters; to ſome 500*l.*, and to others 1000*l.*, and if any ſurplus, to be divided between all his children who ſhould be then living, (there being then ſeven in all). He afterwards took his ſon into partnerſhip with him, and by the deed of partnerſhip, the ſtock was to be 3000*l.* to be brought in equally; and they were to be equally entitled to the whole. The father brought in the whole capital, and it was underſtood by the whole family, that he meant to give the ſon the half of the ſtock. The children, who were of age, by their anſwer admitted this; and there was parol evidence of declarations of the teſtator at different times, that he meant to bring his ſon into partnerſhip, and to give him half the ſtock, and even the whole; and that he told one witneſs, that he had brought his ſon in, and had given him 1500*l.* The queſtion was, Whether this advancement was a ſatisfaction of the legacy of 500*l.*? and it was held not to be a ſatisfaction, not being *ejuſdem generis*; and that it muſt have been the teſtator's intention, that the ſon ſhould have both.

A teſtator

A teſtator bequeathed to his putative daughter in the following terms, viz. "I bequeath the mortgage bond 1365*l.* due to me from Mrs. *M.*, to Miſs *Kitty Meredith*, now in my houſe, in order to fit her out for *India*, or to diſpoſe of her in marriage" Miſs *Meredith*, during the teſtator's life, married *More* the bankrupt, and the teſtator gave *More* a bond for 1000*l.* as a marriage portion. He alſo gave them after marriage 500*l.* to buy furniture, *&c.* The bond was afterwards paid; 400*l.* of it being retained by *More* out of money received on accoount of the teſtator, and the remaining 600*l.* upon ſuit by the aſſignees. *More*, the bankrupt's father, being examined as a witneſs, ſaid, that the teſtator, before the marriage, told him, in a converſation on the ſubject, that "he could only give her 1000*l.* on her marriage, but there would be more hereafter, as his life was a bad one;" by which he underſtood ſhe would have a further fortune at the teſtator's death. Lord *Thurlowe* held, that the ſum of 1000*l.* advanced upon the marriage was not an ademption of the legacy; nor was there any evidence or preſumption, that the gift of 600*l.* after the marriage was an execution of the teſtamentary gift. Debeze v. Mann, 2 Br. Ch. Rep. 165. 519.

A teſtator bequeathed to a young lady, to whom he was not related, the ſum of 6000*l.*, payable in three months after his deceaſe. After the making of the will, the lady married a clergyman, which marriage was had with the approbation of the teſtator, who gave 5250*l.*, 5000*l.* of which was ſtated in the ſettlement to be her marriage portion. After the marriage, the teſtator laid out 800*l.* in the purchaſe of a chaplainſhip of *Chelſea Hoſpital* for the huſband. It was inſiſted, that theſe ſums making together 6050*l.* were inſtead and lieu of the legacy of 6000*l.* But Lord *Thurlowe* held, that where a ſtranger gives a legacy by will, and afterwards gives a ſum without any evidence that it is intended for the ſame purpoſe, it is not taken as a ſatisfaction; that to make it ſo, it muſt appear, at the time of the gift, to be meant as an ademption of the legacy; and nothing of that kind appearing here, he decreed the legacy not to be deemed. Powell v. Cleaver, 2 Br. Ch. Rep. 499.

H. and *F.* the daughters of *J. S.* were entitled under his marriage ſettlement to 2000*l.* charged upon his eſtate. *J. S.*, by codicil to his will, gave the ſum of 20,000*l.* to be equally divided between *H.* and *F.*, to be paid down, or ſufficient ſecurity given for the payment thereof within thirty days of either of them being married, provided the perſon to whom ſhe ſhould be married ſhould ſettle on her a jointure of 500*l. per ann.*, otherwiſe ſhe ſhould be entitled but to 5000*l. &c.* This was adjudged to be a cumulative proviſion, and not a ſatisfaction of the 2000*l.* provided for the daughters by the ſettlement. Hanbury v. Hanbury, 2 Br. Ch. Rep. 352.

A teſtator being poſſeſſed of 32,771*l.* 16*s.* 2*d.* Bank 3 *per cents.*, deviſed to truſtees three ſums of 8114*l.* 1*s.* 11*d.* in the ſaid ſtock, part of the ſaid capital therein, in truſt for his ſon *T.* and his daughters *S.* and *C.* and their reſpective children and grandchildren. After the making of the will, the teſtator being then poſſeſſed of 34,657*l.* 14*s.* 2*d.* Bank 3 *per cents.*) *C.* intermarried with the plaintiff, and by their marriage ſettlement, the plaintiff, in conſideration of 5000*l.* in Bank 3 *per cent.* conſolidated annuities, which were to be accepted by him as the portion of *C.* his wife, and in ſatisfaction of his contingent right to a legacy given her by her grandfather's will, covenanted, within one month after ſhe ſhould attain her age of 23 years, to releaſe her ſhare of the ſaid legacy to her father. Lord *Thurlowe* held that this portion could not be conſidered either an ademption or ſatisfaction of the legacy given to *C.* by her father's will. Baugh v. Reed, 3 Br. Ch. Rep. 192.

Before

Ackworth v. Ackworth, 1 Br Ch. Rep. 307. note.

Before marriage, a ſum of money, partly belonging to the huſband, partly to the wife, was ſettled to the uſe of the huſband for life, remainder to the wife for life, remainder to the children to be equally divided between them. There were ſeveral children, and the money amounted to only 2400*l.* among them. The father afterwards made his will, and gave each of the children 2000*l.*, and the reſidue of his eſtate among them. Lord *Bathurſt* decreed, that what they took by the will ſhould be in lieu of their portions under the ſettlement.

Warren v. Warren, 1 Br. Ch. Rep. 305.

J. W. the plaintiff's father, by his marriage ſettlement, conveyed his eſtate to truſtees to the uſe of himſelf for life, remainder to truſtees to preſerve, *&c*, remainder to his wife for life, remainder to truſtees for a term to raiſe 10,000*l.* for younger children, remainder to his eldeſt ſon in tail, remainder over, *&c.* In the ſettlement was a power reſerved to him to raiſe money, but ſubject to the wife's life eſtate, and the proviſion for the children; and alſo a proviſo, that in caſe he ſhould in his lifetime give to any of his younger children any ſums of money towards his or their portions and advancement, and declare the ſame by writing to be in part of his or their portions, they ſhould go *pro tanto* in ſatisfaction thereof. By his will, reciting that he had made no proviſion for his wife by ſettlement or otherwiſe, he declared it to be his will that the truſtees ſhould pay her 600*l. per ann.* for life in bar of dower; and if he ſhould have but one younger child only, they ſhould raiſe 5000*l.* for ſuch one child, if more, 2000*l.* each, which be charged on his perſonal eſtate, and in default thereof, upon the ſettled eſtate. He died leaving the plaintiff his eldeſt ſon, and two of the defendants, his younger children. It was decreed, that this proviſion by the will was in part ſatisfaction of the portion by the ſettlement, and that upon payment of 5000*l.* each, the ſurviving truſtee in the ſettlement ſhould aſſign the term.

Elliſon v. Cookſon, 2 Br. Ch. Rep. 307. 3 Br. Ch. Rep. 61.

Teſtator by will, 7th *March* 1774, deviſed to his eldeſt ſon *Iſaac Cookſon* certain freehold and copyhold eſtates, and continued as follows, "As "to all my other lands, goods, and chattels, of what nature or ſort ſo-"ever, I give to my dear wife *Elizabeth*, appointing her executrix of this "my laſt will, with the tuition and education of all and every ſuch "younger children, and to provide for them, with regard to their for-"tunes, as they may deſerve and merit." To the will he added a paper of the ſame date, called *Inſtructions to my wife with regard to my younger children*; wherein, after directing fortunes for his younger ſons, he ſays, "My daughters *Hannah* (the plaintiff) and *Sarah* to have 5000*l* each; "all the ſurpluſſes over and above your own expences to be laid out in "mortgages or purchaſes for the purpoſes before mentioned." By an additional codicil on the ſame paper, and of the ſame date, he ſays, "I "do further add to what I have ſaid on the other ſide, that what ſavings "or increaſe I may make, or my dear wife may make of my effects, ſhe "may give and diſpoſe of the ſame, either in her lifetime, or by will, to "ſuch of her children as ſhe ſees proper." The teſtator died in *December* 1783, without revoking the ſaid will and codicil, which were proved by the defendant, the widow, in the eccleſiaſtical court.

After the date of the will, *viz.* about *September* 1776, a treaty of marriage being on foot between the plaintiff *Richard Elliſon* and the co-plaintiff his wife, Mr. *Buſh*, brother-in-law to Mr. *Elliſon*, was deſired by Mr. *Elliſon* ſenior, the father of the plaintiff, to go to Mr *Cookſon*, the co-plaintiff's father, to acquaint him with the proviſion intended by Mr. *Elliſon* ſenior for his ſon, and to learn from Mr. *Cookſon* what he meant to give his daughter; when

hen Mr. *Cookſon* informed Mr. *Buſh* (as he ſwore in evidence), that he eant to give his daughter *Hannah* (the co-plaintiff) 5000*l.* upon her mar-iage, and intended to give her *a further ſum, equal or nearly equal thereto, pon his death*; but refuſed to ſettle or ſpecify the ſums. In the courſe of he treaty between Mr. *Buſh* and Mr. *Cookſon*, ſeveral letters paſſed; and n one of them from Mr. *Buſh* to Mr. *Cookſon*, dated 5th of *October* 1776, Mr. *Buſh* ſays, "Mr. *Elliſon* the father) ſays—as he hopes the proviſion you told me and Mr. *Richard Elliſon* you intended making for Miſs *Cookſon* at your deceaſe, WILL BE *equal, or nearly ſo, to what you propoſe giving upon the marriage*, he ſhall reſt perfectly ſatisfied with your word for ful-filling that engagement." In anſwer to this letter the teſtator wrote to Mr. *Buſh*, and in the letter ſaid, "You muſt miſtake Mr. *Elliſon* in regard to any ſuch declaration as you mention; the miſtake may ariſe between what may be poſſible and probable: I told him my preſent plan, which would be executed by my wife, if the longer liver."

In *February* 1777, the plaintiffs intermarried; and, on the 14th of that month, the plaintiff *Richard* received from Mr. *Cookſon* the ſum of 5000*l.*, and gave a receipt for the ſame as for his wife's portion. The Maſter of the Rolls, Sir *L. Kenyon*, thought there was not ſufficient to repel the general preſumption in ſuch a caſe as this, that the portion was a per-formance of the legacy; and Lord *Thurlowe* was afterwards of the ſame opinion.

A. by her will ſays, "*Item*, I give to my ſervant *Jane Greeſe* "500*l.*, to be paid her within three months after my deceaſe." In another part ſhe ſays, "I give 5*l.* a-piece to the reſt of my ſervants, but I do not give 5*l.* "to the ſaid *Jane Greeſe*, becauſe I have done very well for her before." By another clauſe ſhe gives her lands lying in different pariſhes, in truſt, by mortgage, ſale, or otherwiſe, to pay her debts and legacies; and after her debt and legacies paid, then, *&c.* The teſtatrix was at her death in-debted to *Jane Greeſe* in 260*l.* on bond. Lord Chancellor held, that the legacy was not a ſatisfaction of the debt; for the words, "*becauſe I have done very well for her before*," ſhew, that what ſhe had given her before ſhe intended as a bounty, and not as a ſatisfaction; and they likewiſe intimate, that the teſtator meant the 500*l.* to be equally a reward for the ſervices of *Jane Greeſe*, as the 5*l.* was for thoſe of the other ſervants; and legacies to ſervants have never been held to be in ſatisfaction of debts. The argument too, that the legacy was not to be paid within three months after the death of the teſtatrix, was not to be laid entirely out of the caſe: though, if it had been charged upon real eſtate only, and not at all chargeable upon the per-ſonal eſtate, his Lordſhip ſaid, he ſhould have thought it of greater weight; for the poſſibility and contingency of the legatee's dying before the legacy be-came payable, muſt be taken into conſideration, as the legacy might not have been paid at all, if the legatee had died before the three months. But where the legacy is charged upon a mixed fund of perſonal and real eſtate, if the perſonal aſſets are ſufficient, the legacy is payable, though the legatee die before the day of payment: otherwiſe, if the legacy be out of a real eſtate only.

Richardſon v. Greeſe, 3 Atk. 65.

Where a teſtator by will gave to *Sarah Gannon* a legacy of 500*l.* and thereby declared, that in caſe his perſonal eſtate ſhould not be ſufficient to pay *all his debts, legacies, and funeral charges*, he thereby ſubjected all his real eſtates to the payment thereof; and afterwards by a codicil gave a fur-ther legacy of 500*l* to the ſaid *S. G.*, and died indebted to *S. G.* in 200*l.* on bond, which debt was contracted after making the will, but before the

Gayon v. Wood July 19, 1759; 1 Cox's P. Wms. 410. note.

codicil: the Maſter of the Rolls declared, that the 500*l.* given *by the codicil*, was to be conſidered and deemed a ſatisfaction of the ſaid 200*l.* owing by the teſtator to the plaintiff *Sarah*.

Mathews v. Mathews. 2 Vez. 635,

Admiral *Mathews* had upon his marriage a real eſtate of 300*l. per annum* in ſtrict ſettlement, ſo as to make his eldeſt ſon tenant in tail. Long afterwards, in 1773, he enters into a deed, which was an agrement between the father and ſon upon the ſon's marriage, whereby the father agreed to take 800*l.*, part of the fortune of the ſon's wife, and to make a ſettlement in this way; that in conſideration of the 800*l.* he ſhould in one month afterwards convey to truſtees for a term of years, lands, ſubject to theſe truſts, to ſecure 50*l. per annum* to the ſon, and 800*l.* to the younger children of the ſon, to be paid at ſuch days, times, manners, and proportions, as the ſon ſhould direct and appoint, and for want of appointment, to be paid to them equally at twenty-one or marriage, with benefit of ſurvivorſhip upon the death of any before; and if he had no child, the ſaid 800*l.* ſhould not be raiſed, and the term ſhould attend the inheritance. In 1749 he made a will, and deviſed 700*l. per annum* to his ſon, upon conſideration that the ſon, within twelve months after teſtator's death, ſhould convey the whole family eſtate, for better ſecuring to the teſtator's ſiſter-in-law *Anne Burgeſs* 100*l. per annum* for life, which he had before given her out of the ſaid lands; with another condition, that the ſon ſhould confirm his will, otherwiſe the 700*l.* annuity to ceaſe; and then makes a very large proviſion for the grandchildren at their age of twenty-five, or marriage. In 1750, the teſtator by a deed made his ſon tenant for life, inſtead of tenant in tail, as he was before, by levying a fine, and reſettling the eſtate in the ſtricteſt ſettlement, and to no other uſes. After his death, the queſtion was, How far the claims of the ſon, his wife and children, under the agreement in 1773, were barred by any other proviſions in the will of the father; and whether that was a ſatisfaction? The Maſter of the Rolls, Sir *Thomas Clarke*, ſaid, that the deed in 1733 was a contract between the father and ſon, ſo as to make the ſon and his family purchaſers from the father, and created a debt owing from the father to them: that the wife had clearly received no ſatisfaction for the debt contracted to her: that as to the children, by the articles in 1733 they were entitled to 800*l.*, ſo as that every child muſt have had part of it; by the will the teſtator has given twenty times as much in the whole among them; but then it is ſo given, that if they do not arrive at the age of twenty-five or marry, they are entitled to nothing: this therefore did not fall within the rules of ſatisfaction to which the court had adhered: that as to the annuity of 50*l.* for life to the ſon, independent on the deed in 1750, what is given by the will is not a ſatisfaction of that: for the annuity given by the will is *diverſo intuitu*. It is the ſame as if the teſtator had deviſed the ſettled eſtate to his ſon for life, &c. ſubject to the annuity to *Anne Burgeſs*; and then if the ſon had performed that condition, he would be entitled to claim under the deed in 1733: for the rule of ſatisfaction was never carried ſo far by conſtruction as to make that anſwer a double purpoſe. That it ſtood thus with reſpect to this annuity of 50*l.* merely upon the will; but by the deed of 1750 it was put out of the ſon's power to perform the condition annexed to the deviſe of the 700*l. per annum* which the ſon might have done when the will was made, he being then tenant in tail of that eſtate: the annuity of 700*l.* therefore is, by the deed in 1750, a pure annuity, and free from the condition; and then it is the ſame as if the condition compriſed in the will never had been mentioned; and if it had been pure and free, it would be a ſatisfaction of the 50*l. per annum*.

annum. By the deed in 1750, then, it is within the general rule of ſatisfaction, though by the will it would not have been ſo.

C. B. by her will gave to her brother *G. B.*, and the lawful heirs of his body, if he ſhould have any, her whole fortune (except a few legacies), but if he ſhould die without heirs, ſhe gave to *J. S.* 1000*l.* and to *J. C.* 500*l.*, the reſidue to her brother. The property was perſonal to the amount of about 5000*l.* The teſtatrix died, and the brother ſurviving, and having no child, by his will gave a legacy of 1000*l.* to the ſaid *J S.*, *to her ſole and ſeparate uſe*, and alſo 500*l.* to the ſaid *J. C.* It was decreed, that the legacies given by the brother would be a ſatisfaction for the legacies given by the former will (ſuppoſing thoſe legacies not to be too remote, as it washolden they were). Attorney-General v. Hird, 1 Br. Ch. Rep. 170.

By ſettlement on the marriage of *Godolphin Edwards* and *Elizabeth More*, a term of 600 years was created to raiſe portions for daughters, by which it was provided, that in caſe there ſhould be but one daughter, the ſum of 5000*l.* ſhould be raiſed for ſuch only daughter, to be paid at eighteen or day of marriage with maintenance in the mean while. There was a proviſo in the ſettlement, that in caſe the daughters ſhould be advanced with portions in money or lands, equal in value to the portions thereby provided, in the lifetime of *Godolphin Edwards*, or he ſhould give or leave them money or lands not equal in value, the truſtees ſhould raiſe only ſo much as would make the money, or value of the lands ſo given, equal to the portions provided. *Elizabeth* the appellant, being the only daughter of the marriage, attained eighteen the 4th *December* 1746. *Godolphin Edwards* being poſſeſſed of 5300*l.* *Eaſt India* annuities, which he had ſaved from the income of the eſtate, 21ſt *November* 1772 transferred them to the appellant *Elizabeth*, then the widow of Mr. *Manlove*. A bill had been filed, and the cauſe came on to be heard before Lord *Bathurſt*, 25th *June* 1776, when there was a decree in favour of the appellant for her portion of 5000*l.*, the preſent queſtion not being then before the court. The reſpondents afterwards exhibited their bill of review, ſtating, that ſince the pronouncing of the decree in that cauſe, they had diſcovered, that *Godolphin Edwards* had transferred to the plaintiff theſe *India* annuities in part of her portion. Upon the cauſe coming on to be heard, Lord Chancellor declared, that theſe annuities transferred by *Godolphin Edwards* to the appellant *Elizabeth*, were to be conſidered as having been ſo transferred in part ſatisfaction of the portion of 5000*l.* under the marriage ſettlement, and therefore varied the former decree ſo far; whereupon an appeal was lodged in parliament, which being heard *March* 15th, 1780, it was ordered that the ſame ſhould be diſmiſſed, and the decree therein complained of affirmed.] Pugh v. Duke of Leeds, 1 Br. Ch. Rep. 67. note.

(E) Of Legacies veſted or Lapſed: And herein,

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(*So, where A. by will,*) 1 P. Wms. 83. S. C. The Lord Keeper declared, "that the laſt clauſe in the will, (whereby it was directed that the ſecurity ſhould be delivered up to the ſaid William Elliot, his executors, adminiſtrators, or aſſigns, to be cancelled, and that no uſe ſhould be made thereof,) was only in aid of the firſt clauſe in the will, by which alone the ſum is to be taken as a lapſed legacy." Reg Lib. A. 1705. fol. 521.

The teſtatrix, the grandmother of the plaintiff, deviſed in the following words: "I likewiſe forgive my ſon-in-law *Richard Chillingworth* a debt "of 500*l.* due to me upon bond, and all intereſt that ſhall be due for the "ſame at my deceaſe, and deſire my executor to deliver up the bond to "be cancelled," and made her ſon *J. P.* executor. The legatee died in Sibthorp v. Moxom, 3 Atk. 580.

the life-time of the teſtatrix. Lord *Hardwicke* thought the teſtatrix intended *in all events* the bond ſhould be delivered up to be cancelled: that there was nothing perſonal in the preſent caſe for the direction that it ſhould be delivered up. In *Elliot* v. *Davenport*, his lordſhip ſaid, the words are not penned as *forgiveneſs or remiſſion*; there was no intention to releaſe the recognizance till Sir *William Elliott* paid 150*l.* thereout; but here is a clear intention to releaſe the debt. There, it was to be delivered up to Sir *William Elliot*; here, in general, to be cancelled. There, the right of action ſubſiſted, which was the reaſon of that opinion; here, it would be too nice to make ſuch a diſtinction, and would narrow too much the bounty intended by the teſtatrix to her family. His Lordſhip therefore decreed the bond to be delivered up to the plaintiff to be cancelled, but without coſts.

Toplis v. Baker, Excheq. Hil. 1789. 1. Cox's P. Wms. 86. note.

In a will was the following clauſe: "I give to my kinſman "*N. D.* "the ſum of 400*l.*, which he owes to me on mortgage of his eſtate "in *S.*, and I further order my executor to *give him up all bonds* owing "from him to me, and which ſhall be found in my cuſtody at the time of "my deceaſe, together with all intereſt due thereon." The mortgage debt was alſo ſecured by bond; beſides which, *N. D.* was indebted to the teſtator on another bond in 200*l.*: both bonds were in the cuſtody of the teſtator at the time of his death. After great conſideration, the court held this to be a lapſed legacy. The Lord Chief Baron, in delivering the judgment of the court, obſerved, that none of the circumſtances which could be ſuppoſed to diſtinguiſh the caſe of *Sibthorp* v. *Moxom*, from *Elliot* v. *Davenport*, occurred in the preſent caſe. That the principal ground on which *Sibthorp* v. *Moxom* was decided, was this, *viz.* that there was nothing in the will to confine the delivery of the bond to the *perſon* of the ſon-in-law, and that charge therefore was not ancillary to the former bequeſt to him, but amounted to a declaration that in all events the bond ſhould be delivered up, and therefore of neceſſity operated for the benefit of the repreſentative; that in the preſent caſe, the word uſed by the teſtator was "*give*" and not "*forgive*;" and (what was more material) the bond was directed to be delivered up to *N. D.* (perſonally), and there was no direction whatever for delivering up the mortgage; and therefore the court ſaw no reaſon for departing in this caſe from the general rule, *viz.* that a teſtamentary diſpoſition muſt lapſe by the death of the legatee in the life-time of the teſtator.

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(*A. deviſed*) This caſe of Burnet, v Holgrave is much weakened in point of authority, by the caſe of Oke v. Heath, 1 Vez 135. In that caſe a feme covert having by marriage articles power by deed or will to appoint 4000*l.* for ſuch perſons as ſhould be her kin, and for none other; the 4000*l.* in default of appointment to go according to the ſtatute of diſtributions; appointed by will to her nephew *C.* he in conſideration thereof paying an annuity to his mother. *C* died in the lifetime of the teſtatrix. Lord Hardwicke held, that by the death of the appointee in the lifetime of the teſtatrix, the appointment was void; for though it ariſes under a power, it is a teſtamentary diſpoſition, and ſubject to all the qualities of a will. The caſe of Burnet v. Holgrave, his Lordſhip ſaid, is a very particular and extraordinary caſe, and, he doubted, if it would be ſo determined now: it appeared by the regiſter to have been a cauſe by conſent, and not adverſary; which takes off greatly from the weight of the opinion there, ſhewing it to have been probably ſudden, and without conſideration. But taking it as it is, his Lordſhip obſerved, there are ſeveral differences: firſt, the wife there, by marrying a ſecond huſband, had diſabled herſelf from making a will; nor is the power given her to be executed during coverture; therefore, it could not be a will, but muſt be conſidered as a writing under hand and ſeal only; and then the determination may be right: but that is nothing to this, which is by a will properly proved as ſuch. But, ſuppoſe the court took it as a will, or a writing in nature of a will; the appointment, there, was not perſonally to the huſband only, but the executors or adminiſtrators, and on truſt to pay thereout. It is true, that in general the words *executors* or *adminiſtrators* are underſtood as repreſentatives only, but not always; as in caſes *pur autre vie*, executors or adminiſtrators take, not as repreſentatives

repreſentatives of the firſt taker, but as new ſpecial occupants newly named in the will or deed: and if they took further ſo as to be perſons taking the truſt, in that light it is different. And the court rather did this in ſupport of the truſt, one of the *ceſtuy que truſts*, for whoſe benefit it clearly was, being then living; nor can the *ceſtuy que truſt* be defeated by the death of the truſtee in the teſtator's life. The words are that the court took it to be an execution of a *truſt*; which is not a miſprint inſtead of *power*; and imports the huſband, his executors or adminiſtrators, to be barely truſtees. Another thing in ſupport of that determination is, that all was come back to the wife herſelf; the huſband, to whom and his executors ſhe had appointed, dying in her life, and making her executrix.

J. S. (*inter al.*) bequeathed the ſurplus of his perſonal eſtate unto four perſons equally to be divided between them, ſhare and ſhare alike. One of the four reſiduary legatees died in the lifetime of the teſtator; and the queſtion being, to whom the fourth part bequeathed to the legatee ſo dying, ſhould belong? Lord Chancellour was of opinion, that the teſtator having bequeathed his *reſiduum* in fourths, and one of the reſiduary legatees dying in his lifetime, the deviſe of that fourth part became void, and was as ſo much of the teſtator's eſtate undiſpoſed of by the will; that it could not go to the ſurviving reſiduary legatees, becauſe each of them had but a fourth deviſed to them in common, and the death of the fourth reſiduary legatee could not avail them, as it would have done, had they been all joint legatees, for then the ſhare of the legatee dying in the life of the teſtator would have gone to the ſurvivors (*a*). But here the *reſiduum* being deviſed in common, it was the ſame as if a fourth part had been deviſed to each of the four, which could not be increaſed by the death of any of them. Bagwell v. Dry, 1 P. Wms. 700. (*a*) Show. 91. Salk. 238.

One deviſed the reſidue of his perſonal eſtate to ſix perſons, *to each of them a ſixth part*, and made them executors. One of theſe executors and reſiduary legatees died in the lifetime of the teſtator. *Per* Lord Chancellour—This is a lapſed legacy as to one-ſixth, and undiſpoſed of by the will, the reſiduary legatees being tenants in common, and not joint-tenants. Page v. Page, 2 P. Wms. 489. Moſel. 42. S. C.

A teſtatrix, after ſeveral legacies, bequeaths in theſe words: "All the "reſt and reſidue, *&c.* I give and bequeath to my two nieces *M.* and "*E.* daughters to my nephew *W. O.*, and *A.* his wife, whom I deſire to "be truſtees for their children, to take care of their legacies for them, "they being of tender age; and my will is, that my eſtate be equally di-"vided between my two nieces *M.* and *E.*, whom I nominate and ap-"point my executrixes accordingly." One of the nieces died in the lifetime of the teſtatrix. Lord *Hardwicke* thought that the bequeſt to the two nieces did not make a joint-tenancy, for the words *equally divided*, though not annexed to the clauſe which gives the reſidue, can relate to that only; the conſequence was, that it was a lapſed legacy. Owen v. Owen, 1 Atk. 494.

A teſtator deſired all the reſt and reſidue ſhould be divided between two. By the Maſter of the Rolls—This muſt be underſtood to be *equally divided*; and by the death of one in the lifetime of the teſtator, his moiety ſhall not ſurvive to the other deviſee of the reſidue. Peat v. Chapman, 2 Vez. 542.

A teſtator gave ſeveral legacies to *A.*, *B.*, *C*, *D.*, *E*, *F.*, and *G.*, and afterwards directed all his real and perſonal eſtate to be ſold, and after payment thereout of his debts and legacies, he ordered the reſidue to be paid to the ſaid *A*, *B.*, *C.*, *D.*, *E.*, *F.*, and *G.*, *in proportion to their ſeveral and reſpective legacies therein to them bequeathed.* Two of the reſiduary legatees died in the teſtator's lifetime. Lord *Thurlowe* was clear, that this was a tenancy in common in the reſidue, and therefore the ſhares of the two who died in the teſtator's life had lapſed. Ackroyd v. Smithſon, 1 Br. Ch. Rep. 503.

S. M. by his will gave the uſe of his perſonal eſtate to his wife for life, if ſhe ſhould ſo long continue his widow, and after her death to *A.*, *B.*, *C.*, and Man v. Man, 2 Str. 905.

C., and *D.*, ſhare and ſhare alike. *C.* and *D.* died in the life time of the teſtator. Adjudged, that the ſhares of *C.* and *D.* had lapſed, the teſtator having particularly appointed that each of his legatees ſhould have a ſpecial ſhare.

Maybank v. Brooks, 1 Br. Ch. Rep. 84.

A teſtator left a legacy to *M.* his executors, adminiſtrators, or aſſigns. At the time of making the will, *M.* was dead. This is a lapſed legacy, notwithſtanding the words are to *M.*, his executors, adminiſtrators, and aſſigns; nor is parol proof admiſſible, that the teſtator knew of the legatee's death, as an argument, that he meant, it ſhould be tranſmiſſible to his perſonal repreſentative.

Northy v. Burbage, Gilb. Eq. Rep. 137.

A deviſe was of 500*l.* a-piece to two of the teſtator's grand-children by name; and if either of them died, his ſhare to go to the ſurvivor; and if both died, then their ſhares to go to their mother: one of them died in the lifetime of the teſtator, yet his ſhare went by the expreſs words of the will to the other grand-child, and was held to be no lapſed legacy.

Buffar v. Bradford, 2 Atk. 220.

A teſtator having divided his perſonal eſtate into eight parts, bequeathed four parts to his niece *B.*, and the children born of her body. The plaintiff was born after the making of the will, and *B.* died in the teſtator's lifetime. This was adjudged not to be a lapſed legacy, for the plaintiff took as joint-tenant with *B*, and upon her death is entitled to the whole by ſurvivorſhip.

Sibley v. Cook, 3 Atk. 572

A teſtatrix deviſed (*inter al.*) as follows: "I give and deviſe the ſeveral legacies and ſums following, which I will ſhall be paid to the ſeveral perſons hereinafter named; *and that if any of thoſe perſons ſhould die before the ſame become due and payable, I will that they, or any of them, ſhall not be deemed lapſed legacies*;" then ſhe particularized the ſeveral legatees, and ſays, "To *Anne* the wife of *Richard Wenſley*, and to her executors or adminiſtrators, I give the ſum of 50*l.*" *Anne Wenſley* died in the lifetime of the teſtatrix, and her huſband adminiſtered to her. Lord *Hardwicke* ſaid, I am of opinion this is not a lapſed legacy. If a man deviſes a real eſtate to *J. S.* and his heirs, and ſignifies or indicates his intention, that if *J. S* dies before him it ſhould not be a lapſed legacy, yet, unleſs he had nominated another deviſee, the heir at law is not excluded, notwithſtanding the teſtator's declaration. So, in the bequeſt of a perſonal legacy to *A.*, though the teſtator ſhould ſhew an intention that the legacy ſhould not lapſe in caſe *A.* die before him, yet this is not ſufficient to exclude the next of kin. But, here, in caſe *Anne Wenſley* dies before the teſtatrix, ſhe expreſsly provides againſt the lapſing, for ſhe ſays, *If any of theſe perſons die before the ſame become due or payable, I will, that they or any of them ſhall not be deemed lapſed legacies*; and ſubſequent to this, bequeaths to *Anne* and her executors and adminiſtrators 50*l.*, ſo that in caſe of her death before the teſtatrix, other perſons are named to take, which diſtinguiſhes it from the caſe I put before; and in *Dorrel* v. *Molſworth*, the court laid a ſtreſs upon the words *was payable*, which are much the ſame with the preſent, *become due or payable*. And upon the authority of this caſe, his Lordſhip decreed the legacy to the huſband.

Bridges v. Abbot, 3 Br Ch Rep. 224.

A teſtatrix conveyed the reſidue of her perſonal eſtate to *J. W.* and ſeven other perſons, equally to be divided between them, ſhare and ſhare alike; and ſhe directed, "that *in caſe of the death of any of them* (the ſaid reſiduary legatees) *before her, then the ſhare or ſhares of him, her, or them, ſo dying before her, ſhould go to, be had and received* by his or her legal repreſentatives." *J. W.* died in the lifetime of the teſtatrix. His ſhare was prevented from lapſing, and thoſe perſons are entitled to it as his

legal

gal repreſentatives, who would have been entitled as next of kin to him the death of the teſtatrix.

A teſtator ordered the intereſt of the reſidue of his perſonal eſtate to b aid to his ſiſters for their lives equally between them, and in caſe any of hem ſhould die leaving iſſue, he directed his truſtees "to pay and tranſ- for the ſhare and proportion of the *reſiduum* to which his ſiſter ſo deceaſ- ing was entitled, at or before the time of her deceaſe, to receive the in- tereſt and dividends thereon, unto and amongſt all and every ſuch child or children of ſuch deceaſed ſiſter, equally between them, ſhare and ſhare alike, at their reſpective ages of 21 years." One of the ſiſters died in he lifetime of the teſtator. Adjudged, that her children were entitled to er ſhare of the reſidue. Rheeder v. Ower, 3 Br. Ch. Rep. 240.

A teſtator gave all the reſidue of his perſonal eſtate, after debts and le- acies paid, to truſtees, until *W. N.* ſhould attain his age of twenty-four ears; from the age of twenty-one until the age of twenty-four to pay him hereout an annuity of 10*l.* yearly; and thenceforth in truſt for him, his executors, adminiſtrators, and aſſigns. *W. N.* attained his age of 21, ut died before his age of 24 inteſtate. It was decreed, that the repre- entative of *W. N.* was entitled, as the right veſted in him immediately pon the teſtator's death. Love v. L'Eſtrange, 3 Br. P. C. 337.

J. C. bequeathed his perſonal eſtate to his wife for her life, and gave ſe- veral particular legacies after her death, and then declared, that the reſidue t her deceaſe, and after the legacies paid, ſhould be divided between his relations *A.*, *B.*, *C.*, and *D.*—*A.* and *B.* died in the lifetime of the wife; nd after her deceaſe, the adminiſtrator of *A.* and *B.* had a decree for heir ſhares; for by Lord *Talbot*, the time of payment was future, but the ight to the legacies veſted upon the death of the teſtator. Corbet v. Palmer, 2 Eq. Ca. Ab. tit. Legacies. (A), pl. 27.

A teſtatrix bequeathed her perſonal eſtate to her daughter, to be ſold and diſpoſed of by ſuch parcels, and at ſuch times, and in ſuch manner, as ſhe ſhould think fit, and out of the money ariſing by ſale thereof to pay her debts; and the reſidue thereof ſhe willed ſhould be equally paid and divided to and between *E. S.* and *T. S.*, her two grandchildren, at ſuch time as they ſhould ſeverally attain their reſpective ages of twenty-one, *or ſooner*, if her daughter ſhould think fit, and appointed her daughter ſole executrix. Lord *Hardwicke* ſaid, if it had reſted upon the words, *at ſuch time as they ſhould ſeverally attain twenty-one*, he ſhould have thought that the legacies did not veſt till then, and that it would have been the ſame thing as if the teſtator had ſaid, "I give it them at twenty-one." But what is the meaning of the teſtatrix's ſaying *or ſooner, if her daughter ſhould think fit?* Not to hinder the legacies from veſting; but ſhe conſi- dered her daughter as the natural guardian of her children, and left it to her diſcretion to accelerate it, if ſhe thought proper. And as the teſta- trix, by the whole tenor of her will, left the mother a truſtee only for the children, without giving her any power over the capital of the legacies, his Lordſhip was of opinion that the legacy veſted in *E. S.* and *T. S.* at the death of the teſtatrix. Steadman v. Palling, 3 Atk. 423.

T. A. bequeathed the reſidue of his perſonal eſtate to his wife for life; "but if it ſhall happen that my wife ſhall depart this life, leaving no child "or children at the time of her death, then my will is, that my truſtees "ſhall transfer the ſecurities in which my eſtate ſhall then be veſted to my "two brothers, or, if either of them ſhall depart this life without iſſue, "then to the ſurvivor, and I hereby give the ſame to *J. A.* and *H. A.* "accordingly." *J. A.* and *H. A.* ſurvived the teſtator, but both died in the Barnes v. Allen, 1 Br. Ch. Rep. 181.

the lifetime of the wife. Lord *Thurlowe* declared, that the intereſt veſted in them as joint-tenants, and *H. A.* having ſurvived *J. A.*, it belonged, ſubject to the wife's intereſt for life, to the perſonal repreſentative of *H. A.*

Monkhouſe v. Holmes, 1 Br. Ch. Rep. 298.

J. M. by will gave his wife the uſe of 800*l.* for life, and from and after her deceaſe diſpoſed of the ſame as follows: that is to ſay, to *L. H.* 100*l.*, to *M. M.* 100*l.*, to *E.* and *C. H.* 100*l.* each, to *M. H.* 5*l.* a-year. Then followed other deviſes, ſome of real, ſome of perſonal eſtate, among others to a ſervant 5*l.*, and then the legacy on which the queſtion aroſe. "*I* "*alſo give to* J. M., *ſon of my brother* G., *the ſum of* 100*l.*" He then gave the reſt and reſidue to his wife. The nephew *J. M.* (the legatee of the 200*l.*) died in the lifetime of the teſtator's widow. His legacy was holden to be veſted, and tranſmiſſible to his perſonal repreſentative.

Benyon v. Maddiſon, 2 Br. Ch. Rep. 75.

L. made his will, and ſubject to his debts was a clauſe, by which he gave the whole of his eſtate to *J. M.*, in order to pay the income to his (the teſtator's) mother *H. L.* for life, and after her deceaſe, he then gave to five perſons the ſum of 500*l.* each 3 *per cent.* annuities, and to *J. B.* and *M.* his ſiſter, the ſum of 100*l.* 3 *per cent.* annuities. All the reſt and reſidue he gave to his executor, and empowered him to diſpoſe of by will the *reſiduum* he would be entitled to after the deceaſe of his (the teſtator's) mother. *J. B.* died in the lifetime of the teſtator's mother. His legacy veſted immediately upon the teſtator's death.

May v. Wood, 3 Br. Ch. Rep. 471.

A teſtator bequeathed to his daughters the ſum of 3000*l.* 5 *per cent.* navy annuities, and all the dividends and proceeds ariſing therefrom, to be equally divided between them, and all his eſtate at *S.*, to be equally divided between them, *when they ſhould arrive at twenty-four years of age.* One of his daughters died before ſhe attained her age of twenty-four years. The Maſter of the Rolls was of opinion, that according to the true rule of conſtruction, the word *when* could not be otherwiſe conſidered than as denoting the period of payment, and muſt not be deemed as a condition precedent, upon which the legacy was to veſt, but merely poſtponing the payment of this 3000*l.* with the dividends thereon till twenty-four; and therefore declared, that the perſonal repreſentative of the deceaſed daughter was entitled to a moiety of the 3000*l.* 5 *per cent.* navy annuities.

Barlow v. Grant, 1 Vern. 255.

A legacy of 30*l.* was given to an infant to bind him an apprentice. The infant died before he attained a proper age to be bound an apprentice. It was decreed, that this legacy was veſted; and the infant being 17 years old, and having made a will, and named an executor, it was allowed to be a good diſpoſition of the 30*l.*

Collins v. Metcalfe, 1 Vern. 462.

The giving of intereſt before the payment has been conſidered as evidence of an intention to veſt the legacy. Hence, where a portion was deviſed to a child with intereſt, but not to be paid or payable, until the child ſhould attain twenty-one years, or be married; and the child died under twenty-one and unmarried; it was decreed, that the portion ſhould go to the adminiſtrator of the child.

Pr. Ch. 317.

So, in the caſe of *Stapleton* v. *Cheales*, *ſupra*, if the teſtator had there added, that in the mean time, or until the legatee attain the age of twenty-one, he ſhould have intereſt for the legacy at ſuch a rate, from the time of his (the teſtator's) deceaſe, this ſubſequent clauſe would explain the intent of the teſtator, ſo as to make the legacy, which was the principal, an intereſt veſted, which ſhall go to his executors or adminiſtrators, though the legatee die before that age, becauſe, if the principal were not due preſently upon the teſtator's deceaſe, there could no intereſt accrue to the legatee at the time.

Again,

Again, *T. B.* being poſſeſſed of a conſiderable perſonal eſtate, by his will gave *J. N.* 600*l.* to be laid out in the names of his executors, as counſel ſhould adviſe, in the purchaſe of ſome advowſon or advowſons, or other ſpiritual preferment for him, and until the ſame ſhould be purchaſed, ordered his executors to place out the 600*l.* at intereſt in their names, and continue the ſame until ſuch preferment could be had, and to pay *J. N.* ſuch intereſt for his maintenance; and if there ſhould be a remainder after the payment of the purchaſe, directed the ſame to be paid to him; but if he ſhould afterwards lend him any money upon bond or note, it ſhould be deducted out of the 600*l.* but without intereſt. *T. B.* afterwards by his will directed, that if his brother-in-law *R. N.* ſhould be living at his deceaſe he thereby charged *R. N.*'s three ſons, *viz.* the ſaid *J. N.* and *T.* and *R.*, to pay their father yearly during his life, 20*s.* out of each of their legacies; and then directed, that if *J. T.* and *R. N.* ſhould die before their legacies ſhould become payable, that then the legacies of them or him ſo dying ſhould not be paid, but fall into the *reſiduum* of his perſonal eſtate, and be applied as the ſame was directed. *J. N.* died about a year after the death of the teſtator, being at that time about twenty-five years of age. The 600*l.* given him by the will was never paid him, nor was it ever laid out according to the directions of the will. The queſtion was, Whether the 600*l.* given to *J. N.* by this will, was tranſmiſſible to his adminiſtratrix with the will annexed? Lord *Hardwicke* was of opinion, that it was: for it is payable at the death of the teſtator, and if *J. N.* had, inſtantly upon the teſtator's death, found out a purchaſe for the money to be laid out in, he might have demanded it. There is no ſuſpenſion of the intereſt ariſing from the legacy, till the advowſon can be purchaſed; but, on the contrary, intereſt is to be paid on the legacy in the mean time, and that to *J. N.* himſelf. And as to the clauſe reſpecting the deviſe over, the words of it may well be anſwered by conſtruing it to mean no more, than that the legacies given to the nephews ſhould ſink into the eſtate in caſe any of them had happened to have died in the teſtator's lifetime.

Neale v. Willis, Barnardiſt. Ch. Rep. 43.

A teſtator bequeathed to *C. F.*, when he ſhall have attained the age of 25 years, 1000*l* which he empowered his four ſons his executors, guardians, and truſtees of the will, to lay out on ſuch ſecurities as they ſhould think fit, and the intereſt or income thereof to be for or toward the education of the infant as they ſhould think fit, as alſo part of the principal to put him apprentice, and the remainder to be paid him when he ſhould have attained his age of twenty-five, and not before. The queſtion was, Whether the time of twenty-five years was put in, in order to poſtpone the veſting of the legacy, or only to poſtpone the payment of it? Lord *Hardwicke* held, that it was only to poſtpone the payment. Where a teſtator gives intereſt in the mean time, he gives a property in the principal, unleſs ſomething ariſes on the face of the will to take off the force of it. And this caſe is ſtill ſtronger than that, there being a direction to diſpoſe of part to put him apprentice, to which a court of equity would compel the executors, it being obligatory upon them; and their diſcretionary power being confined to the ſecurities, the executors might have taken the greater part, almoſt to the extent of the whole, to place him out; which ſhews, it ariſes from his property. In the caſe of the *Attorney-General* v. *Hall*, in Lord *King*'s time, where the teſtator gave a legacy to one for life, and ſo much as he did not diſpoſe of gave to a charity, it was held, the legatee might diſpoſe of the whole: ſo, here is a direction very near to the whole of the principal; which can ariſe only from his having the property.

Fonnereau v. Fonnereau, 3 Atk. 645. 1 Vez. 118. S. C.

J. P.

Walcott v. Hall. 2. Br. Ch. Rep. 305.

J. P. bequeathed to his godſon *T.* the plaintiff, the ſum of 50*l.* to be paid to him at the age of twenty-one years, or day of marriage, which ſhould firſt happen, the ſame to be put out at intereſt in the name of his executors and adminiſtrators, the intereſt ariſing therefrom from time to time to be applied towards his maintenance and education; and if he ſhould die before 21, or marriage, he gave the legacy to his executors in truſt for the poor of *S.*, and appointed the defendant his executor. The defendant proved the will, retained 50*l.* for the payment of the legacy to the plaintiff, and paid over the reſidue (after payment of debts and legacies) to the reſiduary legatees, and afterwards became bankrupt, and obtained his certificate. By the Maſter of the Rolls, this was a veſted legacy, and as ſuch, might have been proved under the commiſſion. The giving intereſt always veſts perſonal legacies. It was therefore veſted, ſubject to be diveſted, on the legatee's dying under 21, and although it might not have been proveable as a debt, yet the guardian, upon petition, would have been admitted to prove it. The certificate therefore bars it.

Atkins v. Hiccocks, 1 Atk. 500.

A teſtator deviſed in theſe words: "I deviſe to my daughter *E. H.* the "ſum of 200*l.* to be paid her at the time of her marriage, or within three "months after, provided ſhe marry with the approbation of my two ſons "*W.* and *S. H.* or the ſurvivor of them; and my will is, that my ſaid "daughter *E.* ſhall yearly receive and be paid, until ſuch time as ſhe ſhall "marry, the ſum of 12*l.*, free and clear of all taxes and impoſitions what-"ſoever." And he willed, that his leaſehold eſtate called ——, ſhould ſtand charged with the payment of the 12*l. per ann* and likewiſe with the payment of the 200*l.* when the ſame ſhould become due, and deviſed the ſaid leaſehold premiſes, and his whole perſonal eſtate to his two ſons, and made them executors. *E* died after 21, but without being married, and her adminiſtrator claimed the legacy of 200*l.* But Lord *Hardwicke* was of opinion, that it was not a veſted legacy; for that when the time annexed to the payment is merely eventual, and may or may not come, and the perſon dies before the contingency happens, he could find no inſtance, where it had been held, that the legacy ſhould in all events be paid: that the rule as to veſting is founded upon another rule, *certum eſt quod certum reddi poteſt*, and it is plain the teſtator did not regard the point of time, but the fact that was to happen, *the marriage*, which makes it a legacy on a condition, and cannot be demanded till the condition is ſatisfied; that as to what had been inſiſted, that the teſtator's giving 12*l. per ann.* to *E.* till the contingency of her marriage, is in the nature of intereſt for the 200*l.*, and that from thence it appears to be his intention, that the legacy ſhould veſt in the mean time; whenever this doctrine has been allowed, the payment of the principal hath been certain, and ſo not ſimilar to the preſent caſe, becauſe, here, this is not meant as intereſt, for it is an annuity of 12*l. per ann.* charged upon, and iſſuing out of an eſtate.

Duke of Chandois v. Talbot, 2 P Wms. 612. Pateman v. Roach, 9 Mod. 106 Smith v. Smith, 2 Vern. 92.

The above authorities, it muſt be obſerved, are applicable only where the legacies ariſe out of a fund *merely perſonal*: for with reſpect to intereſts ariſing out of land, theſe rules are totally different; for whether the land be the primary or auxiliary fund, whether the legacy be given with or without intereſt, the *general* rule is, that charges upon land payable at a *future* day, ſhall not be raiſed, where the party dies before the time of payment. Therefore where *T. S.* by will gave his daughter 1000*l.* to be paid by his executor, at her age of 21, or marriage, which ſhould firſt happen, willing the ſame to be raiſed out of the rents and profits of his lands; and further willed, that in caſe his ſon ſhould die before his age of

21 years,

years, or without heirs of his body lawfully begotten, then from and after the death of his ſon, he gave all his ſaid lands, &c. to the defendant, he making up his daughter's portion 2000*l.*; and the daughter died upon after the teſtator's death an infant and unmarried; upon which her mother took out letters of adminiſtration and claimed the 2000*l.*; it was decreed, that ſhe was not entitled to any part of it, for it appears, that the intention of the teſtator was, that it ſhould be for a portion, and it is expreſsly called a portion in the will: it is no perſonal legacy, but money to be raiſed out of the rents and profits of lands, and the payment is expreſsly to be at 21 years, or marriage.

A. having entailed his lands on his ſon, ſubject to a mortgage, deviſed his leaſehold and perſonal eſtate for the payment of his debts and legacies; directing, that if his perſonal eſtate was applied to pay off his mortgage, the ſame ſhould be kept on foot to make good his daughter's portion, and bequeathed to his daughter 3000*l.* to be paid her at 21, or marriage, if married with conſent; if not, then but 1000*l.* The daughter died under age, and unmarried. It was decreed, that this being a portion and charged upon land, ſhould extinguiſh in the land for the benefit of the heir. Beſides, the deviſe being of 3000*l.* at 21 or marriage, which marriage was to be had by conſent, it did not veſt in the daughter, but was contingent. Yates v. Phettiplace, 2 Vern. 416

A. deviſed his lands to his eldeſt ſon *B.* in fee, and added, "But my will and mind nevertheleſs is, that *B.* ſhall pay out of the lands ſo deviſed to him, the ſum of 600*l.* *viz.* to my daughter *M.* 200*l.* at the age of 21 years, and to my ſon *J.* 200*l.* at his age of 21, and to my ſon *N.* 200*l.* at his age of 21; and if my ſon *B.* ſhall die before he attain the age of 21 years, then my will is, that my ſon *J.* ſhall not have the 200*l.* ſettled on him, but that it ſhall be paid to my daughter *M.* and ſon *N.*, to be added to their portions, and *J.* to have all the eſtate given to *B.* paying the 600*l.* as before expreſſed; and my ſaid children ſhall be allowed 4*l. per ann.* maintenance for every 100*l.* till their ſeveral portions are paid." *B.* died before 21: the plaintiff married *M.* and has iſſue by her. *M.* dies two months before her age of 21. The queſtion was, Whether this was not a ſubſiſting charge upon the land, and an intereſt ſo veſted in *M.* as to entitle the plaintiff, as her adminiſtrator to the legacies? Lord Chancellour diſmiſſed the bill as to the demand of both the legacies, becauſe there were no words in the will which veſted any intereſt in thoſe legacies before the age of 21 years; and as to the other 100*l.* that was governed by the other legacies. Carter v. Bletſoe, Pr. Ch. 267. 2 Vern. 617 S. C. Gilb. Eq. Rep. 11. S. C.

In the caſe of *Stapleton* v. *Cheales*, *ſupra*, it is ſaid, if ſuch portion were to ariſe out of lands or a term for years, though it were limited to the parts *generally* to be paid, or payable at ſuch an age, there, for the heir, the portion ſhould ſink, and not go the repreſentatives of the party ſo dying. Pr. Ch. 318.

One has two ſons *R.* and *T.*, and being ſeiſed in fee of the manor of *B.* (which manor was in mortgage) makes his will, thereby deviſing 1000*l.* to his younger ſon *T.* (being then about a year old) to be paid to him when he ſhould arrive at his age of 21, out of the manor of *B.*, with a power to the executors by felling timber growing on the eſtate to raiſe ſuch monies, as his perſonal eſtate ſhould fall ſhort of, for the payment of his debts and legacies. The younger ſon *T.* dies about the age of two years, and the eldeſt ſon *R.* about the age of ſix, upon which the eſtate comes to the uncle, and the mother having adminiſtered to the younger ſon, claims the 1000*l.* legacy. But Lord Commiſſioner *Jekell* ſaid, that it was determined about the latter Jennings v. Looks, 2 P. Wms. 276.

latter end of Lord *Somers*'s time, in the caſe of *Yates* v. *Phettiplace*, *ſupra*, that where one by will gave a portion to a child out of a real eſtate, payable at a future time, and the child died before that time, the portion ſhould ſink; nay, that it ſhould ſink as well for the benefit of an *hæres factus*, as of an *hæres natus*, for the former is ſubſtituted by the teſtator in the place of the latter; and the true reaſon is, that the legacy being given as a portion, when the child dies before the portion is payable, there is no occaſion for it; and equity will not countenance the loading of an heir for the benefit of an adminiſtrator. And it being objected, that though this might be true as to a portion given out of a real eſtate, yet here the legacy was a charge alſo upon the perſonal eſtate, and therefore that if the real eſtate was not ſufficient for the payment of the ſaid legacy, yet the perſonal eſtate ſhould be liable; and that this was the plainer from the executor's being empowered to fell timber for the payment of ſuch of the legacies as the perſonal eſtate was not ſufficient to pay; the court ſaid, this muſt be intended ſuch of the legacies as the perſonal eſtate was liable to pay; it is true, were the legacy chargeable on the perſonal as well as real eſtate, that ſo much thereof as the perſonal eſtate would extend to pay, ſhould go to the executors or adminiſtrators of the child; but this is a charge only upon the land.

Rich v. Wilſon, Moſel. 68.

Sir *R. R.* ſettled all his lands in truſt for the payment of debts and portions to his children, as he ſhould direct by his will. Afterwards, he makes his will, and gives 1000*l.* a-piece to his five ſons, payable at their reſpective ages of 21, with intereſt in the mean time and bequeaths all his perſonal eſtate to his lady for her ſole uſe and benefit, and makes her executrix. Sir *R.* dies, and afterwards *R.*, one of the ſons, dies under the age of 21, and Lady *R.* takes out adminiſtration to him, and Mrs. *W.* the defendant, his ſiſter, ſues her in the ſpiritual court, (ſhe being in poſſeſſion both of the real and perſonal eſtate of Sir *R. R.*) for a diſtribution of the 1000*l.* bequeathed to her brother by her father's will. Lady *R.* files a bill, and moves for an injunction to the ſpiritual court, becauſe the portion of the ſon was charged on the real eſtate, and therefore ought not to be ſued for in that court; and the whole perſonal is given to the plaintiff. Lord Chancellour granted the injunction.

Hall v. Terry, 1 Atk. 502.

M. T. being entitled to the reverſion of an eſtate after the death of his wife, "deviſed it to *C. D.* and his heirs, ſo as he ſhould pay to his ſiſter "*E. O.* the ſum of 100*l.*, within ſix months after the reverſion came into "poſſeſſion, and deviſed the reſt and reſidue of his perſonal eſtate, all his "debts and legacies before bequeathed being firſt deducted, to *C D.* "and another, whom he made his executors." *E. O.* died in the life-time of the wife, and upon the death of the wife *E. O.*'s repreſentative brings a bill againſt *C. D.* for the 100*l.* It was inſiſted by the plaintiff's counſel, that the legacy is veſted, and only the time of payment poſtponed for the convenience of the eſtate, as it was a dry reverſion. But Lord *Hardwicke* thought, that the gift of the ſum of money is only by direction for the payment; and that it cannot be ſaid, this is an original gift ſo as to veſt the legacy, and the payment only poſtponed to a future time. Another diſtinction was attempted, that the time of payment was not taken from the nature of the legacy, or the circumſtances of the legatee, but from the nature of the eſtate, and that therefore this is different from all the caſes. But Lord Chancellour ſaid, if he ſhould give into this reaſoning, he ſhould overturn the caſes of portions, or of other ſums bequeathed, for that of late years it had been holden, that where a ſum of money is given

Lord Hardwicke ſpeaking of this caſe, in the Attorney-General v. Tunſtal ſays, there, the whole of the gift depended

ven by way of portion, or as a general legacy, charged upon land, if e party dies before the time, it cannot be received. In the preſent caſe, ere is no contingency, the time is ſingle, within ſix months after the death the tenant for life, when the reverſion came in poſſeſſion, ſo that it ne- r could be raiſed, becauſe the perſon died before the time for raiſing it. upon the time of payment.

T. C. deviſed all his lands to *J. C.* and *J. P.* in truſt, that they ſhould ll his lands in *M.* and *P.*, and out of the purchaſe money pay his debts; d as to the reſt of the lands in truſt to receive the rents, and to make aſes for 99 years determinable on three lives, and therewith to pay his ebts and legacies, then to the uſe, *&c.*; and he bequeathed a legacy of ool. to his nephew *T. P.*, to be paid at his age of 21, or marriage. The ephew *T. P.* died before the age of 21, and unmarried. His adminiſ- ator claimed this legacy as being a veſted intereſt, and tranſmiſſible. After long argument. Lord *Hardwicke* ſaid, that the only inducement he had ſuffer ſo long a debate, was in order to receive ſatisfaction as to the point, hich had been inſiſted upon in relation to this legacy being chargeable on mixed fund, conſiſting of real and perſonal eſtate. He ſaid, that was a ifficulty which always ſtuck with him, and it was ſomething very ex- raordinary, that the real eſtate which was only an auxiliary fund to the erſonal, ſhould, in caſes of this kind, be chargeable in a different man- er, and not be made liable to the ſame rules and determinations with the rimary ſecurity, the perſonal eſtate; but, he ſaid, he found the reſoluti- ns ſo ſtrong, that there was no difference between a charge on the real ſtate only, and a charge on the real and perſonal eſtate too; that he could ot, at that time of day, think of determining in a different manner. He id, it was very clear, that charges on land, payable at a future day, could ot be raiſed, if the party died before the day of payment; that there was o difference at all whether that charge was created by deed or will; nor, whether it was provided by way of portion for a child, or given merely as legacy by collateral relations, or others; and this was the caſe in the Duke of *Chandos* v. *Talbot*, and *Jennings* v. *Looks*, in which he was coun- el, for in neither of them was the proviſion made by a parent. That the rue reaſon, why legacies charged on land, payable at a future day, ſhall ot be raiſed, if the legatee dies before the day of payment, is, that the court will govern themſelves, as far as is conſiſtent with equity, by the rules of the common law. In the caſe of perſonal eſtate, the rule is the ſame here as in the civil law, that there may be an uniformity of judgments in the different courts: but in caſe of lands, the rule of the common law has always been adhered to: as, ſuppoſe a perſon ſhould covenant to pay money to another at a future day, if the covenantee (*a*) dies before the day of payment, the money is not due to his repreſentative. The ſame rule holds in a promiſe to pay money, *&c.*

Prowſe v. Abingdon, 1 Atk. 482.

So, Boycot v. Cotton, 1 Atk. 555. 6. in which the authority of Jackſon v. Farrant, 2 Vern. 424. and Cave v. Cave, *id.* 508. is denied.

(*a*) But ſurely the law is not ſo, nor ever hath been ſo. That executors or adminiſtrators ſhall have a writ of covenant for a perſonal thing, ſee F. N. B. 145. D. 146. D. Reg. 165. b. Goſs v. Nelſon, 1 Burr. 227.

M. C. deviſed to *G. C.*, his heirs, executors, and adminiſtrators, all that her meſſuage in *Great Lincoln's-Inn Fields*, with all her furniture, *&c.* and all her real and perſonal eſtate not otherwiſe diſpoſed of, to the intent that, out of the ſaid real and perſonal eſtates ſo deviſed, her ſeveral legacies might be paid. She then gave to *T. L.* 2000*l.* in truſt for the uſe of his daughter *M.*, and declared that the ſaid *T. L.* ſhould, until the ſaid *M.* ſhould attain the age of eighteen, or be married, which ſhould firſt happen, place out the 2000*l.* at intereſt upon good ſecurity, and alſo ſhould

Van. v. Clarke, 1 Atk. 510.

ſhould from time to time put out at intereſt, the intereſt of the ſaid ſum, and the ſame ſhould ariſe to a fit ſum for that purpoſe, and ſhould pay the 2000*l.*, with the intereſt and produce thereof, to the ſaid *M.* for her own uſe, upon her attaining her age of eighteen, or marriage; ſhe likewiſe directed the 2000*l.* to be paid to *T. L.* the truſtee, within one year and a half after her deceaſe. *T. L.* died in the lifetime of the teſtatrix; *M.* died about half a year after the teſtatrix, unmarried. Lord Chancellour was of opinion, that, as the infant died before the time of payment to the truſtee, the legacy was not raiſable for the benefit of her repreſentative. If ſhe had ſurvived the year and half, (for the death of the truſtee made no) difference, ſhe would have been entitled to the legacy; or, if ſhe had died *after the term aforeſaid*, and before eighteen, or marriage, her repreſentatives would have been entitled: but if this had been merely perſonal, as ſhe died within the year and half, her repreſentative could not have been entitled, for the whole gift is in the direction of the payment, which makes that the ſubſtance. In the preſent caſe, his Lordſhip ſaid, it is not a legacy merely out of perſonal eſtate, but out of both funds, and the real charged in the firſt place, by the teſtator's expreſs directions, *viz.* her eſtate in *Great Lincoln's-Inn Fields*. And this conſtruction is more agreeable, as the ſum was intended clearly as a portion for *M.*; and the court always goes as far as it poſſibly can to hinder the raiſing of portions out of land for the benefit of repreſentatives.

Attorney-General v. Milner, 3 Atk. 112.

A. S. (inter al.) gives to three truſtees 8000*l.* upon truſt, that they ſhould diſpoſe thereof in the purchaſe of lands of inheritance in fee-ſimple, to be ſettled to the uſe of her grandſon *T. M.*, and the heirs of his body; and for default of ſuch iſſue, directed the truſtees to convey the ſame to the Drapers Company, upon truſt, that they ſhould, within three months after the eſtate ſhould be conveyed to them, by mortgage, or ſale of ſome part thereof, raiſe and pay to *E. L.* her nephew 2000*l.*, which ſhe bequeathed to him, in caſe of the death of her grandſon without iſſue. *E. L.* died in the lifetime of the grandſon; and the grandſon died a few years afterwards, under the age of twenty-one, and without iſſue. The queſtion was, whether this legacy of 2000*l.* was lapſed, as *E. L.* died before the contingency happened, or, whether it was tranſmiſſible to his perſonal repreſentative? The Maſter of the Rolls held, that it was lapſed: that the 8000*l.* being directed to be laid out in land, muſt be conſidered in equity as land: that the teſtatrix herſelf conſidered it as land, becauſe ſhe directs the 2000*l.* to be raiſed by mortgage or ſale, which ſhews it muſt be out of land: that as the legacy therefore is to be paid out of real eſtate, it was within the general rule, and ought to ſink in favour of the heir at law.

Gawler v. Standewicke, 1 Br. Ch. Rep. 106, note.

Legacies were given to infants out of land (charged generally with debts) payable at twenty-one, with intereſt at 3 *per cent.* One of the infants dying before that age, Sir *L. Kenyon*, after great conſideration, decreed that the legacy lapſed.

Harriſon v. Naylor, 3 Br. Ch. Rep. 108.

A teſtator gave legacies to his natural children, payable at the age of twenty-one, to be raiſed by the means thereinafter pointed out: he then directed an eſtate to be purchaſed, a ſum to be raiſed for maintenance of two of his natural children, upon whom he had ſettled the eſtate he directed to be purchaſed, and ordered the reſidue of the rents and profits of the ſaid eſtate to be applied to raiſe the legacies, and in default thereof, made the eſtate liable. One of the legatees died an infant. Lord Chancellour ſaid he thought at firſt it was a mere perſonal legacy; but he doubted, upon the

whole

hole, whether it must not be considered as charged upon the land, the ſtator having referred to the manner in which it was to be raiſed, and aving afterwards provided for the payment of it, by charging his real eſtate. he moment the money ought to be laid out in land, it muſt be conſidered a real fund, and therefore the legacy fell within the general rule, and was lapſed.

This rule however, that charges upon land payable at a *future* day, ſhall ot be raiſed, where the party dies before the day of payment, is ſubject many exceptions, as, where the time of payment is poſtponed from the rcumſtances, not of the perſon, but the fund.

A bequeſt ran in theſe words: "I give and bequeath unto each of my ſaid daughters the ſum of 1000*l*, to be raiſed and to be paid unto them ſeverally and reſpectively immediately after the deceaſe of my wife, out of the rents, iſſues, and profits of my manors, lands, tenements, and hereditaments in *W*., or by ſale or mortgage of the ſame, or a competent part thereof, together with intereſt for the ſaid ſeveral ſums of 1000*l*., after the rate aforeſaid, from the deceaſe of my ſaid wife, until the ſaid ſums ſhall be duly paid to my ſaid daughters, or their reſpective executors, adminiſtrators, or aſſigns: and my further will is, that in caſe either of my ſaid daughters ſhall depart this life before me, then the ſurvivor of my ſaid daughters, her executors, adminiſtrators, and aſſigns, ſhall have and receive all and every the ſum and ſums of money herein by me before deviſed out of my ſaid lands, to be raiſed in the manner herein-before appointed; and in ſuch caſe, the part of the daughter ſo dying, ſhall not ceaſe or ſink into the eſtate for the benefit of my heir, but ſhall remain and be raiſed for the benefit of my ſurviving daughter." The teſtator died, and left one ſon *T*., and two daughters, *D*. d *J*. In 1719, after the death of the teſtator, *D*. intermarried with r *W*. *L*.: *D*. died in 1736: *A*. the mother died in the year following: on which Sir *W*. *L*. brought his bill againſt *T*. and *J*., in order to have e ſum of 1000*l*. mentioned in the will, raiſed out of the eſtate, which as thereby charged with it. Lord Chancellour held, that it ought to be iſed: that the teſtator had poſtponed the raiſing of it till after his wife's ceaſe, not from the circumſtances of the perſon, but becauſe it did not it the circumſtances of his eſtate, that it ſhould be raiſed before: that e intention of the teſtator that it ſhould veſt, was ſhewn moſt ſtrongly in e clauſe, where he gives the whole to the ſurviving daughter: that that tention was further manifeſted, by his uſing the words *executors*, *adminiſtators*, *and aſſigns*, immediately preceding the clauſe of ſurvivorſhip; for s meaning was, that in caſe the daughters ſhould die before the portion as raiſed, the executors ſhould be entitled to have the 1000*l*. raiſed off e eſtate. On the whole, his Lordſhip ſaid, he thought the intention exemely clear under the will, that the portion ſhould be raiſed, and that e poſtponing the time of payment was only for the convenience of the tate, becauſe it would have diſtreſſed the ſon to have raiſed it in the moer's lifetime, before her jointure fell in.

Lowther v. Condon, 2 Atk. 127. 130. Barnard. Ch. Rep. 327. S. C.

J. *S*., having a conſiderable real and perſonal eſtate, deviſed as follows: I give and bequeath unto my daughter *M*., at her age of twenty-one, or day of marriage, which ſhall firſt happen, the ſum of 2500*l*.; and my will and meaning is, that if my ſon *A*. ſhould die without iſſue male of his body then living, or which may afterwards be born, that then my ſaid daughter ſhould have and receive at her age of twenty-one, or day of marriage, which ſhall firſt happen, the further ſum of 3500*l*., over and

King v. Withers, Ca. temp. Talb. 1. 7. 3 P. Wms.

"above

" above the ſaid ſum of 2500*l.*; but in caſe the contingency of my ſa
" ſon's dying ſhould not happen before the ſaid age of my daughter, or be
" day of marriage, that then ſhe ſhall receive and be paid the ſum of 350
" whenever it may after happen." Then he deviſes his real eſtate to his ſo
in tail, and for want of ſuch iſſue remainder to his brother in fee; and the
goes on thus: " And my will and meaning is, that the lands and premiſe
" hereby deviſed ſhall be liable to, and chargeable with the payment of the
" ſaid ſum of 3500*l.*, whenever it ſhall become due and payable;" and
directs, that in caſe of failure of iſſue of his ſon, his daughter, her heirs o
aſſigns, ſhould join in a ſurrender of ſome copyhold lands to the uſe of hi
brother, otherwiſe the legacy of 3500*l.* to become void.—The daughte
marries, having attained her age of twenty-one, and dies in her brother'
lifetime, leaving the plaintiff, her huſband, who took out adminiſtration t
her, and then her brother dies without iſſue male.—The queſtion wa
Whether the legacy of 3500*l.* ſhould be raiſed out of the land, the perſona
eſtate being deficient; and whether it was ſuch an intereſt in her as would
go to the plaintiff, her adminiſtrator? Lord Chancellour ſaid, that three
things were by the will neceſſary to happen, to entitle *M.* to this legacy o
3500*l*, *viz.* the death of *A.* the ſon without iſſue male; marriage, or her a
taining the age of twenty-one; and that all three had happened; and tha
though it is to be raiſed out of land, it remains money ſtill; and though ſhe ha
not lived to receive it, yet, the contingency having happened, it muſt go t
her huſband, who is her repreſentative, and who may well be thought t
have married in contemplation of this additional fortune of 3500*l.* though
depending upon a contingency.

Emes v. Hancock, 2 Atk. 507,

T. H. deviſed copyhold lands to his wife and her aſſigns for her life, and
after her deceaſe to his ſon *S.*, till his grandſon, the defendant *T.*, attain-
ed the age of twenty-three, and no longer; and ſo ſoon as his grandſon at-
tained that age, then he gave them to his ſaid grandſon, his heirs and aſſigns
for ever, on condition that the ſaid grandſon, his heirs or aſſigns,
ſhould pay or cauſe to be paid to his grand-daughter *E. H.* the ſum of 60*l.*
within two years after his grandſon attained his age of twenty-three; and if
his ſaid grandſon ſhould happen to die without iſſue of his body, then he
gave and deviſed the ſame to his ſon *S. H.* and his heirs, on condition of
paying the ſum of 100*l.* to *E. H.* within one year after his ſon *S. H.* enjoy-
ed the ſaid premiſes by virtue of this laſt deviſe; and his will further was,
that if his ſaid grandſon or ſon would make default in payment of the ſaid
ſum of 60*l.* then it ſhould be lawful for his ſaid grand-daughter *E. H.*, her
executors and adminiſtrators, to enter into the ſaid premiſes, and the rents
thereof to receive and take till the 60*l.* ſhould be paid.—*E. H.* married the
plaintiff, and lived till after the defendant, her brother, attained his age of
twenty-three, but died before the two years were expired after his attaining
that age. It was decreed, that the 60*l.* was a veſted legacy, and tranſmiſ-
ſible to *E.*'s repreſentative: that the teſtator ſo appointing two years after
his grandſon attained twenty-three, for raiſing the 600*l.*, ſeemed to be done
merely *for the convenience of the eſtate:* that if *T.* the grandſon had died
within the two years, (for if he had died after, *E* would have been entitled
only to the 60*l.*) and the money had not been paid, and he had left a ſon,
and the ſon had likewiſe died within the two years, and then *E.* had died
before the year was out which the teſtator had allowed to *S. H.* for payment
of the 100*l.*, *E.*'s repreſentative would clearly have been entitled to the
100*l.*: that the caſe of *King* v. *Withers*, *ſupra*, was directly in point for that
purpoſe; and thence it might be argued, that it was the intention of the
teſtator, that his grand-daughter *E* ſhould have one or the other. The de-

vi

e was further considered as a conditional limitation, and therefore whatever ht *E.* gained thereby was a legal estate.

A testator bequeathed unto each of his daughters *A.* and *M. C.* 300*l.*, be paid them by his executor *J. C.* when he should attain his age of enty-six; and then went on thus: "but in regard my two daughters are already provided for by lands settled on them by me, and my late wife, and by legacies left them by their grandfather, and which I have paid to them; it is my intention, that they shall not be entitled to any interest (*a*) for the said sums to them given by me as aforesaid; however, for the better securing the said several sums of 300*l.* given to my two daughters, my will is, that my two closes in *S.* shall stand respectively charged with my personal estate, and be liable to the payment of the said several sums of 300*l.* to my two daughters at the time above-mentioned, with a power to enter and hold till payment of principal and interest, from the time it shall become due;" and after the payment thereof he devised the premises his son *J. C.* in fee, whom he makes executor and residuary legatee. th the daughters arrived at their age of twenty-one, but died before *J. C.* ained his age of twenty-six: one of them married, and left two children; other died unmarried, but by will gave the 300*l.* to her sister. Lord *rdwicke* held these to be vested legacies; for that the time of payment was stponed, in order to prevent the burden of interest from falling upon the ate of the son till he attained his age of twenty-six. Besides, upon general es of law, the legacies are vested, for the persons entitled might have had egal remedy by ejectment. The words are, *with a power to enter and d till payment*. This is a right of entry given them to hold the land in nature of a tenancy by *elegit*, and is a chattel interest. The charge is an equitable charge, but a legal one. Sherman v. Collins, 3 Atk. 319.

(*a*) These words, Lord Camden observed, operated as words of gift.

A testator devised all his real and personal estate to *T. B.* for life, and erwards to his children, and for want of such issue, to his sister *Martha* life, and after her decease, to *J. B.* for life, and then to his children, d for want of such issue, part of his real estate called *M.*, to *W.* and his rs; the other part called *C.*, to the defendant *Foy* and his heirs, paying of it, when it falls, 500*l. viz.* 100*l.* to *S. D.*, 150*l.* to *W.* and *O.*, 100*l.* *N.*, and 50*l.* a-piece to *Elizabeth*, *Mary*, *and Margaret*, the three daughs of his sister. *J. B.* died without issue, and his sister *Martha* died in his time. *Margaret*, one of the three daughters, married the defendant , and died two years after the testator. *T. B.* died without issue two rs after *Margaret*, whereby the defendant *Foy* came to the possession of estate devised to him and his heirs. The defendant *G.* having taken out ministration to his wife *Margaret*, assigned to the plaintiff the 50*l.* payable his wife; and the question was, Whether this legacy was vested in *Mar-et?* The court held that it was; for first the remainder vested immedily by the death of the testator; for *Foy* might sell or devise it, and, conquently, the 50*l.* is vested in those to whom it was payable; for if he had d it, it must have been subject to the charge laid upon it by the testator. d farther, the estate and the charge upon it pass together, and the dee must take it *cum onere*; for as it was the testator's intent that *Foy* should e the estate, it was as much his intent, that he should pay the money out it when he had it. Hutchins v. Foy, Comb. Rep. 716.

J. H. devised part of his real estate for payment of debts, the surplus to mother, and another part to his mother for life; and afterwards to *W.* his heirs and assigns; he and they paying thereout legacies to several sons, which sums he willed to be paid within 12 months next after his Hodgson Rawson, 1 Vez. 44.

mother's deceaſe, charging his land therewith accordingly. After the teſtator's death the mother entered, and poſſeſſed the real eſtate, and died. A legatee of 100*l.* ſurvived her but a month, and his executors bring a bill for the legacy againſt the deviſee of the real eſtate, who was not the heir at law. Lord *Hardwicke* held, that it was a veſted legacy, and tranſmiſſible to the repreſentatives; that the twelvemonth clauſe was not intended to ſuſpend the veſting, and make it contingent; but only as a reaſonable time to the deviſee for payment, which he could not do before he was poſſeſſed. And his Lordſhip cited the following caſe of *Wilſon* v. *Spencer*, *Jan.* 31, 1732, which was determined on that ground only. There, the teſtator directed the payment of his debts and legacies by and out of ſuch part of his perſonal eſtate, as ſhould not afterwards be ſpecially deviſed; and if that proved deficient, then out of the real eſtate; and that his executor ſhould within 12 months after his death levy and raiſe ſufficient to pay 1000*l.* to his younger ſon, to be paid to him immediately when raiſed, charging all his real eſtate, if the perſonal eſtate not ſpecifically deviſed proved deficient. The younger ſon died before the expiration of the year: his executors bring a bill for it againſt the eldeſt ſon, the deviſee for life of the real eſtate with a remainder to his ſons. The defendant admitted it was intended for the brother's advancement; but inſiſted, that he dying unmarried before it was extinguiſhed, and not to be raiſed; the perſonal eſtate was admitted to be deficient, and it was therefore chargeable on the real eſtate, and to take the fate out of real eſtate. The court held, it ſhould be raiſed, which is an authority, that the year for raiſing was not ſufficient to prevent the legacy from veſting. Upon the authority of *Wilſon* v. *Spencer*, his Lordſhip held that the legacy in the principal caſe ſhould be raiſed and paid with intereſt at 4 *per cent.* from a year after the mother's death, and that the plaintiff muſt have his coſts.

Thompſon v. Dow, 1 Br. Ch. Rep. 193. note. See Manning v. Herbert. Ambl. 575. S. P upon nearly the ſame words.

A teſtator, ſeiſed of the reverſion of an eſtate, expectant upon the death of his aunt, deviſed this eſtate to his wife for life, remainder to *J. D.* in fee; ſubject to the payment of 200*l.* to his daughter *E.*, ſix months after his wife's deceaſe; with power for the daughter in default of payment to ſeize the rents. *E.* died in 1750; the mother in 1754; the aunt in 1760. Lord *Northington* held this a veſted intereſt in the daughter, and decreed the 200*l.* to be paid with intereſt from the deceaſe of the aunt, it appearing from the words of the will, that the ſon was to pay this 200*l* out of the rents of the eſtate.

Tunſtall v. Brachen, Ambl. 167. 1 Br. Ch. Rep. 124. note, S. C.

A. deviſed lands to *M. B.* his ſiſter, in fee, paying 100*l. per annum* to his wife for her life, and alſo ſeveral legacies to ſeveral of his nephews and couſins within 12 months after the death of his wife, with a proviſo, that in caſe his wife ſhould at his death have a child or children who ſhould live to 21, he revoked the deviſes and bequeſts, except the annuity to his wife, and gave all his ſaid lands, *&c.* to ſuch child or children, his, her, or their heirs. Several of the legatees died in the lifetime of the wife, who had a child at the teſtator's death. It was decreed that their legacies were tranſmiſſible to their repreſentatives.

Embry v. Martin, Ambl. 230.

W. N. deviſed his freehold eſtates to his ſon *J.* in tail, remainder to his daughter *P.* in tail, remainder to his daughter *E.* for life, remainder to his ſon *J. N.*, and his heirs for ever, upon condition of his paying to his eldeſt ſiſter, the plaintiff's mother, 100*l.* at or ſoon after his being poſſeſſed of the premiſes, and for non-payment the eſtate ſhould be to the plaintiff's mother *&c. J.*, *P.*, and *E.* are all dead; the plaintiff's mother is alſo dead; and ſince her death, the remainder in fee is veſted in *J. N.*, in poſſeſſion.

plaintiff, as his mother's executor, is entitled to have the 100*l.*
ed.

H. S. deviſed two houſes to his wife for life, and immediately after her eaſe, to the defendant in fee, he paying thereout to the teſtator's couſins *T.* and *T. T.* 20*l.* a-piece, within three months after the death of his . The teſtator died in 1752, and his wife entered. *T. T.* ſurvived the tor, and by will gave the legacy to the plaintiff *Jeal*, but appointed no utor. The plaintiff *Jeal* obtained adminiſtration. *H. T.* ſurvived the tor, and died in 1758 inteſtate. The teſtator's widow died in 1767, *E. T.* entered. It was inſiſted by the defendant, that as *T. T.* and *T.* died in the life of the wife, the legacies were not payable. But, Lord *burſt* declared, that they were veſted, and tranſmiſſible to their repreatives, and a charge upon the premiſes deviſed to *E. T.* Jeal v. Tickener, 1 Br. Ch. Rep. 120. note.

teſtator deviſed real eſtates to truſtees, to the uſe of *T. S. M.* for life, ainder to truſtees, *&c.* remainder to his firſt and other ſons, in tail ral, remainder to daughters in tail general, remainder to his wife for remainder to *A. W.*, his heirs and aſſigns for ever, with a proviſo, that *W.*, or his heirs, if he or they ſhould actually come into poſſeſſion by virf the limitation in the will, ſhould pay to his daughter *E. W.* 2000*l.*; and hereby charged all the premiſes with the payment of the 2000*l.* to the *E. W.*, at the end of two years next after the ſaid *A. W.* or his heirs d come into poſſeſſion as aforeſaid. After the death of the teſtator, a miſſion of bankruptcy iſſued againſt *A. W.*, under which the defendant choſen aſſignee. *T. S. M.* and the teſtator's widow both died, the forwithout iſſue; upon which the reverſion in fee-ſimple veſted in the deant, who entered and enjoyed two years. *E. W.* died in the lifetime *T. S. M.* and the teſtator's widow. Lord *Bathurſt* nevertheleſs decreed legacy given to her to be raiſed with intereſt from the end of two years the defendant came into poſſeſſion. Clarke v. Roſs, *ibid.*

y a clauſe in the will of Sir *J. K.*, he gave, in caſe his nephew ſhould rt this life before he ſhould attain the age of 21, the ſeveral additional ies hereafter mentioned, *viz.* to his wife 2000*l.*, to his ſiſter *J. B.* 0*l.*, to his ſiſter *M. S.* 1000*l.*, to his ſiſter *E. K.* 1000*l.*, and he direct- oſe ſeveral legacies ſhould be paid and payable within ſix months next ſuch the deceaſe of his ſaid nephew under the age of 21 years, and di- d and empowered his truſtees, their heirs, and aſſigns, to raiſe thoſe ional legacies by any mortgage or mortgages of the whole or a compe- part of his eſtates thereby deviſed to them. The nephew died unmar- under the age of 21. The queſtion was, Whether as theſe legatees, gh they ſurvived the teſtator, died in the lifetime of the nephew, their nal repreſentatives were entitled to the additional legacies given them e contingency of the nephew dying under 21? The court held, that were veſted intereſts, and tranſmiſſible to the repreſentatives. Kemp v. Davy *ibid.*

teſtator deviſed real eſtate to his wife *T.* for her life, remainder to his *R.* in tail male, remainder to his (the teſtator's) right heirs in fee, upon ition that *R.*, or thoſe then in poſſeſſion of this eſtate, ſhould, within onths after the death of teſtator's wife, pay to his two daughters *M. T.* 1200*l.*, *viz.* 600*l.* to each, and intereſt at 5 *per cent.* from the death heir ſaid mother, with power of entry to the daughters in default yment: the daughter *T.* ſurvived the teſtator, but died in the lifetime r mother: *M.* the other daughter adminiſtrated to her ſiſter, but died ut claiming the 600*l.* in her right. The perſonal repreſentative of the ters brought a bill againſt *R.* as heir at law and deviſee of the teſtator Pawſey v. Edgar, 1 Br. Ch. Rep. 193. note.

for this ſum of 600*l.* bequeathed to *T.* the daughter, with intereſt from t mother's death; and upon the authorities of *Hutchins* v *Foy*, and *Hodg* v. *Rawſon*, (both *ſupra*,) Lord *Bathurſt* determined, that the charge ve with the land, and decreed for the plaintiff.

Morgan v. Gardiner, 1 Br. Ch. Rep. 193. note.

H. P. deviſed his eſtate to his wife for life, remainder to his daugh *M.*, and her heirs for ever, chargeable with 400*l.* to his four youn daughters, within one year after the death of his wife, with intereſt fr the death of his wife. Two of the younger ſiſters died in the lifetime the mother unmarried; the eldeſt daughter alſo died in her mother's lifeti ſo that ſhe was never poſſeſſed of the remainder in fee of the eſtate, bu deſcended to her only ſon. It was holden in the Exchequer, that the le cies to the younger daughters were veſted intereſts, tranſmiſſible to th repreſentative.

Dawſon v. Killet, 1 Br. Ch. Rep. 119.

R. M. deviſed an eſtate to his wife for life, and if there ſhould be iſſue between them, then to the defendant, charged with 100*l.* to *W. R.* and 100*l.* to *M. B.*, to be paid within ſix months after the deceaſe of wife. Afterwards, *M. B.* being dead, the teſtator by a codicil, recitin that ſhe was ſo, gave 50*l.* of that 100*l.* to *W. R.*, and 50*l.* thereof to *A.* to be paid at the time when *M. B.* would have been entitled to receive if ſhe had lived. *W. R.* ſurvived the teſtator, but died in the lifetime the wife, making the plaintiffs his executors, who, after the deceaſe teſtator's wife, filed their bill for the ſums of 100*l.* and 50*l.* Lord *Thurlo* ſaid, that this was a deviſe after the death of the wife to the defendant, a the teſtator charges the eſtate of the defendant (meaning the intereſt of t defendant in the eſtate) with the ſums in queſtion, which diſtributes t eſtate between the defendant and the legatees. Upon the death of the te tator, the remainder veſted in the defendant, and the moment it veſted the defendant, the charges veſted in thoſe to whom they were given. T legacies therefore of 100*l* and 50*l.* muſt be raiſed for the plaintiffs, wi intereſt from ſix months after the death of the wife.

Goodwin v. Munday, 1 Br. Ch. Rep. 191.

J. M. deviſed an eſtate to his ſecond ſon *J.* and his heirs for ever, aft the deceaſe or marriage of his (the teſtator's) wife *E.*, with a proviſo, th he ſhould pay to the teſtator's daughter *Mary* then the wife of the plaintiff and ſince deceaſed, the ſum of 100*l.* and unto *Martha* 80*l.*, to be pa within one year after the death or marriage of his wife. *Mary* died in th life of her mother. Lord *Thurlowe* held the legacy veſted.

(F) Of Conditional Legacies, and how far the Condition muſt be complied with, otherwiſe the Legacy will be forfeited.

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(*But the prevailing*) Hence, if in the event of a marriage without conſent, the legacy or portion be given over, a demurrer will lie to a bill for a diſcovery of the fact of the marriage. Chauncey v. Tahourdin, 2 Atk. 392. Chancey v. Fenhoulet, 2 Vez. 265.

This diſtinction as to the legacy being given over or not, it is true, does prevail in our courts of equity, and may in general enable us to decide on the validity of any condition of marriage, where the gift or legacy, to which ſuch condition is annexed, is charged upon perſonal eſtate. But where the gift is of real eſtate, or charged upon real eſtate, in that caſe, it becomes material to conſider whether the condition be precedent or ſubſe-

quent,

nt, for intereſts ariſing out of the land muſt be governed by the rules
he common law. If therefore ſuch condition of marriage be precedent,
uſt be ſtrictly performed, in order to entitle the party claiming to the
fit of the gift.

f by leaſe) So, by Lord Hardwicke in 3 Atk. 335. As to this caſe of Fleming v. Waldgrave, as ſaid by the Attorney-General, and agreed by the Maſter of the Rolls in Reeves v Herne, , that the legacy, *here*, veſted immediately, it being given upon her not marrying without nt, &c.; and his Honour remembered a like caſe in the time of Wright, S. C. where the ition being, if ſhe did not marry with conſent, &c. the legacy was decreed her immediately, ntered into a recognizance to refund, in caſe ſhe married without conſent, &c A teſtator his grand-daughter 200*l.* on condition ſhe continued with his executors till ſhe was twenty- but if ſhe was taken from them by her father (who was a papiſt), or married againſt the nt of his executors, then he gave her but 10*l.* The grand daughter was placed by his exe- rs with a clergyman, who, before ſhe was twenty-one, with conſent of one of the executors, itted her to make a viſit to her father, who took that opportunity to marry her to a papiſt. was decreed the legacy at the Rolls; but upon a re-hearing Lord Keeper held, that ſhe ld have only the 10*l.*; and he ſaid, that in this caſe there was no difference between a condi- that ſhe ſhould marry without conſent, and that ſhe ſhould not marry againſt conſent. Creagh ilſon, 2 Vern, 752. *Qu.* Whether there was any limitation over?

J. S. charged his real eſtate with 500*l.*, to be paid his ſiſter *Alice* Reeves v. *ne* within one month after her marriage, but ſo nevertheleſs as ſhe mar- Herne, Vin. with the approbation of his brother *Joſeph Herne*, (if living,) and in Abr. tit. ſhe married without his conſent, the 500*l.* were not to be raiſed Condition, *e Herne* married in the lifetime of *Joſeph Herne*, and without his con- (Z. d), pl. , and the queſtion was, Whether ſhe was entitled to the 500*l.* or not? 41. here, it was ſaid, that this was a condition only *in terrorem*, and that conſtruction of ſuch conditions had always been, that where there is deviſe over, ſuch condition is void; otherwiſe, where limited over; here it is not. On the other hand, it was argued, that this is a con- on precedent, and nothing ariſes or becomes due but upon the marrying conſent; and this being a deviſe of money out of land, or of a charge n the land, it is to be conſidered as a deviſe of land, and governed by ſame rules; and then being a plain condition precedent, nothing can e; and for this were cited the caſes of *Fry* v. *Porter*, and *Bertie* v. rd *Falkland*. The Maſter of the Rolls ſaid, that the civil law makes diſtinction in *perſonal* legacies, between conditions precedent and ſub- uent; neither does this court as to mere *perſonal* legacies given upon dition of marrying with conſent. But this court differs from the civil in this; that whereas by that law all conditions in reſtraint of marri- are void, this court ſays, they are not void, where the legacy is n over, and another perſon particularly ſubſtituted by the teſtator to e the benefit of it, in caſe the condition be not complied with. But muſt be a ſpecial nomination as a legatee; and therefore a reſiduary *Sed vide* atee or executor ſhall not have the benefit of ſuch non-performance. *infra. contr.* d his Honour remembered a caſe to this purpoſe, where on a legacy en upon condition of marrying with conſent, and if not, to ſink into the due of teſtator's eſtate which he gave to *J. S.* &c., it was holden, that ugh the marriage was without ſuch conſent, yet, it was not loſt, becauſe ould have been the ſame if the teſtator had ſaid nothing about its ſinking o the *reſiduum*, and therefore was conſtrued only *in terrorem*. So it is in caſe of a truſt of a term limited of lands for raiſing portions with ſuch triction, this court governs itſelf by the ſame rules as in caſe of a deviſe a legacy with ſuch condition, becauſe though the term be a legal eſtate d intereſt, yet the truſt of a term is a creation of equity only. But it is otherwiſe

otherwiſe in caſe of a deviſe of lands; there, conditions precedent and ſ
ſequent take place. And this was *Fry* and *Porter*'s caſe of an infant bou
by condition relating to her marriage, it being a condition precedent: a
the preſent caſe being a charge upon land, is to be governed by the ſa
rule, and is to be conſidered as land; the will muſt be atteſted in the ſa
manner; and this being plainly a condition precedent, and nothing veſte
(as it is in the caſe of a truſt-term, where the term is veſted, and the tr
only left open,) it is too hard for this court to charge the land contrary
the expreſs will of the teſtator; and to ſay the money ſhould be rais
when the teſtator has ſaid it ſhall not: and a charge upon the land can
ariſe otherwiſe than as a deviſe of the land itſelf.

Hervey v. Aſton, Ca. temp. Talb. 212. 1 Atk. 361. S. C. Com. Rep. 726. S. C.

A. by ſettlement after marriage created a truſt-term of 100 years
mortgage or ſale to raiſe 2000*l.* for the portion of each of his daughte
provided they married with their mother's conſent, and directed a yea
payment out of the rent till they married; and if any of them died bef
marriage with ſuch conſent, her portion was to ceaſe, and the eſtate w
to be exonerated thereof; or, if it were raiſed, it was to be paid to t
perſon to whom the eſtate ſhould belong. By will, he created anot
truſt-term to raiſe by ſale or mortgage 4500*l.*, whereof 2000*l.* were t
paid to each of his daughters, in augmentation of their fortunes, ſubject
the conditions in the ſettlement; and by a codicil (in purſuance of a po
of revocation,) he created another truſt-term for the better raiſing of
daughters portions. *A.* died. The daughters married without conſe
The Maſter of the Rolls held, that the portions ſhould be raiſed,
huſband making a competent ſettlement. But this decree was reverſed
Lord Chancellour *Hardwicke*, aſſiſted by Lord C. J. *Lee*, Lord C. J. *Wi*
and *Comyns*, J., for they conſidered portions or intereſt directed t
raiſed out of land, as having nothing teſtamentary in them, and that t
were therefore not to be governed by the rules of the civil or canon l
but by thoſe of the common law: that, in that law, no rule was
fixed, than that portions charged upon the land did not veſt till the time
payment arrived; and that the preſent condition to marry with con
was a lawful one, and a condition *precedent:* and that being ſuch, noth
veſted in the daughters until that condition was performed.

Reyniſh v. Martin. 3 Atk. 330. 1 Wilſ. 130 S. C.

E. P. deviſed her real eſtate to her daughter *Martha* and her hein
ever, ſubject to ſuch charges as ſhould afterwards in her will be expreſ
then follows this clauſe: "Provided always, and it is my will, that if
"daughter *Mary* marry by and with the conſent of the truſtees (the
"named), or the major part of them, and ſignified in writing before
"marriage had, then, and not otherwiſe, I give and deviſe unto my
"daughter *Mary* the ſum of 800*l.*; and it is my will that my ſaid da
"ter *Martha* ſhall pay unto my ſaid daughter *Mary* the ſum of 30*l.* ye
"during the ſaid *Mary*'s continuing ſole and unmarried, by 15*l.*
"*May-day* and *All-Saints-day*. And I do hereby charge all my afore
"real eſtate with all my debts and legacies of all kinds." *Martha*
Mary ſurvived the teſtatrix. The latter married the plaintiff without
conſent of the truſtees. Upon her death, the plaintiff, as her repreſe
tive and adminiſtrator, filed a bill for an account of the perſonal eſ
and that the ſame might be applied in payment of the ſaid legacy of 80
and ſo much of the arrears of the annuity of 30*l. per annum* as were
to *Mary* before her marriage; but in caſe the perſonal eſtate ſhould no
ſufficient, that then the real eſtate, or ſo much thereof as would m
good the deficiency, might be ſold, and the money ariſing therefrom a

for that purpoſe. Lord Chancellour ſaid, that the real eſtate was not iginally charged with this legacy, but only as auxiliary in failure of the rſonalty; and the charge upon the lands depended upon a condition ecedent, which never was performed; that this could not be conſidered a legacy charged, or chargeable upon the real eſtate, but as a mere per-nal legacy, and as ſuch, was to be governed by the rules of the civil and non law. He therefore directed, that the plaintiff be paid the arrears the 30*l. pro rata*, till the time of the marriage; and in caſe the perſonal tate ſhould be exhauſted by the payment of debts or other legacies, that e plaintiff ſhould ſtand in the place of ſuch creditors and legatees *pro uto*, as had received ſatisfaction, and that ſo much of the real eſtate ould be ſold, as would be ſufficient to ſatisfy the legacy of 800*l.* and the rears of the annuity.

A teſtator gave to truſtees 4000*l.* for the uſe of *J. W.*, if ſhe married th conſent; if not, then only 1000*l.*, and a ſimilar legacy to the uſe of *. W.*: then followed this clauſe: "*If either of theſe girls ſhould marry into the family of* G. *or* R., *and have a ſon, I give all my eſtate to him for life*," (with remainder over); "*if they ſhall not marry, then I give all my eſtate to* Randal." A bill was filed, and there was a decree that e money ſhould be inveſted in the funds till the event ſhould happen, th leave for the parties intereſted to apply, as occaſions ſhould ariſe. he girls being married with conſent, but neither of them into the fami-s of *R.* or *G.*, *Randal* filed his bill for the reſidue, as forfeited to him. t, by Lord *Thurlowe*—Nothing could veſt till they married, marriage ing a condition precedent: then can any thing veſt till the whole condi-n becomes impoſſible? The plaintiff ſuppoſes, that if the girls once rried, they had loſt all chance of marrying into the family of *R.* or *G.* the teſtator had ſaid ſo, it would have been very well. Suppoſe one of em, after the death of her huſband, to marry into one of the favoured nilies, and to have a ſon, who comes here to claim the eſtate: the court ould not incline to refuſe him. The decree that the money ſhould be veſted, *&c.*, muſt be carried into execution. Randal v. Payne, 1 Br. Ch. Rep. 55.

A father deviſed lands in truſt to permit his daughter *S*, to receive the nts until her marriage or death, and in caſe ſhe married with the conſent the truſtees, then to convey the premiſes to her and her heirs; but if e died before marriage, or married without ſuch conſent, then to convey other perſons. The daughter afterwards married with the conſent of r father, who ſettled part of the lands on her and her huſband, and d. By the father's conſenting in his lifetime the condition is diſpenſed h. Clerk v. Berkley, 2 Vern. 720.

A legacy was given to a daughter with a condition annexed to it, that e ſhould marry with her mother's conſent. The daughter ſued for the acy, and it was pleaded in bar, that ſhe did not marry with her mo-r's conſent; notwithſtanding which, ſentence was given in her favour, t ſhe ſhould have the legacy. Pigot's caſe, cited in Moor, 857.

The plaintiff's bill was for 400*l.*, left her to be paid at her age of 21, day of marriage, ſo as ſhe married with the aſſent of the truſtees, and r mother, and eldeſt brother. The defendant inſiſted, that the plaintiff s about to marry without ſuch aſſent, and refuſed payment. But the urt declared it juſt and reaſonable, that the ſaid 400*l.* with damages ould be paid to the plaintiff. Norwood v. Norwood, 1 Ch. Rep. 65.

R. P. bequeathed to his two daughters *Eleanor* and *Alice* 200*l.* a piece, be paid at their ages of 21 years, or days of marriage, and he alſo gave them Vintner v. Pix, 1 Ch. Rep. 65.

them 200*l.* more by a marginal note in his will, with this clauſe, "*if they behave themſelves dutifully to their mother.*" *Alice* died, and *Eleanor* adminiſtered to her, and married the plaintiff without the conſent of the defendant her mother, who was executrix of her father's will. The court of Chancery declared, that as to the 200*l.* poſitively given by the will, the defendant ought to pay the ſame to the plaintiff; but as to the 200*l.* given by the marginal note in the will upon their dutiful behaviour to the defendant, ſhe having married herſelf without the conſent of her mother, they referred that point to the judges. The judges certified, that the 200*l.* mentioned in the marginal note, as well as the 200*l.* in the body of the will, belonged to the plaintiff *Eleanor*, her marriage notwithſtanding.

Bellaſis v. Ermine. 1 Ch. Ca. 22.

A ſuit was for a portion of 8000*l.*, given to the plaintiff's wife. The defendant pleaded, that it was given her, provided ſhe married with the conſent of *A.* and if not, that ſhe ſhould have but 100*l. per annum*; and that ſhe married without the conſent of *A.* It was ordered that the plea ſtand over-ruled. And the court all declared this proviſo was but *in terrorem*, to make the perſon careful, and that it would not defeat the portion. But it was ſaid, that if the party who gave the portion, had limited it to another, in the caſe of her marriage without the conſent of *A.*, there, it would have been otherwiſe.

Sutton and Wife v. Jewke, 2 Ch. Rep. 50.

A ſum of 1500*l.* was to be put out at intereſt for the uſe of the plaintiff *Anne*, and the principal and proceeds thereof were to be paid to her at her age of 21, or marriage; but if ſhe ſhould marry without the conſent of the defendant *Jewke* and his wife, her father and mother, or one of them, or the ſurvivor of them, then 500*l.*, part of the ſaid 1500*l.*, was to be paid to ſuch perſon, as the defendant *Jewke*'s wife, by writing under her hand, and without her huſband, ſhould appoint. The plaintiffs filed their bill for the 1500*l.*, ſtating, that the defendant *Jewke*'s wife died in 1668, without making any appointment, ſo that the plaintiff *Anne* was become entitled to the whole 1500*l.* and the proceed thereof. The defendant *Jewke* inſiſted, that *Mary*, his wife, died in 1670; but, before her death in 1666, by deed poll directed, that in caſe the plaintiff *Anne* married without the conſent of her, the ſaid *Mary*, or the defendant *Jewke*, her huſband, then 500*l.* part of the ſaid 1500*l.* was to be paid to her and the defendant, or the ſurvivor of them, and that the ſaid deed was made upon mature deliberation, to keep the plaintiff *Anne* in due obedience: that the plaintiff *Sutton* having in a clandeſtine manner married the plaintiff *Anne*, without the defendant's privity and conſent, and after he had forbidden his daughter to marry him on the forfeiture of his bleſſing, or what otherwiſe ſhe might expect from him, he the ſaid defendant, by means thereof, and by being adminiſtrator to his late wife, became entitled to 500*l.*, part of the ſaid 1500*l.* The queſtion therefore was, Whether the plaintiff *Anne* was entitled to the whole 1500*l.*, or, whether ſhe had not forfeited 500*l.* thereof by her marriage without her father's conſent and privity, and contrary to his direction and advice? Lord Chancellour was fully ſatisfied, that the plaintiff *Anne*'s marriage was without the defendant's privity, and againſt his conſent, and that therefore ſhe could not have the 500*l.*

Hicks v. Pendarvis, 2 Freem. 41.

A ſum of 500*l.* was bequeathed to the plaintiff's wife, if ſhe married with the conſent of certain truſtees; and in caſe ſhe did not, then 20*l.* *per annum* for her life. She married the plaintiff without the conſent of the truſtees, and he preferred his bill for the 500*l.* It was urged on behalf of the defendant, that this differed from the common caſe of a deviſe on a condition

ondition *in terrorem*; for it had always been holden, that where there is a eviſe over to a third perſon for non-performance of the condition, there, f the party marry without conſent, all ſhall go to the third perſon, becauſe e hath a conditional intereſt by the will; but if there be no deviſe over, hen it is eſteemed only *in terrorem*, and the party ſhall have the legacy, otwithſtanding the breach of the condition. But here, that this is tantamount, or as ſtrong as a deviſe over, when the party himſelf ſaith, that if he marry without conſent, ſhe ſhall have but 20*l. per annum*. But it was nſwered by Lord Chancellour, that this differed not from the reaſon of he common caſe of a deviſe *in terrorem*, and the reaſon, he ſaid, he had rom the Lord Chief Juſtice, (*Hale*,) who (when it was objected in anoher caſe in this court, that this court did not make men's wills for them, nd give their eſtates quite contrary to their intent) anſwered, that this ourt holds plea of legacies, and judges of them by the rules of the civil aw, and by that law any condition added to reſtrain marriage is void; ſo hat where an intereſt doth not accrue to a third perſon by the breach of he condition, ſuch a condition is void, and only *in terrorem*; and therefore decreed the 500*l.* to the plaintiff.

A teſtator, having two daughters, bequeathed to each of them 20,000*l.* o be paid them at their ages of 25 years, or marriage, which ſhould firſt appen, ſo as ſuch marriage was had with the conſent of the mother and ther truſtees, and after ſuch time as they reſpectively had attained the age f ſixteen years: if either of them married before ſixteen, or without conent, then ſuch daughter to have only 10,000*l.* And he directed, that he ſurplus of his perſonal eſtate ſhould be inveſted in lands, and ſettled on is daughters and their iſſue with croſs remainders. In the teſtator's lifeime a treaty of marriage was ſet on foot between the plaintiff and one of he daughters; but before any agreement could be made, the teſtator died. After his death, however, the treaty was renewed, and the marriage was ad with the conſent of all the truſtees, but before the lady was ſixteen. The court decreed the 20,000*l.* to the plaintiff.

Lord Saliſbury v. Bennet, 2 Vern. 223. Skin. 285. S. C. 2 Ventr. 365. S. C. but differently reported, for it is ſaid there, that the court decreed the Earl only 10,000*l*, for that both parts of the condition muſt be obſerved. But theſe hiſtories of the caſe eem to refer to different periods of time; the laſt to the original hearing before the Lord Keepr; the two former to a re-hearing before the Lords Commiſſioners.

A. bequeathed 3000*l.* to his daughter, the plaintiff *Garret's* wife, at 21, or marriage, and recommended her to the care of *S.*, provided that if ſhe married without the conſent of *S.*, her legacy of 3000*l.* was to ceaſe, and he was to have but 500*l.*, and made the defendant, his ſon, executor and reſiduary legatee. The plaintiff married the daughter without the conſent of *S.*; yet the court decreed her the whole 3000*l.* with intereſt from the marriage; and principally, becauſe it was not expreſsly deviſed over, but to fall into the ſurplus.

Garret v. Pritty, 2 Vern. 293.

P. by his will (*inter al.*) gave to each of his grand-daughters that ſhould be living and unmarried at the time of his deceaſe, on their reſpective days of marriage, the ſum of 1500*l.*, and deſired, that none of his grand-daughters ſhould marry without the conſent of the father and mother, or the ſurvivor of them; and therefore, if any or either of them ſhould marry without ſuch conſent, then by his will he revoked what was thereby directed to be paid to ſuch grand-daughter or grand-daughters, and ſuch of them ſhould not be entitled to any benefit by virtue of ſuch his will, further than what the father and mother, or the ſurvivor of them, ſhould direct; and he afterwards directed, that after the ſeveral legacies and ſums

Wheeler v. Bingham. 3 Atk. 364.

directed to be paid were ſatisfied, if any ſum of money ſhould remain in the hands of the truſtees, the ſurvivors or ſurvivor of them, the ſame ſhould be paid to his daughter *P.* for life, and after her deceaſe to the defendant and his heirs. The plaintiff, one of the daughters, married without the conſent of the father and mother, and brought a bill for the legacy. Her mother appointed truſtees of the legacy for the plaintiff for her ſeparate uſe for life, and to her iſſue, but if ſhe had no iſſue, then to the defendant. Lord *Hardwicke* held, that the plaintiff was entitled abſolutely to this legacy; that it was merely perſonal; and though an expreſs deviſe, that if the legatee ſhould not perform the condition, the legacy ſhould ſink into the *reſiduum*, amounts to a deviſe over, yet that there was no ſuch direction here; that if this had been a particular fund, which was given to the truſtees, as certain ſtocks, or certain mortgages, and the will had ſaid, the legatee ſhall have no more than the father and mother ſhall appoint, it would then have been a deviſe over of the remainder of that particular fund; but that this was only a deſcription of the *reſiduum* of the perſonal eſtate in the hands of the truſtees.

Scott v. Tyler, 2 Br Ch. Rep. 431.

A teſtator bequeathed part of his perſonal eſtate to truſtees, to pay one moiety thereof to *M. T.*, at her age of 21 years, if unmarried; and the other moiety to her at her age of 25 years, if unmarried; but if ſhe ſhould marry before ſhe ſhould be 21, with conſent of her mother, then one moiety to be ſettled on her and her iſſue in ſuch manner as her mother ſhould think proper, and the other moiety to be diſpoſed of as *M. T.* ſhould think fit. But in caſe *M. T.* ſhould die before 25 years unmarried, then, the whole of this legacy was bequeathed to her mother, to whom there was alſo a gift of the general reſidue of the real and perſonal eſtate. *M. T.* married before ſhe was 21, againſt the conſent of her mother. Lord *Thurlowe* held, that the bequeſt to *M. T.* was hereby rendered void, and became the property of her mother, as part of the reſidue; for that a bequeſt of the reſidue is as effectual to defeat a perſonal legacy or a portion payable out of money, when the condition which is to veſt the legacy has not been performed, as a ſpecifick deviſe over.

Lady Kilmurry's caſe, cited in 2 Freem. 59.

A teſtator deviſed 1000*l.* a-piece to daughters, if they married with the conſent of *B.*, and if they married without ſuch conſent, then, they ſhould have but 500*l.* a-piece, and the reſidue ſhould go to the ſon. The daughters being 30 years of age ſued for their legacies, and it was alleged in their behalf, that now being of that age, it was not material, whether they married with or without conſent, being of underſtanding and diſcretion to diſpoſe of themſelves. But it was reſolved, that the teſtator was chancellour of his own eſtate, and having added this reſtriction, and a limitation over, the court of Chancery could not alter it. The full legacies were decreed to them; but they were to enter into recognizances for ſecurity of re-payment in caſe they married without ſuch conſent.

Barlow v. Bateman, 3 P. Wms. 65. 4 Br. P. C. 194. S. C.

A teſtator deviſed in the following words: "I give and bequeath to "my kinſwoman *Mary Barlow*, the ſum of 1000*l.* to be paid her at her "age of 21 years, or marriage, which ſhall firſt happen. *Item*, In caſe "the ſaid *Mary Barlow* ſhall marry with any one of the ſurname of *Barlow*, then I give her the further ſum of 1000*l.* to be paid her on the day "of ſuch her marriage with a *Barlow* aforeſaid. But if the ſaid *Mary* "*Barlow* ſhall die unmarried, or ſhall marry a perſon not bearing the ſurname of *Barlow*, then I give the laſt-mentioned ſum of 1000*l.* unto "*Charles Barlow*." *Mary Barlow* married one *Robert Bateman*, and thereupon *Charles Barlow* preferred his bill for the laſt-mentioned 1000*l.*

as

is forfeited by this marriage. The defendant, *Robert Bateman*, by his anſwer admitted, that *on the occaſion of his marriage, and not before*, he aſſumed and took upon him the name of *Barlow*, that his father's name was *Bateman*, and that he aſſumed and took upon him the name of *Barlow, in order to entitle him to the ſaid ſum of* 1000*l. bequeathed to the ſaid* Mary *on the condition aforeſaid.* The Maſter of the Rolls held, that the condition was complied with by the defendant's taking the name of *Barlow*, and diſmiſſed the plaintiff's bill. But on appeal to the Houſe of Lords, it was declared, that the appellant was entitled to the legacy of 1000*l.* conditionally bequeathed to him, and the decree of the Maſter of the Rolls was reſerved.

A caſe aroſe upon the words of two will, the one made by the father, and the other made by the mother of *Mary Graydon*, the plaintiff in the croſs bill. The father's will was as follows: "I give the ſum of 1000*l.* "to my only daughter *Mary Graydon*, to be paid her at her age of twenty- "one years, or day of marriage, which ſhall firſt happen, provided ſhe "marry by and with the conſent of my executors: but, in caſe ſhe dies "before the money becomes payable, on the condition aforeſaid, then I "give the ſaid 1000*l* equally between my two youngeſt ſons, *Benjamin* "and *Gregory Graydon*, Mrs. *Mary Graydon*, grandmother of *Mary* "*Graydon*, *Mary Graydon* the mother, and Mr. *Jeremy Graydon* the un- "cle, to be my joint and ſole executors." The mother's will was in theſe words: "*Item*, I give to my daughter *Mary Graydon* all my wearing ap- "parel of all ſorts, with all my dreſſing plate, jewels, watch-chain, *&c.* "Then my will is, that in caſe my daughter *Mary Graydon* ſhall marry "before ſhe comes to the age of twenty-one years, without the conſent "and approbation of my executor, under his hand firſt had and obtained, "(if he be living,) that then ſhe ſhall not be entitled to any part of ſuch "legacies as I have herein left her, but her whole ſhare ſhall be equally "divided between my ſons *Benjamin* and *Gregory Graydon*;" and the reſidue, after her debts and legacies paid, the teſtatrix gave to her three children, *Benjamin*, *Gregory*, and *Mary*, equally to be divided between them, or the ſurvivors of them, ſhare and ſhare alike, and appointed her ſon *J. Graydon* to be her ſole executor. The bill was brought by the plaintiff in the original cauſe againſt the defendant *Hicks*, as the huſband of *Mary Graydon*, to relinquiſh the 100*l.* which were left to the wife under the will of the father, ſhe having married without the conſent of the executors, and contrary to the direction of his will; and likewiſe to relinquiſh the legacies under the will of the mother. The executors under the will of the father were all dead before the marriage of *Mary Graydon*; and *J. Graydon*, appointed executor under the will of the mother, and who was to give his conſent to *Mary Graydon*'s marriage, recounced the executorſhip in the moſt formal manner in the eccleſiaſtical court. The croſs bill was brought by *Mary Graydon*, as a feme ſole, againſt the plaintiff in the original cauſe, as one of the deviſees over under both wills, in caſe of *Mary Graydon*'s marriage without conſent; and likewiſe againſt Mr. *Timewell*, who took out adminiſtration to the mother, on the executor's renouncing; and alſo adminiſtration *de bonis non* to the father. Lord *Hardwicke* diſmiſſed the croſs bill, there being abundant evidence of *Mary Graydon* being married to *Hicks*. As to the original bill, his Lordſhip held *Mary Graydon* entitled to the 1000*l.* under her father's will, the condition upon which it was given being ſubſequent (*a*), and having become impoſſible to be performed by the death, before her marriage, of the perſons whoſe

Graydon v. Hicks, and Graydon v. Graydon, 2 Atk. 16.

(*a*) So, Peyton v. Bury, 2 P. Wms. 626.

whoſe conſent was required; but he declared that the portion given under the mother's will was forfeited by the marriage without conſent.

Holmes v. Lyſaght, 4 Br. P. C. 103.

J. S. bequeathed to his daughter in theſe words: "*Item*, I leave and "bequeath to my ſaid daughter *Anne* 2000*l.*, to be paid her on the day of "her marriage, or at the age of twenty-one years, which ſhall firſt hap-"pen; and in caſe my ſaid daughter *Anne* ſhall marry with the conſent of "*R. S.*, *&c.* or any two of them, I leave her the additional ſum of 2000*l.* "more, otherwiſe not." *Anne* married without the conſent required in the will, and to a perſon to whom her father had expreſſed ſtrong objections in his lifetime. On a bill brought by her and huſband for both theſe legacies, it was decreed, that ſhe was entitled to the firſt, but had forfeited the ſecond. This decree was affirmed in the Houſe of Lords by conſent of parties.

Underwood v. Morris, 2 Atk. 184.

A father by his will gave the plaintiff *Agnes* his daughter 3000*l*, payable at her age of twenty-one, or day of marriage, if ſhe married with the conſent of the executors; provided, if either of the legatees died before their legacies became payable as aforeſaid, then ſuch legacy was to be divided between the ſurvivor of her brother and ſiſters. *Agnes* married the plaintiff *Underwood* at her age of fifteen, without the conſent of the executors. The queſtion was Whether as *Agnes* was married without the conſent of the executors, this deviſe was not to be conſidered as a deviſe over; and that, conſequently, the legacy will not veſt unleſs ſhe arrive at her age of twenty-one? But Mr. Juſtice *Parker* ſaid, as this is a mere perſonal legacy, he was of opinion, it was a deviſe *in terrorem* only, and that it veſted abſolutely in the daughter; and that marriage, one of the contingencies upon which it became payable, having happened, the executors muſt be decreed to pay it to the plaintiffs.

Hemmings v. Munkley, 1 Br. Ch. Rep. 303.

W. C. by his will gave five-ſixteenth parts of the reſidue of his perſonal eſtate to truſtees, to lay out the ſame, and to pay the dividends, *&c.* to his daughter *Rachael*, on her attaining her age of twenty-eight years, or day of marriage, which ſhould firſt happen, provided his daughter ſhould marry with the approbation of his ſaid executors, or ſuch of them as ſhould be then living. He gave the remaining eleven ſixteenth parts among his other four children; and in caſe either of his ſons or daughters ſhould die before his, her, or their ſhare or ſhares ſhould become payable, then, the part or ſhare, parts or ſhares, of him, her, or them ſo dying, ſhould go and be paid among all the reſt of his children who ſhould then be living, and the iſſue of a deceaſed child or children (if any) *per ſtirpes*, and not *per capita*, at the ſame time as their original ſhares would become due. *Rachael* married *J. C.*, one of the defendants, without the conſent of the executors, and had a child, (to whom *J. C.* adminiſtered,) and died under twenty-eight. It was inſiſted for the plaintiffs, that the portion never veſted in *Rachael*, ſhe marrying without conſent, and not attaining twenty-eight years of age. On the other ſide it was argued, that the portion veſted on the marriage, notwithſtanding the proviſo, which was only *in terrorem*, for which was cited the above caſe of *Underwood* v. *Morris*: and that, whether the condition be precedent or ſubſequent, it will not prevent the legacy from veſting, unleſs it be given over. But Lord *Loughborough* doubted the authority (*a*) of *Underwood* v. *Morris*, and decreed, that it did not veſt: but there being five children of the teſtator, he held the infant child of *Rachael* to be entitled to one-fifth of the legacy, under the deviſe over, (as being "the iſſue of a deceaſed child,") and decreed the ſame to her father in her right.

(*a*) So, by Lord Thurlowe—— "The caſe "of Under-"wood v "Morris, "by Baron Parker, does not ſeem to have been cloſely conſidered. I agree with the late Lords "Commiſſioners in denying the authority." 2 Br. Ch. Rep. 488.

A teſtator

A teſtator gave to *M.* 8000*l.*, and to her ſiſter *S.* 5000*l.*, which ſeveral ſums were to be paid to them at their ages of twenty-one, or day of marriage, which ſhould firſt happen, provided they married with the conſent of their father and mother, or the ſurvivor of them; otherwiſe their legacies ſhould ſink into his perſonal eſtate. And it was the teſtator's will, that if the ſaid *S.* and *M.*, or either of them, ſhould thereafter marry with any perſon or perſons whomſoever, without the conſent of their father and mother, and the truſtees named in the ſaid will, or the greater number of them living, ſignified under their hand; that ſuch of them ſo marrying ſhould have or receive no more benefit or advantage by his will, or any thing therein contained, than if they were actually dead, or not named in his ſaid will. Lord *Hardwicke* held, that the legacies veſted in *M.* and *S.* on their attaining their age of twenty-one, and though either of them afterwards married without conſent, yet it would be of no effect; for the marriage with conſent muſt be conſtrued to relate to the time of the legacies veſting. Pullen v. Ready, 2 Atk. 587.

The teſtator having only one child, a daughter, deviſed all his real and perſonal eſtate to *J. S.* in truſt, after paying an annuity to his widow, for his daughter, if ſhe married with the conſent and approbation of *J. S.*; but if ſhe ſhould marry without ſuch conſent and approbation, then the premiſes to go to, *&c.* The daughter married within a month after the teſtator's death without even aſking the conſent of *J. S.*, but about eleven months after her marriage, ſhe obtained his approbation in writing. The queſtion being, whether ſhe had forfeited her eſtate or not; Lord *Hardwicke* held, that he was at liberty to conſtrue the word *and* to mean *or*, which he accordingly did, and then the ſubſequent approbation was ſufficient, and the previous conſent was not neceſſary. He alſo held, that ſuppoſing the condition had made conſent neceſſary, yet, that notice to the daughter, being heir at law, was neceſſary to work a forfeiture. Burleton v. Humfrey, Ambl. 256.

A teſtator deviſed to truſtees, upon truſt for his only ſon for life, then to the uſe of ſuch woman as ſhould be his ſon's wife, at her ſon's death for her life; remainder to the iſſue of his ſon's body in tail; remainder to the teſtator's two daughters in fee: "Provided always, and it was his very will, true intent, and expreſs meaning, that in caſe his ſaid ſon ſhould marry with any woman not having a competent marriage portion, or without the conſent and approbation of the ſaid truſtees, their heirs and aſſigns, in writing under their hands and ſeals, to be executed in the preſence of two or more credible witneſſes firſt had and obtained; then his ſaid truſtees, and their heirs and aſſigns, ſhould ſtand and be ſeiſed to and for the uſe of his (the teſtator's) ſaid two daughters and their heirs for ever; any truſt, uſe, *&c.* notwithſtanding. And his will, true intent, and meaning was, and he did declare, that the ſaid proviſo and condition therein before expreſsly mentioned, was not intended by him, nor to be conſtrued or taken *in terrorem*; but *a condition*, for want of performance whereof in every reſpect, the ſaid lands, *&c.* ſhould in no caſe be veſted in ſuch wife of his ſaid ſon, nor the heirs of that marriage; but, on the contrary, that his ſaid truſtees and their heirs ſhould ſtand ſeiſed of the premiſes, to the only uſe and behoof of his ſaid two daughters and their heirs in manner aforeſaid." The court of *K. B.* held, that all clauſes and conditions in reſtraint of marriage, ought to be conſtrued with the utmoſt rigour and ſtrictneſs, againſt ſuch reſtraint, and in favour of the perſon attempted to be reſtrained: that the teſtator meant, that the ſon's complying with either part of the alternative ſhould be a performance of Long v. Dennis, 4 Burr. 2052. 1 Bl. Rep. 630. S. C.

the

the condition; and that therefore he had not incurred a forfeiture by marrying (as the ſpecial verdict found he had done) a woman, who, at the time of her marriage with him, had a competent marriage portion, though he married her without any conſent or approbation of the truſtees.

Knapp v. Noyes, Ambl. 662.

The teſtator bequeathed to each of his daughters 1500*l.*, to be paid to them reſpectively at the time of marriage with the conſent of his executors, whom he alſo made guardians of his daughters during their minority. There was likewiſe a clauſe in the will for their maintenance and education till their portions became payable. One of the daughters, having after attained twenty-one, died unmarried; and the queſtion was, Whether the portion ſurvived, that is, whether the time of payment was confined to the marriage? Lord *Camden*, after obſerving, that it was very unnatural for a parent to impoſe a conſent to a marriage during his daughter's whole life, ſaid, that, conſidering all the clauſes of this will, the portions muſt be underſtood to be payable at twenty-one, or marriage with conſent.

Elton v. Elton, 1 Wilſ. 159.

A. E. bequeathed the ſum of 1500*l.* to his grand-daughter, to be at her own diſpoſal, purſuant to the requeſt of his deceaſed daughter *E. D.*, in caſe ſhe married with the conſent and approbation of his ſon *E. J.* and his wife; and in caſe of their deaths before that time, then with the conſent and approbation of their truſtees, and not otherwiſe. The grand-daughter ſurvived the teſtator, but died at fourteen years of age, and unmarried. The legacy never veſted.

Garbut v. Hilton, cited *ibid.*

A teſtator bequeathed the plaintiff 200*l.*, provided ſhe married with the conſent of her father and mother, or the ſurvivor of them. The plaintiff brought her bill to have the legacy raiſed and paid to her; and the queſtion was, Whether ſhe muſt not be married before ſhe was entitled to have the 200*l.*? The Maſter of the Rolls was clearly of opinion, that there muſt be a marriage firſt.

Stackpole v. Beaumont, 3 Vez. jun. 89.

A teſtator deviſed his real eſtates to the eldeſt of his three natural daughters and her huſband for their joint lives, and the life of the ſurvivor, remainder to her ſons ſucceſſively in tail male; remainder to his next daughter and her huſband and iſſue male in the ſame manner; remainder to the youngeſt or ſuch perſon as ſhe ſhould firſt marry, (if under twenty-one, with the conſent of the truſtees,) for their joint lives, and the life of the ſurvivor, with like remainders. The teſtator alſo gave a rent-charge limited in the ſame manner to the ſecond, her huſband and iſſue male; and he gave a ſimilar rent-charge to the youngeſt, until ſhe ſhould marry, (under and with the reſtriction above-mentioned,) or for her life; and when ſhe ſhould marry as aforeſaid, upon the ſame truſts; and having given the ſecond daughter 10,000*l.* on her marriage, he gave the youngeſt a legacy of 10,000*l.*, payable, 5000*l.* upon her marriage, (with ſuch conſent as aforeſaid,) and 5000*l.* two years after. The youngeſt daughter married without the conſent of the truſtees, as required by the will. It was decreed, that ſhe was entitled to an eſtate for life in the rent-charge; but that her huſband was not. But it was alſo decreed, that ſhe was not entitled to the 5000*l.* payable upon her marriage with conſent, ſhe having married without conſent. Ld. Chancellour *Loughborough*, in giving judgment upon this laſt point, ſpoke as follows—"There can be no ground in the conſtruction of legacies for a diſtinction between legacies out of perſonal and out of real eſtate. The conſtruction ought to be preciſely the ſame. I do not ſee more importance in reality in the diſtinction between conditions precedent and ſubſequent. The caſe of all theſe queſtions is plainly this. In deciding queſtions that ariſe upon legacies out of land, the court very properly followed the rule that the common law preſcribes, and common ſenſe ſupports, to hold the condition

binding

blinding, where it is not illegal. Where it is illegal, the condition would be rejected, and the gift pure. When the rule came to be applied to perſonal eſtate, the court felt the difficulty upon the ſuppoſition, that the eccleſiaſtical court had adopted a poſitive rule from the civil law upon legatory queſtions, and the inconvenience of proceeding by a different rule in the concurrent juriſdiction, (it is not right to call it ſo,) in the reſort to this court inſtead of the eccleſiaſtical court upon legatory queſtions; which after the Reſtoration was very frequent, and in the beginning embaraſſed the court. Diſtinction upon diſtinction was taken to get out of the ſuppoſed difficulty. How it ſhould ever have come to be a rule of deciſion in the eccleſiaſtical court is impoſſible to be accounted for, but upon this circumſtance, that in the unenlightened ages, ſoon after the revival of letters, there was a blind ſuperſtitious adherence to the text of the civil law. They never reaſoned; but only looked into the books, and transferred the rules without weighing the circumſtances, as poſitive rules to guide them. It is beyond imagination, except from that circumſtance, how in a *Chriſtian* country they ſhould have adopted the rule of the *Roman* law with regard to conditions as to marriage. Firſt, where there is an abſolute unlimited liberty of divorce, all rules as to marriage are inapplicable to a ſyſtem of religion and law, where divorce is not permitted. Next the favor to marriage, and the objection to the reſtraint of it, was a mere political regulation applicable to the circumſtances of the *Roman* empire at that time, and inapplicable to other countries. After the civil war, the depopulation occaſioned by it, led to habits of celibacy. In the time of *Auguſtus*, the *Julian* law, which went too far, and was corrected by the *Lex Papia Poppæa* not only offered encouragement to marriage, but laid heavy impoſitions upon celibacy. That being eſtabliſhed as a rule in reſtraint of celibacy, (it is an odd expreſſion,) and for the encouragement of all perſons who would contract marriage, it neceſſarily followed, that no perſon could act contrary to it by impoſing reſtraints directly contrary to the law. Therefore it became a rule of conſtruction, that theſe conditions were null. It is difficult to apply that to a country, where there is no law to reſtrain individuals from exerciſing their own diſcretion as to the time and circumſtances of the marriage, their children, or objects of bounty may contract. It is perfectly impoſſible now, whatever it might have been formerly, to apply that doctrine not to lay conditions to reſtrain marriage under the age of twenty-one to the law of *England*; for it is directly contrary to the political law of the country. There can be no marriage under the age of twenty-one without the conſent of the parent. This teſtator places truſtees in the room of a parent; and gives *quoad* the marriage the authority to them. I am now called upon to pronounce, that this condition is bad, becauſe it is illegal to impoſe a condition in reſtraint of marriage. What: illegal here! I have committed this gentleman for marrying without conſent. It is impoſſible to ſay, that a condition has any ſtamp of illegality, impolicy, or impropriety, that does no more than add an extenſion of bounty to induce the parties to do that, which neglecting to do, the huſband becomes an object of the cenſure of this court, and liable to puniſhment. Therefore I am perfectly free in this court in a caſe, where the condition only operates up to the age of twenty-one, and requires no more than the general policy of the law and courſe of this court hold to be proper, to ſay, there is nothing illegal in ſuch a condition, and therefore not to determine that this legacy, which the teſtator directs to be paid only under certain circumſtances, ſhall be paid, not only though

" thoſe

" thoſe circumſtances have not happened, but where every thing has been
" done directly in oppoſition and defiance of the directions of the will.
" Confined therefore to ſuch caſes, where the reſtraint operates only up
" to the age, till which by the law and policy of the country conſent is
" neceſſary, I have no difficulty to ſay, there is no authority to lead the
" court to pronounce a propoſition ſo repugnant to that law, as that ſuch
" a condition is invalid. In *Scott* v. *Tyler* there is a very accurate though
" not a very extended opinion of Lord *Thurlowe*, which carries conviction
" along with it, The queſtion is not whether any forfeiture has been in-
" curred; but whether the parties, to whom the legacy is given, have put
" themſelves in a ſituation to anſwer that deſcription of the perſon to take.
" There is no gift here but in the direction to pay; for I cannot ſtop in the
" middle of a ſentence. He gives her 10.000*l.*; that is in effect two ſums
" of 5000*l.*, one payable upon her marriage with conſent. She has not
" married with conſent. She has married without it. Can ſhe claim the
" 5000*l.* under the will? I do not ſee the great importance of the diſ-
" tinction upon a bequeſt over of the legacy. It is one of the points that oc-
" curred to judges ſitting here, to deliver them from the difficulty ariſing
" from the rule of the civil law, adopted without ſeeing the ground and the
" reaſon of applying it to this country under different circumſtances. The
" authorities ſtand ſo well ranged, that the court would not appear to act
" too boldly, whichever ſide of the propoſition they would adopt; but I
" have always upon repeated conſideration thought, there was not much
" reaſon in any of the determinations founded upon a rule applicable to the
" laws of the country, from which it is taken, but not to this country, and
" rejecting theſe conditions as inapplicable to a country which adopts them
" as to real property, and where the reſtraint impoſed is analogous to the
" political regulation of the country upon the ſubject; and here I am deci-
" ding upon the plaineſt circumſtances; for the condition is reſtrained to
" the age, before which by the law of this country a marriage cannot be
" had without conſent. Therefore declare her not entitled to this le-
" gacy,"

Crommelin v. Crommelin, 3 Vez. jun. 227.

A teſtator deviſed his eſtates to truſtees to ſell, and to ſtand poſſeſſed of the money ariſing from the ſale in truſts for his natural daughters *M.*, *I.*, and *H.* equally; one moiety to be paid when they ſhould reſpectively attain the age of 24, or be married with the conſent and approbation of the truſtees, which ſhould firſt happen; but if any ſhould marry without ſuch conſent under 24, ſuch moiety to be paid to her or her huſband on her attaining 24, or when ſhe, if living, would have attained that age, or to the executors, *&c.* of her huſband; and the other moiety to be paid to his daughters reſpectively when they ſhould attain 28, or be married with ſuch conſent and approbation as aforeſaid. But in caſe any of his daughters ſhould marry before 28 without ſuch conſent, then, as to a moiety of her or their ſhare or ſhares, upon truſt for her or their ſeparate uſe for life; and after the death of ſuch daughter or daughters for her or their children; and if there ſhould be none, for the other daughter or daughters, her or their children, ſubject to the ſame reſtrictions with regard to their marrying, and upon the ſame truſts as the original ſhares, and in caſe all his daughters ſhould marry without ſuch conſent, and die without children, then, as to all the ſaid moieties, in truſt for his next of kin. Provided that if any of his daughters ſhould marry under 21 with ſuch conſent, it ſhould be lawful for the truſtees to pay one moiety to her huſband, or to make a ſettlement; and if any ſhould

die

ie before 24 or marriage, the whole of her ſhare, and if after 24, and efore 28 or marriage, the remaining moiety ſhould go to the ſurvivors qually, or the ſurvivor, their or her executors, &c. to be paid at the ſame ime, ſubject to the ſame reſtrictions with regard to marrying, and upon the ame truſts in caſe of marriage without ſuch conſent as aforeſaid, as the origi- al ſhares: and in caſe all his daughters ſhould die before they ſhould reſpec- ively attain the age of 28, or be married after 24 with ſuch conſent, ſo that he whole or part of the ſaid reſidue ſhould not be abſolutely diſpoſed of, hen in truſt for his next of kin. *I.*, one of the daughters, in the teſta- or's lifetime married with the approbation of one of the truſtees under the will. Her father on being appriſed of her marriage appproved of it Soon fter her father's death, her huſband being then dead, ſhe married the laintiff, in the preſence and with the conſent of the ſame truſtee. It as adjudged, that having married, and being then a widow, ſhe was not ntended to be ſubject to the conditions of the will.

(G) Of Specifick and Pecuniary Legacies, and the Difference between them.

THERE are two kinds of gifts included under the deſcription of ſpeci- fick legacies. Firſt, when a particular chattel is ſpecifically deſcrib- ed, and diſtinguiſhed from all others of the ſame kind. Secondly, ſome- hing of a particular ſpecies, which the executor may ſatisfy by delivering omething of the ſame kind, as an horſe, &c. The firſt kind may be more properly called an individual legacy, and if ſuch, ſo bequeathed, is not found among the teſtator's effects, it fails; or, if given firſt to *A.* and then to *B.*, they muſt divide it; or, if it is diſpoſed of in the life of the teſta- tor, it is an ademption of ſuch legacy. *Per* Lord Hardwicke in Pearce v. Snaplin, 1 Atk. 417.

Although it may be difficult to make pecuniary legacies ſpecifick, yet money may be ſo as diſtinguiſhed to be the ſubject of a ſpecifick bequeſt, as money in a certain cheſt (*a*), &c.; or a particular ſum of money in the hands of *B.* (*b*); or a particular debt (*c*). So, a bequeſt of ſtock in a particular fund is ſpecifick (*d*); or a legacy to be paid out of the profits of a farm which the teſtator directs to be carried on (*e*). So, a bequeſt of part of a ſpecifick chattel may be equally a ſpecifick legacy, as, where the teſtator gives part of the debt due to him from *A.* (*f*); or part of his ſtock in a particular fund (*g*).

(*a*) Lawſon v. Stitch, 1 Atk 508. (*b*) Hinton v. Pinke, 1 P. Wms. 540. (*c*) Ellis v. Walker, Ambl. 310. Aſhburner v. Macguire, 2 Br. Ch Rep. 108. (*d*) Aſhton v Aſhton, Ca. temp. Talb. 152. Avelyn v. Ward, 1 Vez. 424. Drinkwater v. Falconer, 2 Vez. 623. (*e*) Mayet v. Mayet, 2 Br. Ch. Rep. 125. (*f*) Heath v. Parry, 3 Atk. 103. (*g*) Sleech v. Thorington, 2 Vez 563.

But a mere bequeſt of *quantity*, whether of money, or of any other chattel, is a general legacy, as of a quantity of ſtock (*b*); and where the teſtator has not ſuch ſtock at his death, it is a direction to the executor to procure ſo much ſtock for the legatee (*a*). Perſonal annuities given by will (*b*) are general legacies, though this ſeems to have been doubted in one caſe (*c*).

(*b*) Purſe v. Snaplin, 1 Atk. 414. Sleech v. Thoring- don, 2 Vez. 562. Bronſ- don v. Win- ter, Ambl. 57. Biſhop of Peterſborough v. Mortlock, 1 Br. Ch. Rep. 565. (*a*) Partridge v. Par - ridge, Ca temp. Talb. 227. Bronſdon v. Winter, *ubi ſupra.* (*b*) Hume v. Edwards, 3 Atk. 693. Lewin v. Lewin, 2 Vez. 417. (*c*) Peacock v. Monk, 1 Vez. 133.

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(*A ſpecifick legacy*) But where the reverſion of a leaſehold eſtate for three lives was deviſed to *A.* for life, afterwards to *B.*, and then to *B.*'s ſon, and a creditor of the teſtator filed a bill to charge the eſtate with his debts, Lord King ſaid, that as this was a ſpecifick deviſe, all the reſt of the teſ- tato.

tator's perſonal eſtate not ſpecifically deviſed, muſt be firſt applied to pay the debts; and if there were any other ſpecifick deviſe, the ſame ought to come in average with this, and pay its proportion; but if that would not ſerve, all muſt be ſold to pay the teſtator's debts. Duke of Devon v. Atkins, 2 P. Wms. 381.

(H) Of abating, refunding, and giving Security for that Purpoſe.

Davis v. Davis, Vin. Abr. tit. Deviſe (Qd), 35.

ON a bill by an executor againſt a legatee to refund a legacy voluntarily paid him by the executor, the aſſets falling ſhort to ſatisfy the teſtator's debts; it was decreed by Sir *J. Jekyll*, Maſter of the Rolls, that the defendant ſhould refund to the plaintiff; and that an executor may bring a bill againſt a legatee to refund a legacy voluntarily paid him, as well as a creditor; for the executor, paying a debt of the teſtator out of his own pocket, ſtands in the place of the creditor, and has the ſame equity againſt a legatee to compel him to refund.

Anon. 2 P. Wms. 594.

But if an executor had at firſt enough to pay all the legacies, and afterwards by his waſting the aſſets, occaſions a deficiency, in ſuch caſe a legatee who has recovered his legacy, ſhall not be compelled to refund, but ſhall retain the advantage of his legal diligence, which the other legatees neglected by not bringing their ſuit in time, before the waſting by the executor; whereas if the other legatees had commenced their ſuit before ſuch waſte committed, they might have met with the like ſucceſs, *et vigilantibus, non dormientibus jura ſubveniunt.*

Walcot v. Hall, 1 Cox's P. Wms. 49c. note.

J. P. by will gave to the plaintiff 50*l.*, to be paid to him at his age of twenty-one years, or day of marriage, the ſame to be put out at intereſt in the name of his executor, *C. P. H.*, *&c.* He then diſpoſed of the reſidue, and appointed *C. P. H.* executor, who proved the will, retained the 50*l.* for the plaintiff's legacy, and afterward became bankrupt, and obtained his certificate. The plaintiff having attained his age of twenty-one, filed his bill againſt the executor and the reſiduary legatees for payment of the legacy. The Maſter of the Rolls, Sir *L. Kenyon*, ſaid, the reſiduary legatees could not be liable; that the diſtinction was between the caſes where there was originally a deficiency of aſſets, and where the executor had waſted them; in the former caſe, a legatee who had more than his proportion, muſt refund to the others; but here, the reſiduary legatees had received no more than they were entitled to, and the executor was therefore the only perſon to be reſorted to. And his honour, being of opinion, that this demand, as againſt the executor, was barred by his certificate, diſmiſſed the bill.

In Orr v. Kaines, 2 Vez. 194. Sir J. Strange is reported to uſe theſe words: "The rule of which there are ſeveral caſes in Eq. Ca. Abr. is, that whenever an executor pays a legacy, the preſumption is, he has ſufficient to pay all legacies, and the court will oblige him, if ſolvent, to pay the reſt, and not permit him to bring a bill to compel the legatee, whom he voluntarily paid, to refund; *although, if the executor proves inſolvent, ſo that there is no other way, the court will admit a bill by the other legatees to compel that legatee to refund.*"

(K) Of the Payment of Legacies: And herein,

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(*An executor*) (*a*) The receipt by 36 Geo. 3. c. 52. muſt be on a ſtamp for every ſpecies of legacy. See tit. Stamps.

Jones v. Tuberville, 2 Vez. jun. 11. But if the legatee allege that he knew not of his right, it ſeems, the preſumption cannot be raiſed. Ord. v. Smith, Sel. Ca. Ch. 11.

Mar.

Mrs. *Paget* gives a legacy of 100*l.* to each of the three children of Mr. *Philips*, and makes the defendant her executor, leaving him the bulk of her eſtate, provided he pays the three legacies of 100*l.* within a year after her death, purſuant to her will. The defendant, within the time, pays into the children's own hands their legacies: the eldeſt of them was ſixteen years old at the time, the next fourteen, and the youngeſt nine only. The children now brought their bill againſt the defendant, to be paid their ſeveral legacies, ſuggeſting that their father had embezzled the money paid by the defendant during their infancy, and was inſolvent, and that this was a fraudulent payment to the father, and therefore it muſt be paid over again. The defendant in his anſwer denied he knew this money ever came to the father's hands. Lord Chancellour aſked the counſel for the defendant, if they knew any inſtance where an executor paying ſo large a ſum as 100*l.* into the hands of minors, has been allowed ſuch payments? Indeed, in caſes where legacies have been very ſmall, the payment has been allowed by the court. But in this caſe, notwithſtanding the ſum is above 100*l.*, yet, as the payment by the executor to the children themſelves is ſo fully proved, and not at all controverted by the plaintiffs, and their loſing the benefit of it is owing to the negligence and inſolvency of the father, his Lordſhip ſaid, he would not ſtrain the rules of the court to make the executor pay it over again; eſpecially, as he made this payment to ſave a forfeiture, it being an expreſs condition of his own taking under the will, that he ſhould diſcharge theſe legacies within a year after Mrs. *Paget*'s death. But the next day, the Lord Chancellour ſaid, that, upon looking into the caſes, he found this a very doubtful point; and unleſs the defendant would agree to give the plaintiffs ſomething, he would not determine it, without taking time to conſider of it. The defendant, upon this recommendation of the court, agreed to pay in 50*l.* to be divided between the three plaintiffs; and each ſide were to abide by their coſts; and it was made part of the decree, that the 50*l.* were paid by conſent of all parties; and his Lordſhip directed each of the plaintiffs, upon receiving their reſpective ſhares, to releaſe their legacies under the will. The caſe of *Dagley* v. *Tolfery*, he ſaid, muſt have ſome other circumſtances; for the rule is laid down too ſtrictly, that in all caſes where executors pay infants' legacies to fathers, in order to deter executors from ſuch payments, they muſt all be paid over again. Lord *Cowper* confirmed the decree of the Maſter of the Rolls in that caſe; but he ſeems, even by this report of the caſe, to have had a remorſe of judgment at the time; for on looking into the regiſtrar's office, it appears, his Lordſhip ordered the depoſit to be divided between the parties.

Philips v. Paget, 2 Atk. 80

Supr. 529.

In *Rotheram* v. *Fanſhaw*, Lord *Hardwicke* ſaid, *arguendo*, that where a ſuit is inſtituted in the ſpiritual court for an infant's legacy, by a father, to have it paid into his hands, the court will grant an injunction; becauſe it will not allow the money of an infant to come into the father's hands.

3 Atk. 629.

B. T. by will gave ſeveral pecuniary legacies, and among the reſt, "to *Thomas Cooper* of —— *ſtreet*, *Weſtminſter*, one hundred pounds, to be equally divided between himſelf and his family," and made —— *Winſtanley* and the defendant (his wife) executors, and the defendant reſiduary legatee, and died in 1768. In *November* 1769 *Winſtanley* paid the legacy to *Thomas Cooper*, who, at that time, had a wife and ſeven children, ſix of whom were adults, and the ſeventh an infant. The father lived till 1775, when he died, no demand having been made by any of his children of this legacy. *Henrietta*, the youngeſt child, came of age

Cooper v. Thornton, 3 Br. Ch. Rep. 96.

in 1777. In 1784 ſhe and the other children made a demand of this legacy; and in 1779 they filed their bill (after the death of *Winſtanley*) againſt the defendant as executrix and reſiduary legatee of the teſtator, for the legacy, inſiſting, that the payment to *Thomas Cooper* was not a good payment, and that, therefore, the defendant was liable to pay it over again. The Maſter of the Rolls ſaid, it is argued on the part of the plaintiffs, that the payment to the father of legacies given to his children, who are not of age, is a bad payment. In early times, it appears from the caſe of *Holloway* v. *Collins*, in the 26th and 27th *Car.* 2. 1 *Eq. Abr.* 300. that the payment to the father of a legacy to the child, was held good: but ſince the caſe of *Dagley* v. *Tolfery*, the idea of the court has been, that it is not a good payment: and that even in the caſe of an adult child, it is not good, unleſs done by the conſent of the child, or made ſo by a ſubſequent ratification. In that caſe the rule was laid down, and was laid down very harſhly, as the teſtator, on his death-bed had given directions that the legacy ſhould be paid to the father, and there had been mutual accounts between the father and the child, and an acquieſcence for near fifteen years. It appears, from the regiſtrar's book, that evidence was read, that the legacy was ordered by the teſtator to be paid to the father: but that circumſtance can make no difference, as I doubt much whether ſuch evidence ought to be read. It would be a dangerous thing to admit evidence that a legacy given to one perſon was ordered to be paid to another. From the regiſtrar's book of the year 1714, fol. 414, it appears, thatthe defendant was decreed to pay the plaintiff his legacy with coſts, but no intereſt; and from the book *A.* of the year 1715, fol. 40. that an appeal being brought before Lord *Cowper*, the decree was affirmed; but as it was thought a hard caſe, the depoſit was divided. I lay the matter out of the caſe, that it was directed to be paid to the father; and although it was ſo directed, and the money paid, and although the ſon acquieſced a great length of time, it ſhould be ſtill competent to him or his repreſentatives to demand it; becauſe a contrary determination would encourage ſuch payments, and becauſe the ſon muſt acquieſce, or purſue his father; or, which is the ſame thing, by bringing his ſuit againſt the executor, occaſion his purſuing the father; and that I take to be the ground on which Sir *J. Trevor* and Lord *Cowper* went; and if the legatee did not ſtand in that relation to the perſon to whom the legacy was paid, the bill would be diſmiſſed. The only other caſe is *Philips* v. *Paget (ſupra)*. It went off upon a compromiſe, ſo that we have no account of it but from Mr. *Atkins*'s book. There, the executor was miſled by the teſtator's directions to pay the legacies within a given time. Then let us conſider the circumſtances of the preſent caſe, for I do not mean to interfere with the doctrine of *Dagley* v. *Tolfery*, that a payment to the father is bad. The preſent caſe is a ſtronger caſe for the executors than that of *Philips* v. *Paget*. Here, after ſeveral other legacies, all with the words "I give to," &c. is the following, "*To* Thomas Cowper, *to be divided between himſelf and* "*his family*." I ſhould do the harſheſt thing in the world to make the executor pay it over again. It is true, the teſtator has not inſerted the words *by him to be divided.* If he had, there could not have been a doubt: but if he meant the executors to divide, why did he mention *Thomas Cowper?* What did he mean by the word *himſelf?* That can only be applicable, if *Thomas Cowper* is to divide. Then it is not only to him and his children, but to his *family*, which is much more extenſive. It is to be paid to him, and he, as a truſtee, is to divide it. If any of the children had

Supr. 429.

Supr. 429.

ad called upon him to have it ſecured, it muſt have been ſo. Therefore, f in *Philips* v. *Paget*, the executor was diſcharged, *a multo magis* he muſt e ſo here. Suppoſing it to be paid by *Winſtanley* in the manner that was rong; for I muſt allow it to be wrong, if it was not meant to be paid to *Thomas Cowper*; *Cowper* died in 1775; from that time the plaintiffs ight have called upon the executor without his being able to purſue the ther. In 1777, the youngeſt came of age; why did they not then file eir bill againſt *Winſtanley*, who did not die till after this bill was filed? or ſix years they took no ſtep. If they had brought their bill, they ight have recovered againſt *Winſtanley*. But, under the circumſtances f the caſe, I believe it was well paid, and that it was intended, that he ould receive it. If one was to give a legacy to the ſenior ſix clerk, to e divided between himſelf and the other ſix clerks, I think it ſhould be id to the ſenior, and the executor not be put to inquire, who the other x clerks were. And that if it had been the caſe of a bequeſt of goods *A.* to be divided between himſelf and family, *A.*, with the aſſent of the xecutor, might bring trover for the goods. His Honour therefore diſ-iſſed the bill.

Where a teſtator bequeathed his perſonal eſtate to truſtees, in truſt to y *(inter al.)* 500*l.* to an infant, and directed, that ſuch of his legatees might be infants at the time of his deceaſe, ſhould receive intereſt at e rate of 5*l. per cent.* till their reſpective legacies ſhould be paid, which e deſired might be to the boys at the age of 21 years, &c.; it was holden, at the executors could not juſtify paying any part of the principal before at time to the infant, or to his uſe, except for expreſs neceſſaries. Davies v. Auſten, 3 Br. Ch. Rep. 178.

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(*But where A.*) The rule ſeems to be this—If a legacy be payable at 21, and the child die, his preſentatives can not claim till the time when the child would have arrived at 21, if the legacy es not bear intereſt, Harriſon v. Bickele, 1 Str. 238. Roden v. Smith, Ambl. 588., but, if it e with intereſt, they may claim immediately. Green v. Pigot, 1 Br. Ch. Rep. 105. Fonnereau Fonnereau, 1 Vez. 118.

A teſtator gave to *J. S.* the ſum of *l.* payable at 21, and in the ean time that he ſhould have the yearly ſum of *l.* which did not mount to the intereſt of the legacy given to him. *J. S.* died under 21, nd his executors demanded the legacy preſently. But it was holden at the ouncil, unanimouſly, that the executors of the legatee ſhould wait for eir legacy until ſuch time as their teſtator ſhould, in caſe he had lived, ave attained 21, it being unreaſonable, that the executors of *J. S.* ſtand-g in his place, ſhould be in a better caſe than *J. S.* himſelf would have en, had he been living; and it was to be preſumed, that the firſt teſta-r had made a computation of his eſtate, and conſidered when it would eſt bear and allow of the payment of this legacy; and there could be no eaſon given, why an uncertain accident ſhould accelerate the payment of is legacy before the time which was at firſt intended for that purpoſe. Cheſter v. Painter, 2 P. Wms. 335.

One, having ſeveral daughters, charged his lands with 1000*l.* to each them, payable at their reſpective ages of 22, or marriage, which ould firſt happen; and if any of his ſaid daughters ſhould die before her portion became payable, the ſhare of her ſo dying ſhould go to the ſurvi-ors. One of the daughters died before 22, or marriage, and another of e daughters attains 22 years of age. By the court—This portion ariſes t of lands, and it would be an hardſhip on the heir (whom equity fa-ours) to make it payable before the time it was intended. Now there can no reaſon to make the additional portion payable before the original Feltham v. Feltham. 2 P. Wms. 271.

one;

one; wherefore as the heir is to ſuffer by the raiſing of theſe portions, it may reaſonably be preſumed in favour of him, that the teſtator might compute within what time they might be paid, ſo that this additional portion ſhall not be paid before ſuch time as the daughter to whom it was given ſhould have come to the age of 22 years, if ſhe had lived.

Incledon v. Northcote, 3 Atk. 438.

A teſtator deviſed his real eſtate, and a reſidue of his perſonal eſtate in truſt for payment of all his debts, and ſubject thereto, for raiſing 5000*l.* for ſuch child or children of his body iſſuing, as ſhould attain 21, to be paid to ſuch child or children, if but one, but if more than one, to be divided between them. Though the 5000*l.* were given to ſuch children of the teſtator's body as ſhould attain the age of 21, and, conſequently, the legacy was not veſted, yet, Lord *Hardwicke* decreed intereſt. In the caſe of ſtrangers, he ſaid, whether the legacy be given abſolutely, and payable at 21, or not given until 21, the legatees can have no intereſt in the mean time; but in either of theſe deviſes, where they are given to children, the court will direct intereſt for their portions immediately; and it has been done frequently.

Pearle v. Greenbank, 3 Atk. 716.

A teſtatrix bequeathed to her daughter 100*l.* a-year, until the age of [illegible] years, and after, the further ſum of 50*l.* a-year till ſhe attained the age of [illegible] *the ſaid ſums to be applied by her executors for the education and maintenance of her ſaid daughter according to their diſcretion.* She alſo bequeathed to her ſaid daughter 8000*l.* to be paid her when ſhe ſhould attain the age of [illegible] years, but if her ſaid daughter ſhould die before the ſaid age, without iſſue living at her death, then ſhe bequeathed the ſaid 8000*l.* to, *&c.* Lord *Hardwicke* was of opinion, that the daughter was not entitled to the intereſt of the 8000*l.* The general rule is, he ſaid, where legacies are given payable at a certain time, they carry no intereſt, for intereſt is for delay of payment, and, conſequently, till the day of payment comes no intereſt is demandable. But I admit, where the legacy is given by a father to a child, though the legacy is not payable but at a certain time, yet the court allows intereſt. But in all theſe caſes, the ground the court goes upon, is giving intereſt by way of maintenance. Here, the teſtatrix has allotted maintenance for her daughter from the general fund of her perſonal eſtate. There is another thing obſervable, the contingency in the will of the daughter's dying before 21. I agree it is a condition ſubſequent, but ſtill it ſhews the view of the teſtatrix, and that it might never be her daughter's, and therefore to give her intereſt would be contrary to the intention of the teſtatrix. There are ſeveral caſes where the court has made a great ſtretch to give children intereſt on legacies, particularly *Acherley* v. *Vernon*, 1 *Wms* 783. but that went upon particular circumſtances. Therefore, I am of opinion ſhe can have no more intereſt than the maintenance in the mean time.

Bilſon v. Sanders, Bunb. 240 Ca. Ca. in Chan. 72.

A legacy was given to an infant, the teſtator having a great deal of money in bank ſtock. The executor was reſiduary legatee. A bill was brought in the Exchequer for the legacy. And the queſtion was, Whether it ſhould bear intereſt, and from what time? Chief Baron *Pengelly* and Baron *Hale* it is a certain rule, that where a fund is certain, as where charged on land it ſhall bear intereſt, becauſe it plainly appears the rents are received: the fund on which it is charged produces a profit here, it is equally certain and therefore ſhould bear intereſt, and ſhould be from the teſtator's death. But this was oppoſed by *Carter* and *Comyns*, Barons, that it ſhould only bear intereſt from a year after the teſtator's death; for as legacies are to be paid after debts, the executor has that time to inquire, till which time [illegible]

are not payable, ſo not to bear intereſt: which was agreed. A difference was offered to be made, that as there was a legacy to an infant, it could not be ſafely paid, and therefore could not bear intereſt. To which it was anſwered by the Chief Baron, that it might be ſafely paid into the hands of an infant, having proper evidence of the payment, as in *Wentworth*'s *Executor*, 313. And by *Carter*; it may be paid into the hands of the guardian having evidence: but if he takes ſecurity from the guardian which ſhould prove defective, there, as he doth not rely on the ſecurity the law gives, he muſt depend on that taken at his peril.

Butler v. Freeman, 3 Atk. 58.

The grandfather of the plaintiff, by will, after directing his debts and legacies to be paid, gives all the reſt and reſidue of his perſonal eſtate to his grandſon the plaintiff at his age of 21, and if he die before that age, then to the defendant *Freeman*, whom he makes his executor. The plaintiff brought his bill for the intereſt of the reſidue, to be paid to him during his infancy. The defendant *Freeman* by his anſwer inſiſted, that the plaintiff is not entitled to it, unleſs he attains his age of 21: but that it ought to accumulate: and if the plaintiff dies before 21, that it will belong to the defendant equally with the reſidue. The father of the plaintiff inſiſted, that the reſidue muſt be confined to what the teſtator left at the time of his death, and that the intereſt made after his death ought to be conſidered as an undiſpoſed part, and go to him as next of kin to the teſtator, according to the ſtatute of diſtribution: or if the court ſhould be againſt him in this point, that then he is entitled to receive it for the maintenance of the plaintiff. By the Lord Chancellour *Hardwicke:* I am of opinion, that the plaintiff is not entitled to the intereſt that ariſes from this reſidue; and though the words *reſt and reſidue* muſt be confined to what ſhall be found at the death of the teſtator, after his debts, funeral expences, and legacies are paid, yet, that the intereſt ought to accumulate till the plaintiff arrives at his age of 21, and as often as it amounts to a competent ſum to be placed out by a truſtee appointed by the Maſter. I am not quite ſo clear how the intereſt would go, if the accident ſhould happen of the plaintiff's dying before 21, whether to the repreſentative of the plaintiff, or to the defendant *Freeman*; but that is not neceſſary to be inquired into at this time. As to the father's claim, I am of opinion he has no right to the intereſt, becauſe the teſtator has given *all the reſt and reſidue* of his perſonal eſtate, ſo that he cannot be ſaid to have left any part undiſpoſed, and conſequently can have no title to it as next of kin under the ſtatute of diſtribution. For as the deviſe of the reſidue is contingent, it not veſting till the grandſon's age of 21, the intereſt is ſo likewiſe, and muſt accumulate in the mean time; nor can the father by the rules of this court entitle himſelf to it as maintenance for the infant, becauſe it is given by a grandfather to a grandſon upon a contingency of attaining his age of 21; and as nothing is ſaid how the produce of it ſhall be applied, he is not entitled as a grandſon to be maintained out of the produce. The law of nature obliges only fathers to maintain their children; and unleſs the child, from the mean circumſtances of the parent, is in danger of periſhing for want, the court will not direct the intereſt that ſhall be made of a contingent legacy to be applied for that purpoſe: ſo, that unleſs the parent is totally incapable, or under particular circumſtances, as having a numerous family of children, and is bordering upon neceſſity, the law of the land and of nature make it incumbent on the parent to maintain his child. In the caſe of *Acherley* and *Vernon*, 1 *P. Will.* 783, where the teſtator Mr. *Vernon* had left 6000*l.* to the plaintiff his niece, to be paid to her at her age of 21, and ſhe inſiſted that the intereſt of this money ought to be allowed

lowed for her maintenance; Lord *Macclesfield* was of opinion, that the interest in that case ought to follow the principal, for it was a vested legacy and payable at 21. But, there, it was a sum of money separated and detached from the rest of the estate, and a vested legacy; here, it is a contingent one, and not a specifick sum, but of the residue of his personal estate, which makes a difference between the cases; and the father likewise in the present case is possessed of a good estate and in considerable circumstances. Therefore his Lordship decreed the interest which has arisen upon the residue of the testator's personal estate since his death, or which may arise, to be paid into the hands of a trustee, to be laid out in real or government securities as often as it shall amount to a competent sum.

Heath v. Perry, 3 Atk. 101.

The testator by his will gave 1000*l.* a-piece to five brothers and sisters (but who were no relations to him), to be paid to them at their respective ages of 21, in case they should respectively attain that age, and not otherwise; and if any of them should happen to die before they attain their respective ages of 21, that then and in such case the legacy or legacies of 1000*l.* so given to them respectively should be void. The legatees brought a bill for interest on their legacies. By Lord *Hardwicke:* Cases of this kind, how far a legatee, who is not entitled to the payment of the legacy immediately, shall have interest in the mean time, depend upon particular circumstances. Some upon relationship, some upon the necessities of legatees, and most of them upon the particular penning of wills; and there is hardly one case which can be cited that is a precedent for another. Some things are certain in these cases: for if a legacy is given generally at marriage or at 21, then the vesting and time of payment are the same, and shall not vest till marriage, or 21. To go one step further where a legacy is actually vested, as if given to an infant payable at 21, yet it shall not carry interest, unless something is said in the will that shews the testator's intention to give interest in the mean time. But all these cases are subject to this exception, if it is in the case of a child; for then let a testator give it how he will, either at 21, or at marriage, or payable at 21, or payable at marriage, and the child has no other provision, the court will give interest by way of maintenance, for they will not presume the father so unnatural as to leave a child destitute. But in the present case, the legatees are mere strangers to the testator; and nothing shall be taken out of the estate for their benefit during their nonage.

2 P. Wms. 26.

It hath been resolved, that if one gives a legacy charged upon land which yields rents and profits, and there is no time of payment mentioned in the will, the legacy shall carry interest from the testator's death, because the land yields profit from that time.

So, Lloyd v. Williams, 2 Atk. 108.

But if a legacy be given out of the personal estate, and no time of payment mentioned in the will, this legacy shall carry interest only from the end of the year after the death of the testator.

If a legacy be given generally by a parent to a child, whether by way of portion or not, the court will give interest from the death to create a provision for its maintenance; and if payable at a certain age and the child not otherwise provided for, the court will give interest in the mean time before that age. 1 Vez 310.

If a legacy be given charged upon a dry reversion, here, it shall carry interest only from a year after the death of the testator, a year being a convenient time for a sale.

If a legacy be given out of a personal estate, consisting of mortgages carrying interest, or of stocks yielding profits half-yearly, it seems, in this case, the legacy shall carry interest from the death of the testator.

If

If a legacy be brought into court, and the legatee have notice of it, ſo it it is his fault not to pray to have the money, or that the money ſhould put out, the legatee, in ſuch caſe, ſhall loſe the intereſt from the time e money was brought into court; but if the money was put out, the le- tee ſhall have the intereſt which the money ſo put out did yield.

As to the *quantum* of intereſt, the determinations have been various; 2 Atk. 343.
the caſe of *Guillam* and *Holland*, Lord *Hardwicke* ſaid, where a portion charged upon land, and the will doth not mention intereſt, the court ill not give any more than 4 *per cent.* though the legal intereſt is 5 *per nt.*; and this rule hath alſo been extended to the caſes of legacies and ortions charged upon perſonal eſtate.

In the caſe of *Incledon* and *Northcote*, Lord *Hardwicke* ſaid at firſt, as 3 Atk. 438.
o more had been allowed for many years than 4 *per cent.* intereſt to chil- ren for maintenance, he did not care to break through the rule; but af- rwards, in conſideration of the intereſt of money being altered lately, ortgages being then at four and a half, and ſeveral at five *per cent.* he or- ered the children ſhould have four and a half *per cent.* intereſt.

In *Bryant* and *Speke*, Lord *Hardwicke* ſaid, the general rule is that le- 1 Vez. 171.
acies out of real eſtate carry one *per cent.* lower than legal intereſt; but out of perſonal, becauſe of the higher intereſt of money than land, they hall carry the legal intereſt, unleſs particular circumſtances induce the court o vary therefrom. And this, he ſaid, was in conformity to the eccleſiaſti- al court, which gives legal intereſt upon legacies out of perſonal eſtate.

In *Beckford* and *Tobin*, it was ſaid by the Lord Chancellour *Hardwicke*, 1 Vez. 308.
hat in general the court exerciſes as large a diſcretion as to the rate of in- ereſt upon legacies, where intereſt is not particularly given, as in any caſe: nd that it is difficult to reduce it to a certain rule. The moſt general rule hath een, between intereſt of legacies charged on land, and on perſonal eſtate (*a*; nd where nothing more, the court has ſaid, that land never produces profit qual to the intereſt of money, and will follow the courſe of things, and give ntereſt, where charged on land, one *per cent.* lower than the legal intereſt So, it was when the legal intereſt was at ſix; but in general, where a le- gacy is out of perſonal eſtate, the court gives five; and unleſs that is taken o be a ſort of rule, there will be no diſtinction between them.——Never- heleſs, in the preſent caſe, the fund out of which the intereſt was to ariſe ielded no more than four, the court allowed but four *per cent.*

(*a*) This diſtinction is now at an end. Whether the legacies are charged upon real or perſonal eſtate, it is now become the eſtabliſhed practice to allow only 4 *per cent.*— And note,

although pecuniary legacies, not having the addition of the word ſterling, are to be paid according to the currency of the country, where the will was made, yet intereſt thereon is to be computed according to the courſe of the court, at 4 *per cent*, and not according to the rate of intereſt in ſuch country. 2 Br. Ch. Rep. 47. 3 Br. Ch Rep. 53.

The Counteſs Dowager of *Ferrers* was, by ſettlement and will of her Ferrers v. Ferrers, Ca temp. Talb. 2.
late huſband Earl *Robert*, entitled to a jointure eſtate of 1000*l* a-year, but was kept out of poſſeſſion by Earl *Waſhington*, the ſon of Earl *Robert* by a former venter; and inſiſted upon the arrears, and intereſt, from the time of her huſband's death; comparing it to the caſe of arrears of an annuity, or rent-charge, which are decreed to be paid with intereſt. By *Talbot*, Lord Chancellour—The arrears of an annuity or rent-charge are never decreed to be paid with intereſt, but where the ſum is certain and fixed; and alſo where there is either a clauſe of entry, or *nomine pœnæ*, or ſome penalty upon the grantor which he muſt undergo, if the grantee ſued at law; and which would oblige him to come into this court for relief, which the court will not grant but upon equal terms, and thoſe can

be

be no other but decreeing the grantor to pay the arrears, with intereſt fo the time, during which the payment was withheld; but intereſt for th rents and profits of an eſtate was never decreed yet, the ſame being entirel uncertain. And though it may be ſaid, that the lady is entitled to a eſtate of 1000*l.* a-year, yet that is not ſufficiently certain; being only perception of the profits of an eſtate, which are not to be paid at any on time, but only as the tenants of the land bring them in, ſome at one cer tain time, ſome at another.

Renneſcy v. Parrot, 1 Ch. Ca. 60.

A legacy was made payable at the age of 21 years. The legatee by h guardian brought a bill againſt the executor for maintenance, ſuggeſtin that he had none. The executor demurred; for that the plaintiff was u der age, and the legacy was not payable till 21, and therefore no cauſe o ſuit. But the demurrer was over-ruled.

Harvey v. Harvey, 2 P. Wms. 21.

The teſtator being ſeiſed of a real eſtate, and poſſeſſed of a perſonal e tate, and having ſeveral children, deviſeth all his real and perſonal eſta to his eldeſt ſon, charging the ſame with 1000*l.* a-piece to all his young children, payable at their reſpective ages of 21; but in the will no notic is taken of maintenance for the younger children in the mean time. Th younger children bring their bill, in order to recover intereſt, or ſom maintenance during their infancy. Upon which, the Maſter of the Rol decreed, that the younger children ſhould recover maintenance. He ob ſerved, that theſe being veſted legacies, and no deviſe over, it would b extremely hard that the children ſhould ſtarve, when entitled to ſo conſid rable legacies, for the ſake of their executors or adminiſtrators, who i the caſe of their deaths would have the ſaid legacies: that in this caſe, th court would do, what in common preſumption the father (if living) woul and ought to have done, which was, to provide neceſſaries for his chil dren: that a court of equity would make hard ſhifts for the proviſion o children; as where younger children were left deſtitute, and the eldeſt a infant, equity would make ſuch a liberal allowance to the guardian of th eldeſt, as that he might thereout be enabled to maintain all the children and for the ſame reaſon the court would likewiſe take a latitude in this caſe that ſince intereſt was pretty much in the breaſt of the court, though th will were ſilent with regard to that, yet it ſhould be preſumed that the fa ther, who gave theſe legacies, intended they ſhould carry intereſt, if th eſtate would bear it; for every one muſt ſuppoſe it to have been the inten tion of the father, that his children ſhould not want bread during their in fancy: that for this reaſon it had been held, that though a legacy were de viſed over in caſe of the legatee's dying before 21, yet the infant legat ought to have intereſt allowed him during his infancy, in order for h maintenance; with this difference only, that where the eſtate has appeare to be ſmall, the court, in whoſe diſcretion it always lies to determine th quantum of intereſt, has ordered the lower intereſt: and it ſeemeth, that if one, not a parent, gives a legacy to an infant, payable at 21, without any deviſe over, and the infant has nothing elſe to ſubſiſt on; the cour will order part of this legacy, in order to provide bread for the infant, t be paid preſently, allowing intereſt for the ſame to the perſon paying it, o of the remaining principal; though this is done very ſparingly.

Barlow v Grant, 1 Vern. 255.

Upon a bill for 100*l.* legacy given to a child, the defendant inſiſte upon an allowance of 16*l.* a-year, for keeping the legatee at ſchool. It was objected, that only the bare intereſt of the money ought to have bee expended in his education, and not to have ſunk the principal, as in thi caſe the defendant had done. But the Lord Keeper thought it fit and reaſonable

aſonable to be allowed; and ſaid, the money laid out in the child's edu-
tion was moſt advantageous and beneficial for the infant, and therefore
ſhould make no ſcruple of breaking into the principal, where ſo ſmall a
m was deviſed, that the intereſt thereof would not ſuffice to give the le-
tee a competent maintenance and education; but in caſe of a legacy of
000*l.* or the like, there it might be reaſonable to reſtrain the maintenance
the intereſt of the money.

But if the legacy is deviſed over; it ſeemeth to be otherwiſe; and that the court in ſuch caſe will not diminiſh the principal, but only allow the intereſt thereof to the firſt legatee, until the time that the legacy ſhall become payable. 1 Ch Ca. Leech v. Leech, H. 26 & 27 C. 2. Prec. Ch. 195. Brewin v. Brewin, E. 1702.

Alſo a legacy in the hands of the father given to his children by a relation or other, ſhall not be diminiſhed by the father; becauſe he is obliged to maintain his own children: as in the caſe of *Darley* and *Darley*. A bill was brought by the plaintiff for two legacies of 50*l.* each, left to himſelf and his ſiſter under the will of their grandfather, and for the intereſt that had been made thereof. The ſiſter's legacy he claims by aſſignment from her. The defendant, being executor to the father, inſiſts he is not obliged to account to the plaintiff for principal or intereſt, one hundred and five pounds being expended for putting him out apprentice, and much more than fifty pounds in the maintenance and cloathing of the ſiſter. By the Lord Chancellour *Hardwicke*: where legacies are given to a child by a relation, a father cannot make uſe of ſuch legacy in maintenance of the child, but muſt provide for him out of his own pocket; nor can he ſet him out in the world, or put him out an apprentice, or clerk, with the money ariſing from the legacy; and if he does, he ſhall not be allowed it. And he ordered intereſt to be computed on the legacies given to the plaintiff and his ſiſter, from the time they reſpectively attained their ages of 21, at 5 *per cent.* and that what ſhould be found due for principal and intereſt of theſe legacies be paid by the defendant to the plaintiff, he having admitted aſſets of the father for that purpoſe. 3 Atk. 559.

T. C. by his will veſted his eſtates in truſtees, to pay certain annuities, and ſubject thereto, to pay the reſt and reſidue of the rents and profits, dividends and intereſts, for and towards the maintenance and education of all and every the child and children of his three daughters, (excepting ſuch of his grandſons as ſhould be in poſſeſſion of real eſtates before deviſed,) ſhare and ſhare alike, until the youngeſt of his ſaid grandchildren ſhould attain his or her age of 21 years; and in caſe of the death of any of his grandchildren (before the youngeſt ſhould have attained the age of 21 years) who ſhould have married, and have iſſue, the child or children ſhould be entitled to the ſhare of the parent ſo dying. Upon the hearing of the cauſe, Lord Chancellour refuſed to direct the Maſter to conſider of a proper allowance for the maintenance of the younger children of the teſtator's daughter's; holding the reſidue of the rents, *&c.* to be an accumulating fund for the benefit of the children, and to be paid to them, when the eſtate became diviſible; and that, until it appeared that the parents were incapable of maintaining the children, he could not order any part of the rents, *&c.* of the eſtates to be ſo applied. It was afterwards moved, on the part of the defendants, that the minutes of the decree ſhould be amended by inſerting a reference to the Maſter to conſider of a proper allowance to the parents for the maintenance of the children. Hughes v. Hughes, 1 Br. Ch. Rep. 386.

It

It was ſtated that *J. S.* the huſband of one of the daughters, had by h ſeven children, whom, though without allowance, he might ſupport ag ably to his own rank, he could not in proportion to the additional fortu derived from the teſtator. That the rule was, that wherever a mai nance was given by the will, the child ſhould have it, and a caſe was cit where the direction was, that a ſum for maintenance ſhould be paid to t father; and Lord *Thurlowe* ordered a future maintenance to be allow and upon further application, ordered a ſum to be paid for the maintena of the children, prior to the firſt application. The Lord Chancellour ſa the practice was, to refer it to the Maſter to inquire whether the pare were of ability to maintain the children; if not, then to report wh would be a proper maintenance; and this practice did not vary where maintenance was directly given by the will, unleſs in caſes where it w given to the father, under which circumſtances it was a legacy to hi His Lordſhip therefore referred it to the Maſter to inquire into the abil of the parents to maintain the children: and afterwards, upon petitio ſums were ordered to be allowed for the purpoſe of *J. S.*, who was repor ed not of ability to maintain his children. But, although the Maſter ma the allowance from the date of the decree, the Lord Chancellour order it to the date of the report.

Andrews v. Partington, 3 Br. Ch. Rep. 60.

A grandfather, having given ſeveral legacies, bequeathed the reſidue t his grandchildren at 21, and the produce in the meanwhile, to truſte for their maintenance, and appointed four truſtees, of whom the fathe was one. *J. S.*, one of the truſtees, had expended 400*l.* in the maint nance of the children, previous to any report as to the ability of the p rent to maintain them. The queſtion was, Whether he ſhould be allowe the ſum ſo advanced, and, whether any maintenance ſhould be allowed th children before the report? For the truſtees, it was inſiſted, that th words of the will were imperative upon the truſtees to allow a maintenanc and that this had been done in the caſe of *Fitzgerald* v. *Carey*, *Mich.* 177 Lord Chancellour ſaid, although where there has been a bigotted father who would not educate the child in the proteſtant religion, the allowanc has been made to the truſtees, it was contrary to all rules, that the in tereſt, veſted in the children, ſhould be applied to their maintenance i the lifetime of the parent: that this would amount to a gift to the paren of ſo much as ſhould be neceſſary for the maintenance, and the father bein a truſtee can make no difference. He therefore ordered the reference t be only as to the ability of the parent, and what would be neceſſary fo the future maintenance of the children. But afterwards, by conſent of th children in *England* and adult, their proportions were ordered to be paid.

Clive v. Walſh, 1 Br. Ch. Rep. 146.

Lord *Clive* deviſed a ſpecifick landed eſtate to truſtees for a term of years with remainder to his ſon *Robert* (his ſecond ſon) for life, with remainder over. The truſts of the term were, to raiſe a maintenance till 21, then to pay him an annuity of 1000*l.* till he ſhould attain the age of 25 years when the eſtate was to veſt in poſſeſſion, and to apply the ſavings, to form a perſonal fund for other purpoſes. He then gave his perſonal eſtate to truſtees; he gave to *Robert* and each of his younger ſons 30,000*l.*, and to each of his daughters 20,000*l.*, at 25; in the meanwhile to raiſe maintenances till 21, and from thence to pay 1200*l. per annum* to the boys till 25. Lady *Clive* filed a bill to have the two allowances for the ſecond ſon during his minority. Lord Chancellour—There is not ſufficient in the will to extract any thing from it, but what is expreſſed. The truſt of the term is to raiſe maintenances, but there is a further intent to take the pro fits till 25, and convert them into a perſonal fund for other purpoſes, and

to provide an annuity till that age. The perſonal eſtate is to be laid in good ſecurities, and out of it he provides 30,000*l.* for *Robert*, he ng then no other younger ſon: no intereſt is to be allowed, but a main- nce; ſo that *Robert* is, as to that maintenance, in contemplation, as as the other younger ſons. The argument that he ſhall not have this, uſe he has another proviſion, would apply equally to the annuities from till 25, and no one could ſay he was not to have the two annuities. has given more by way of maintenance to the ſon, to whom he has n a larger eſtate. It muſt be referred to the Maſter, what allowance ld be made, and the reſt muſt accumulate for the uſe of *Robert*.

t is a rule, that a legacy payable at any given time whatſoever, does not y intereſt till that time, whether it is a veſted intereſt or not: the time ayment muſt govern the commencement of intereſt; with this difference , that a legacy given by a parent to a child ſhall carry intereſt from the h of the teſtator on account of the obligation attaching upon the perſon, gives it, and becauſe it is in nature of a portion: therefore intereſt in mean time is added, though it is not given in expreſs terms; and *Acherly Vernon* was determined upon the idea, that the teſtator put himſelf *in loco ntis*. All the other caſes upon the point, whether the adminiſtrator of the tee is entitled to the legacy immediately, or muſt wait till the period, at ch the legatee would have been entitled to it, depend upon this. I hope will be conſidered as a ſettled point, upon which executors may not be to the expence of defending, unleſs at the peril of coſts. I think a wife ld certainly come under the ſame exception as a child. I do not find the books. It can hardly ever happen, that a wife has not ſome other viſion; and that may make a difference in the caſe of a child. If intenance is given generally to the child, ſo that the whole may be ex- ſted by the maintenance, that ſhews the teſtator meant it to carry inter- : but, if a partial maintenance is given, as, if an annual ſum leſs than intereſt is given for maintenance, the child ſhall have no more; and the ecutor paying that ſum ſhall have all the reſt.

By the Maſter of the Rolls, in Crickett v. Dolby, 3 Vez. jun. 16.

If there be a fund, whether reſiduary or particular, given to *A.* for life, d afterwards upon a contingency, which contingency does not take effect on the death of the tenant for life, the intermediate intereſt is an intereſt diſpoſed of, and therefore falls into the reſidue.

Shawe v. Cunliffe, 4 Br. Ch. Rep. 152. Wyndham v. Wyndham, 3 Br. Ch. Rep. 58.

A teſtator by his codicil *deſired* his ſiſter out of the money given her by will to *leave* 500*l.* at her death to her nephew *D.* who ſurvived the teſ- tor, but died before his aunt. His repreſentative is entitled to it. *Deſire*, preſſing the will of the teſtator, amounts to a legacy, and the word *leave* kes no difference; to leave or pay at her death being the ſame. The gacy being out of perſonal eſtate payable on a contingency, it is a clear mand, notwithſtanding the death of the legatee before the contin- ncy.

Medlicot v. Bowes, 1 Vez. 207.

(M) Legacies, in what Court, and how properly recoverable.

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(*Alſo, though*) That aſſumpſit will lie for a legacy upon a promiſe by an executor in conſidera- on of aſſets, was determined in Atkins v. Hill, Cowp. 284. Hawkes v. Saunders, *Id.* 289.

But

But theſe caſes ſeem to be quite overturned by a ſubſequent caſe of Decks v. Strutt, 5 Term Rep. 690. It is true, that in this laſt caſe, it was ſtated that the executor made no expreſs promiſe to pay, whereas in the two former caſes an *actual* promiſe was admitted: yet the arguments of two of the three judges who decided the laſt caſe, proceed upon general grounds, and deny the juriſdiction of the common law courts over the ſubject of legacy, as well where there has been an expreſs, as where only an implied promiſe.

3 Salk. 223. Toth. 114. Pr. Ch. 548. 2 Atk 420. But the uſual remedy in ſuch like caſes is in equity. It is ſaid, that where the eccleſiaſtical court, and a court of equity have a concurrent juriſdiction, whichever is firſt poſſeſſed of the cauſe has a right to proceed; and the ſame of all other courts. However, where the huſband hath ſued in the ſpiritual court for a legacy given to the wife, the court of Chancery hath granted an injunction to ſtay proceedings; becauſe the ſpiritual court cannot compel him to make a ſettlement upon her.

1 Vern. 26. So, where a perſonal legacy was given to an infant; it was holden, that the ſame is more properly cognizable in Chancery than in the eccleſiaſtical court; and if the matter had proceeded to ſentence in the eccleſiaſtical court, yet it was proper to come into Chancery for the executor's indemnity; for in the Chancery, legatees are to give ſecurity for the money, but not in the ſpiritual court; and the Chancery will ſee the money put out for the children.

1 Atk. 491. 1 P. Wms. 575. 544. So, where there is a truſt, or any thing in the nature of a truſt, notwithſtanding the eccleſiaſtical court hath an original juriſdiction in legacies, yet the Chancery will grant an injunction to ſtay the proceedings in the eccleſiaſtical court, truſts being properly cognizable only in equity. And the executor being in equity conſidered as a truſtee for the legatee, with reſpect to his legacy; and as truſtee, in certain caſes for the next of kin, as to the undiſpoſed ſurplus; hence the true ground of equitable juriſdiction in theſe caſes.

3 Atk. 361. So, where a will is ſuppreſſed or deſtroyed, the ſuit for a perſonal legacy may be in equity in the firſt inſtance, without reſorting to the ſpiritual court; otherwiſe it would put the plaintiff upon great difficulties: for in the ſpiritual court, the plaintiff muſt prove it a will in writing, and muſt likewiſe prove the contents in the very words, and muſt alſo prove the whole will, though the remainder of it doth not at all belong to, or regard his legacy; which the temporal courts do not put a perſon upon doing. Much more when the legacy is charged both upon perſonal and real eſtate; for as to the real eſtate, there is no occaſion to reſort to the eccleſiaſtical court at all.

1 Roll. Abr. 919. Legacies may be recovered in the ſpiritual court againſt *an adminiſtrator with the will annexed*, or againſt *an executor of his own wrong*.

1 Ch Ca. 121. An executor may in ſome caſes be compelled to give ſecurity to pay a legacy; as, where 1000*l.* were deviſed to a perſon, to be paid at the age of 21 years; upon a bill exhibited againſt the executors, ſuggeſting a *devaſtavit*, and praying that he might give ſecurity to pay the legacy when due, it was decreed accordingly.

Swinb. a. 40. Law of Ex. 187 A teſtator deviſed 800*l.* to an infant, to be paid by the executor when the infant ſhould attain the age of 21 years. The infant by his guardian exhibited a bill, that the executor might give ſecurity for the payment of the money. It was decreed accordingly.

Pr. Ch. 71. A teſtator bequeaths his perſonal eſtate to his wife for life, and that ſhe ſhould leave at her death to be equally diſtributed between her kindred and his own. If the eſtate be ſo ſmall, that ſhe cannot live upon it without ſpending the ſtock, it ſeems, ſhe ſhall not be obliged to give ſecurity; otherwiſe, ſhe ſhall.

f a perſon poſſeſſed of a leaſe for years. deviſe that his executor out of profits thereof ſhall pay to every one of his daughters 20*l.* at their full the executor may be ſued in the ſpiritual court to put in ſurety to pay legacies, and no prohibition ſhall be granted; for this is to iſſue out of a ttel. 2 Roll. Abr. 285.

But where 500*l.* were given to the grand-daughter to be paid at 21, or rriage; and if ſhe died before either of thoſe contingencies happened, then go over to another; it was ſaid by Lord *Hardwicke*, as the legacy was iſed over, nothing veſted in the grand-daughter till one of the contingen- ſhould happen; and therefore ſhe was not entitled to have the legacy ured. 1 Atk. 505.

The court of Chancery will now, immediately upon the coming in of the cutor's anſwer, order ſo much as he admits to have in his hands of the ator's property to be paid into the Bank. It was formerly thought ne- ary for the plaintiff to ſhew that the executor had abuſed his truſt, or the fund was in danger from the inſolvent circumſtances of the ex- tor. Strange v. Harris, 3 Br. Ch. Rep. 365.

LIBEL.

A Libel is) 2 Stra. 791. But an indictment for a libel reflecting on the memory of a deceaſed per- cannot be ſupported, unleſs it ſtate that it was done with a deſign to bring contempt on his fa- or to ſtir up the hatred of the king's ſubjects againſt his relations, and to induce them to break peace in vindicating the honour of the family. Rex. v. Topham, 4 Term Rep. 126.

An information need not charge the offence to have been committed *vi rmis*; for a libel is not in itſelf an actual breach of the peace, but only ds to it. Neither need it charge the libellous matter to be *falſe*, for it is neceſſary to prove it to be falſe. Rex v. Burke. 7 Term Rep. 4.

(A) What ſhall be ſaid a Libel: And herein,

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s every perſon) (*a*) As, that he hath the itch, and ſtinks of brimſtone, Villers v. Manſley 2 . 403. So where the mayor of Northampton ſent the Lord Haliſax a licence for keeping a pub- houſe. 1 Str. 422.

licence it hath) 2 Wilſ. 403.

An order was made by a corporation, and entered in their books, ſtating *A. B.* (againſt whom a jury had found a verdict with large damages, action for a malicious proſecution for perjury, which verdict had been irmed in *C. B.*) was actuated by motives of publick juſtice, *&c.* in pre- ing the indictment. This was adjudged to be a libel reflecting on the iniſtration of juſtice, for which an information was granted againſt the bers who made the order. Rex v. Watſon, 2 Term Rep. 199.

but Though) Where the libel contains pointed charges, which, if falſe, may be denied by party complaining, an information will be granted, unleſs the party complaining denies ſuch ed charges on oath. Rex. v. Miles, Dougl. 284. Rex. v Haſwell, *Id.* 387. But an ex- atory affidavit is not neceſſary, where the party libelled is abroad, at a great diſtance, or the ect-matter of the charge is general imputation, or an accuſation of criminal language holden rliament. See the laſt caſe,

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to robert a man) Rex v. Maſters, Say. Rep. 122. S. P.

But

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(*But it is*) (*b*) But this is not law: obſcene books are puniſhable as libels. Rex v. Curl, 2 788. Rex v. Wilkes, 4 Burr. 2527. So, books reflecting upon chriſtianity. Rex v. Woo 2 Str. 834. Fitzg. 64. So, a treatiſe on hereditary right was holden to be a libel, though it tained no reflection on any part of the then government. Reg. v. Bedford, Gilb. Rep. K. B. 11. St. Tr. 121.

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(*But a ſcandal*) Rex v. Bedingfield, 2 Burr. 984.

(*An information*) (*b*) As to the manner of making the averments, ſee Rex v. Horne, C 672.

Aſtley v. Younge, 2 Burr. 817.

So, where a charge was, that the defendant in a certain affidavit be the court, had ſaid that the plaintiff in a former affidavit againſt the defe ant had ſworn falſely; the court held, that this was not libellous; for every diſpute in a court of juſtice, where one by affidavit charges a thi and the other denies it, the charges muſt be contradictory, and there m be affirmation of falſehood; this therefore being neceſſary in the cours legal proceeding, no action will lie for it.

3 Wooddeſ. 180. (*a*) Bull. N. P. 8.; where 1 Saund. 140. and 2 Burr. 807. are cited; but thoſe were juſtifications rather from the occaſion, than the truth, of the ſuppoſed libels, the one being a parliamentary, and the other a judicial proceeding.

However, it is advanced in a very uſeful compilation (*a*), that the defe dant may juſtify in an action for libel, as in a common action of ſland And with reſpect to libels charging a man with an indictable offence, ſeems now the prevailing doctrine, that the defendant may plead bar the truth of the defamatory paper: ſuch a plea was allowed on d murrer (*b*) in the Common Pleas; and the caſe being removed i the King's Bench, that court reverſed indeed the former judgment, account of the plea's being too general and indiſcriminate; but no not appears to have been taken of the queſtion at large, except that one of learned judges remarked, that "if the plaintiff had been a common ſwi "ler, (as alleged,) the defendant ought to have indicted him; but he h "no right to libel him in that way;" which may be thought to give ſo countenance to what now perhaps may be called the old opinion. Sel libel may be very ſcandalous, and very pernicious in its effects, wit charging the party libelled with an indictable offence. In that caſe, a very ſenſible writer, as I know of no determination, that the truth of t libel may be pleaded in juſtification, I am at liberty to obſerve, the pre lence of ſuch an opinion would not be very ſeaſonable, nor very conduc to the peace and welfare of ſociety.

So, in the caſe, 4 Co. 12. b. &c. which was an action of *ſcandalum magnatum* on the ſtatute, the p was a relation of circumſtances to extennuate and explain the ſcandal, which is conſidered as a diſtinct defence from alleging the truth of it. Poph. 67. 69. 2 Mod. 166. 1 Freem. 223. J'Anſon v. Stewart, 1 Term Rep. 748.

In an indictment or information for a libel, where iſſue is joined on guilty, the ſtatute of 32 G. 3. c. 60. declares and enacts, that the j may give a general verdict on the whole matter, and the judge ſhall require them to find the defendant guilty, merely on the proof of pub ing, and on the ſenſe aſcribed to the ſuppoſed libel in ſuch complaint or formation. But the ſtatute does not expreſs that the truth of the ſca ſhall be a defence, and is wholly ſilent as to actions of *ſcandalum mag tum*, or for a libel.

(B) W

(B) Who ſhall be ſaid a Libeller: And herein,

If a defendant has owned himſelf to be author of a book, *errors of the preſs and ſmall variations excepted*, it is ſufficient to entitle the prosecutor to have the book read, and the defendant ſhall be put to ſhew, that there were material variances. Rex v. Hall, 1 Str. 416.

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(*And on this*) Rex v. Almon, 5 Burr. 2687. Proof that the defendant gave a bond to the ſtamp-office for the duties on the advertiſements in a newſpaper under the ſtatute 29 Geo. 3. c. 50 § 10., and had occaſionally applied to the ſtamp-office reſpecting the duties, was holden to be ſufficient evidence of his being the publiſher. 4 Term Rep. 126.

If a man ſends a libel to *London* to be publiſhed, it is his act in *London*, the publication be there. Rex v. Middleton, 1 Str. 77.

Limitation of Actions.

(B) Of the Limitation of Real Actions purſuant to 32 *H.* 8. *c.* 2. and 21 *Jac.* 1. *c.* 16.

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(*Alſo by the ſaid*) And ſo it is in Comyns' Digeſt, tit. Temps, (G. 3). But Mr. Reeves ſtates it to be *fifty* years. 4 Vol. 268.

(*If A. by deed*) Mo. 31. S P. According to Sir W. Jones, this exemption of rent ſhould be underſtood with this qualification; that the *certainty* of the rent ſhould appear in the deed; becauſe otherwiſe the *quantum* or *quality* of the rent is no more aſcertained by the deed, than if there was not any exiſting. Therefore if the rent is created by reference to ſomething out of the deed, as by reſerving ſuch rent as the perſon reſerving pays over, without expreſſing what that is, and the latter rent not having commenced by deed is one, of which ſeiſin is the proper proof; in ſuch a caſe, ſeiſin, as Sir W. Jones thought, is equally requiſite to both rents, and, conſequently, both ought to be equally deemed within the limitation of this ſtatute. Sir W. Jon. 238.

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(*By the 1 Mar.*) This ſtatute, ſo far as regards *advowſons*, is no longer of any uſe; it being enacted by 7th Ann. c. 18. that no uſurpation ſhall diſplace the eſtate of the patron, and that he may preſent on the next avoidance, as if there had not been any uſurpation; which proviſion, in effect, takes away all limitations of ſuits about the right of patronage.

In the year 1772, an attempt was made to limit the claims of the Church; but happily failed.

Neither was the crown bound by any of theſe ſtatutes, the ancient doctrine being *nullum tempus occurrit regi*. But by a late ſtatute, the crown is barred from recovering any eſtate or hereditaments, (other than liberties or franchiſes,) where the title did not firſt accrue within the laſt ſixty years. 9 Geo. 3. c. 16 §. 1. 10.

(C) Of the Limitation of Time in regard to Actions on Penal Statutes.

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(*It has been held*) Upon a writ of error, all the judges in the Exchequer-chamber, held, that a *quitat* is a kind of original in the King's Bench. 2 Ld. Raym. 833. Accordingly, in two ſubſequent caſes,

caſes, it was holden to be a good commencement of the ſuit in a penal action. Bridges v. Knapton, and Hardiman v. Whitaker, cited in 2 Burr. 950 3 Burr. 1423. Cowp. 454. But if it be replied to a plea of the ſtatute of limitations, the defendant, in order to maintain his plea, may aver the *real* time of ſuing it out, in oppoſition to the *teſte*. 2 Burr. 950. 3 Burr. 14 3.

(D) Of the Limitation of Time in regard to Perſonal Actions, purſuant to the 21 *Jac.* 1. *c.* 16.: And herein.

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(*Here we ſhall*) *Vide* tit. Evidence, 2 Vol. 311.

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(*It ſeems clearly*) (*b*) But the rule of equity, that the ſtatute of limitations does not bar a *truſt* eſtate, holds only as between *ceſtuy que truſt*, and *truſtees*, not between *ceſtuy que truſt* and *truſtee* on one ſide, and *ſtrangers* on the other; for that would be to make the ſtatute of no force at all; becauſe there is hardly any eſtate of conſequence without ſuch truſt, and ſo the act would never take place: therefore, where a *ceſtuy que truſt* and his truſtee are both out of poſſeſſion for the time limited, the party in poſſeſſion has a good bar againſt them both *Per* Lord Hardwicke, in the caſe of Llewellin v. Mackworth, 2 Eq. Ca. Abr. 579. pl. 8. See too Townſhend v. Townſhend, 1 Br. Ch. Rep. 554.

(*It ſeems to be*) And therefore, to a bill to redeem a mortgage, if the mortgagee has been in poſſeſſion twenty years, the ſtatute of limitations may be pleaded. Aggas v. Pickerell, 3 Atk. 225. And indeed a demurrer has been allowed in this caſe, where the poſſeſſion has appeared upon the face of the bill, 3 P. Wms. 287. note B. 1 Vern. 418. Bunb. 54. though later caſes ſeem to be to the contrary. Aggas v. Pickerell. *ubi ſupra*. Deloraine v. Smith, 3 Br. Ch. Rep. 364.

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(*This Statute*) Fenton v. Emblers, 1 Bl. Rep. 353.

(*So in aſſumpſit*) So, in equity. 3 Atk. 70.

Witterſheim v. Counteſs Dowager of Carliſle, 1 H. Bl. Rep. 631.

A bill of exchange was drawn payable at a certain future period, for the amount of a ſum of money lent by the payee to the drawer at the time of drawing the bill. The payee was allowed to recover the money on an action for money lent, although ſix years had elapſed, ſince the time when the loan was advanced; the ſtatute of limitations beginning to operate only from the time when the money was to be repaid, that is, when the bill became due.

Gardner v. Griffith, 2 P. Wms. 403. Bote'er v. Allington, 3 Atk. 458.

To a bill, on an equitable title to a preſentation to a living, ſeeking to compel the defendant to reſign, plenarty ſix months before the bill was filed may be pleaded in bar; the ſtatute of *Weſtminſter* the ſecond being conſidered for this purpoſe as a ſtatute of limitation, in bar of an equitable as well as of a legal demand. But if a *quare impedit* is brought before the ſix months are e pired, though the bill is filed after, it may in ſome caſes be a ground for the court to interfere, and, conſequently, plenarty would not in ſuch caſes be pleadable in bar.

Smith Sea Company v. Wymondſell, 3 P. Wms. 143.

If a bill charges a fraud, and that the fraud was not diſcovered till within ſix years before the filing of the bill, the ſtatute of limitations is not a good plea, unleſs the defendant denies the fraud, or avers, that the fraud, if any, was diſcovered within ſix years before filing the bill.

But even at law, fraud will not prevent the ſtatute of limitations from operating, though diſcovered by the plaintiff within ſix years before the commencement, unleſs it can be ſhewn that the defendant was conuſant of it. Bree v. Holbech, Dougl. 655.

Bicknell v. Gough, 3 Atk. 558.

Upon a bill for diſcovery of a title, charging fraud, and praying poſſeſſion, the ſtatute of limitations alone is not a good plea to the diſcovery; for the defendant muſt anſwer to the charge of fraud.

Although

Although the ſtatute of limitations is a bar in equity to the claim of a debt, it is not to a diſcovery when the debt became due; for if that is ſet forth, it will appear to the court, whether the time limited by the ſtatute is elapſed. Mackworth v. Clifton, 2 Atk. 51.

The ſtatute of limitations may be pleaded to a bill of revivor, if the proper repreſentative does not proceed within ſix years after abatement of a ſuit, provided there has been no decree. Hollingſhead's caſe, 1 P. Wms. 742.

With reſpect to certain ſuits in the ſpiritual court, it is enacted by *ſt.* 27. *G.* 3. *c.* 44. that 'no ſuit for defamatory words ſhall be commenced in any of the eccleſiaſtical courts, unleſs the ſame ſhall be commenced within ſix calendar months from the time when ſuch defamatory words ſhall have been uttered." And by § 2. "no ſuit ſhall be commenced in any eccleſiaſtical court for fornication, or incontinence, or for ſtriking or brawling in any church or church-yard, after the expiration of eight calendar months from the time when ſuch offence ſhall have been committed."

(E) Of the Exceptions in the Statute 21 *Jac.* 1. *c.* 16. and what will ſave a Bar thereof: And herein,

But, though the exception iu the ſtatute is ſo far limited to tranſactions merely between merchant and merchant, that where there is no item of account at all within ſix years before the action brought, the plaintiff will be precluded, unleſs he can ſhew that the accounts were between merchant and merchant, *&c.*; yet a mutual account of any ſort between a plaintiff and defendant, though neither of them of the deſcription of merchant, after any item of which credit has been given within ſix years, is evidence of a promiſe to pay the balance, and will take the caſe out of the ſtatute of limitations. But where all the items of an open, unliquidated account are on one ſide, the laſt item which happens to be within ſix years ſhall not draw after it thoſe that are of longer ſtanding. Catling v. Skoulding, 6 Term Rep. 189. Cotes v. Harris, Bull. N. P 149.

This exception is not confined to *Engliſhmen*, who may occaſionally go beyond ſea, but is general, and extends to foreigners, who are conſtantly reſident abroad. Strithorſt v. Graeme, 2 Bl. Rep. 723.

As the ſtatutes of 21 *Jac.* and 4 and 5 *Ann.* are both expreſs, that the party to be excuſed muſt be *beyond ſea*, of courſe *Scotland* is not included in the exception. King v. Walker, 1 Bl. Rep. 286.

If a plaintiff be in *England* at the time the cauſe of action accrues, the time of limitation begins to run, ſo that if he, or, if he die abroad, his perſonal repreſentative, do not ſue within ſix years, the ſtatute attaches; and this, though the perſonal repreſentative were abroad at the time of the teſtator's or inteſtate's death. Smith v. Hill, 1 Wilſ 134.

The abſence of one of ſeveral co-plaintiffs will not prevent the ſtatute of limitations from attaching; for it lays the others under no diſability of ſuing. Perry v. Jackſon, 4 Term Rep. 516.

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(*If A. receives*) *Note*; This ſtatement of the facts of the caſe of Curry v. Stephenſon is incorrect. It appears from Skinner's Report, that the money was not received by *A.* until *after* the death of the inteſtate: ſo that, before adminiſtration was granted there was no perſon who could claim it; and the ſtatute begins to operate only from the time a right to demand the thing in queſtion veſts in ſome one. In Stanford's caſe the fine was not levied till *after* the death of the inteſtate. Had the money been received in the lifetime of the perſon who died inteſtate, that perſon would have had a right of action againſt *A.* veſted in him, and from that period the time of limitation would have commenced; and the ſtatute would have been a bar. For, when once

once the time of limitation has begun to run, it ſuffers no interruption from the death of the claimant, nor does it revive in favour of any perſon upon whom the right of claim may devolve.

(*But if an*) It is a noble, beneficial act. *Per* Wilmot, J 1 Bl. Rep 287. It is allowed to be pleaded in the courts both of C. P. and K. B. after an order for time to plead on the terms of pleading iſſuably. Rucker v. Hannay, 3 Term Rep. 124. *Vide* Studholme v. Hodgſon, 2 Term Rep. 390. *contr.*

Knight v. Bate, Cowp 738. Where a ſtatute for allotting waſte lands within a manor, directed all diſputed claims to be tried by a feigned iſſue, and limited the time of bringing the action to ſix months; it was holden, that an action brought against a copyholder, within time, if abated by his death, muſt be revived against the heir within ſix months after the plaintiff had notice of the deſcent, though the heir were not admitted till long after that time.

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(*So, it ſeems, the*) But in this caſe, the defendant may in his rejoinder ſhew the true day on which the *latitat* was ſued out, in oppoſition to the *teſte*. Johnſon v. Smith, 2 Burr. 950.

(*But though the*) The continuances, it ſeems, may be entered at any time. Bates *qui tam* v. Jenkinſon, E. 24 G. 3. cited in 6 Term Rep. 618.

Smith v. Bower, 3 Term Rep. 662. An attachment of privilege is not a continuance of a bill of *Middleſex*. Leadbeater v. Markland, 2 Bl. Rep. 1131.

(*a*) Harris v. Woolford 6 Term Rep. 617. Bull. N. P. 151. Lane v. Wheat, B. R. M. 23 Geo. 3. Dougl 313. n. Although a ſuit actually commenced, though informally or irregularly, will have the effect of preventing the operation of the ſtatute; yet the plaintiff muſt ſhew that the firſt writ was (*a*) returned; for until the return of the writ the court is not in poſſeſſion of the cauſe.

A bill may be filed againſt an attorney in the vacation, in order to prevent the ſtatute from attaching.

Harris v. Woolford, 6 Term Rep. 617. Parſons v. King, 7 Term Rep. 6. If a party give in evidence *two* writs, and it be neceſſary in order to prevent the operation of the ſtatute to ſhew that the ſecond writ on which he has declared, is a continuation of the firſt writ, it is in that caſe incumbent upon him to ſhew that the firſt was returned, in order to warrant the iſſuing of the *alias* writ. But, if he give in evidence only *one* writ, he need not ſhew that it was returned. A writ regularly ſued out will have the effect of a bar, it ſeems, if the plaintiff declare upon it at any time within a year afterwards.

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(*Alſo, it hath*) Bull. N. P. 150. S. C.

(*So, it hath been*) And an acknowledgment of the debt even after the commencement of the action will take it out of the ſtatute. Yea v. Fouraker, 2 Burr 1099. What is an acknowledgment is matter for the conſideration of a jury. Lloyd v. Maund 2 Term Rep. 760. But although a promiſe is not neceſſary to take the demand out of the ſtatute, yet the declaration of the defendant muſt amount to an acknowledgment of a *debt*; and therefore, where a perſon ſued by an executrix ſaid, "I acknowledge the *receipt of the money*, but the teſtatrix *gave* it me," Clive, Baron, held it not ſufficient. Owen v. Wolley, Bull. N. P. 148.

(*But if an*) But it hath been lately determined, that the acknowledgment of one out of ſeveral drawers of a joint and ſeveral promiſſory note, will take it out of the ſtatute as againſt the others, and may be given in evidence in a ſeparate action againſt any of the others. Whitcombe v. Whiting, Dougl. 652. And if in ſuch caſe, one of the drawers becomes bankrupt, and the payee receives a dividend under the commiſſion on account of the note, this payment of the dividend under the commiſſion will amount to ſuch an acknowledgment of the debt as will prevent any of the others from availing themſelves of the ſtatute of limitations in an action brought againſt them for the remainder of the money due on the note. Jackſon v. Fairbank, 2 H. Bl. 340.——The caſe of Blair

nd v. Haſelrig in the text, Mr. Douglas obſerves, may be explained on the manner of the find-
: for, as the plea was *joint*, and the declaration muſt have alleged a *joint undertaking*, the ver-
t did not find what the plaintiff had bound himſelf to prove. But, according to the principle in
hitcombe v. Whiting, the jury were to conſider the promiſe of one as the promiſe of all, and
refore, to find a general verdict againſt all. Dougl. 653. n.

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It ſeems to be) See, as to this point, Blakeway v. Earl of Strafford, 2 P. Wms. 373. Andrews
rown, Pr. Ch, 385. Jones v. Earl of Strafford, 3 P. Wms. 77. Vaughan v. Guy, Moſ. 245.
aſtick v. Cowne, *Id.* 391. Lacon v. Briggs, 3 Atk. 107. Truman v. Fenton, Cowp. 548.
ghterlony v. Earl of Powis, Ambl. 231.

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r) Of the Manner of pleading, and taking Advantage of the Statute of Limitations.

N equity, where a particular ſpecial promiſe is charged to avoid the operation of the ſtatute, the plaintiff muſt deny the promiſe charged, averment in the plea, as well as by anſwer to ſupport the plea. Anon. 3 Atk. 70.

Non-aſſumpſit infra ſex annos to a bankrupt is no plea to an action at the of the aſſignees on an *aſſumpſit* to them. Skinner v. Rebow, 2 Str. 919.

So, to an action brought by the aſſignees of an inſolvent debtor, to re- ver money owing to him before his inſolvency, in which the plaintiffs clared, that in conſideration of the money being due to the inſolvent, defendant promiſed to pay it to them, as aſſignees, it is no plea to ſay that the cauſe of action firſt accrued to the inſolvent before the plaintiffs became aſſignees, and that ſix years had elapſed after the cauſe of action firſt accrued to the inſolvent, and before the ſuing out of the writ of the plaintiffs." Kinder v. Paris, 2 H. Bl. 561. *Qu.* Whether in this caſe the defendant might have pleaded, that the

ney was firſt due to the inſolvent more than ſix years before the action was brought, and that had made no *expreſs* promiſe to the plaintiffs within ſix years. *Qu.* alſo, Whether in ſuch a on the plaintiffs muſt not make an *expreſs* promiſe.

MAIHEM.

(B) How puniſhed.

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If a man attack) In Brown v. Seymour, the court ſeemed to think a declaration, that defendant ulted and maimed the plaintiff in the left hand particular enough, though they did not allow circumſtances of the caſe to be ſuch as called for an increaſe of damages. 1 Wilſ. 6.
n Smallpiece v. Bokenham, M. 27 Car. 2. C. B. upon a motion to increaſe damages *ſuper viſum ertis*, the court ſaid, it was neceſſary to be proved to be the ſame wound for which the damages e given, and ordered notice to be given to the defendant who appeared, and witneſſes on the part and on the other were examined, and ſeveral of the jurymen, who all ſaid, that no evidence given to them that any blow was given upon the eye, or that the plaintiff had loſt his eye by battery; and for this reaſon the court would not increaſe the damages; for new evidence at not to be given, this being a cenſure on the firſt verdict, and a correction of it. Bull. N. 4.

Maintenance, and the Offence of Buying or Selling a pretended Title.

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(*Maintenance in General*) See Mr. J. Buller's comment on the doctrine of maintenance, 4 Term Rep. 340.

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MANDAMUS.

3 Bl. Comm. 110.

THE writ of *mandamus* is high prerogative writ, iſſuing in the king's name, out of the court of King's Bench, and directed to any perſon, corporation, or inferior court of judicature within the king's dominions, requiring them to do ſome particular thing therein ſpecified, which appertains to their office and duty, and which the court of King's Bench has previouſly determined, or at leaſt ſuppoſes, to be conſonant to right and juſtice.

2 Burr. 1267. 4 Burr. 2188. Cowp. 378 1 Term Rep. 404.

The original nature of the writ, and the end for which it was framed, direct upon what occaſions it ſhould be uſed. It was introduced to prevent diſorder from a failure of juſtice, and defect of police. Therefore it ought to be uſed upon occaſions where the law has eſtabliſhed no ſpecifick remedy, and where in juſtice and good government there ought to be one. In the more ancient caſes, the grounds upon which the court of King's Bench have granted or refuſed a *mandamus* are not explicitly ſtated.

3 Burr. 1267. 3 Term Rep. 651. 1 Term Rep. 404. 3 Term Rep. 652.

Within the laſt century, it has been liberally interpoſed for the benefit of the ſubject and advancement of juſtice. The value of the matter, or its importance to the publick police, is not ſcrupulouſly weighed. If the party making the application has a right, a *legal* right, and no other *ſpecifick legal remedy*, *this* will not be denied: for his having a remedy in *equity* will not be conſidered as any ground of refuſal. And even though he may have another *legal* ſpecifick remedy, if ſuch remedy be *obſolete*, the *mandamus* will be granted.

Bull. N. P. 199. Ca. temp. Hardw. 99. 4 Burr. 2189.

This writ is the proper remedy to enforce obedience to acts of parliament, and to the king's charters, and, in ſuch caſes, is demandable *ex debito juſtitiæ*. But where the right is of a private nature, as in the caſe of an office, in which the publick are not concerned, ſuch as that of deputy-regiſter, it is diſcretionary in the court either to grant or refuſe it.

(A) Of the Nature of the Writ: And herein of the Suggeſting and Manner of awarding thereof.

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(*A Mandamus is*) (*f*) Lord Mansfield ſaid, that in a manuſcript book of reports which he had ſeen, the reporter cites (in reporting Dr. Bonham's caſe,) a *mandamus* in the time of Ed. 3. directed to the Univerſity of Oxford, commanding them to reſtore a man that was *banniſus*. 4 Burr. 2189.

(*A Man*

(B) Of the Form thereof, and for what Irregularities it may be quashed or superseded.

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(*A Mandamus it a*) Upon producing the rule in this case, it appeared to be *fourteen* and not *fifteen* days, and so is 1 Str. 407. And one of the days is to be taken inclusive, and the other exclusive, so that a writ tested the 14th may be returnable the 28th. *Ibid.*

(*If there be*) For the court will not amend it after a return has been made to it, particularly, that return has been traversed. Rex v. Mayor, &c. of Stafford, 4 Term Rep. 689. In Rex v. Mayor of York, the court held, that it was too late for a party to object to the writ after he had made a return to it. 5 Term Rep. 74. But in Rex v. College of Physicians, 3 Burr. 2740. the writ was quashed after the return made. And see acc. Rex v. Ward, 2 Str. 893. Rex v. Mayor of Abingdon, 1 Ld. Raym. 559. 2 Salk. 699.

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(*If a mandamus*) Bull. N. P. 200. S. C. 1 Bl. Rep. 60. So, Rex v. Borough of Midhurst, 1 Will. 283.

A motion was made for a *mandamus* to the mayor, to assemble and do the business of the corporation, and the writ was granted accordingly. In drawing up the writ, the officer made it out for an assembly, and to admit all persons having a right to their freedom, who should appear before them to demand it. It was moved to supersede the writ, because every person's right was distinct, and it would be hard to oblige the mayor to make a return that he had admitted all who had a right. *Et per curiam*, It must be superseded, for we never intended such a complicated *mandamus* as this. The reason for the writ's being superseded, is that "it was not warranted by the rule." And see Rex v. Wildman, 2 Str. 579. a *mandamus* superseded on that ground. Rex v. Mayor of Kingston upon Hull, 1 Str. 578. 8 Mod. 209. S. C. but the reason assigned in this last report.

(*If a writ*) Ca. temp. Hardw. 212. S. C. But if the Bishop himself should refuse to compel the execution of the sentence, *qu.* whether the court of King's Bench would not grant a *mandamus* to him for that purpose? See And. 176.

(C) In what cases to be granted: And herein,

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(*So a mandamus lies for a* (*c*) *recorder*) 4 Burr. 1999.

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(*A mandamus lies*) Ca. temp. Hardw. 130. 3 Burr. 1421.

(*So a mandamus*) It will equally be granted, though he be appointed by the parson; for the right to the office is a temporal right; and the clerk, though appointed by the parson, is a servant to the parishioners. Rex v. Ashton, Say. Rep. 159. And the office is *primâ facie* an office for life. *Id.* 175.

(*So a mandamus lies*) 2 Barnard. K. B 365.

So, lecturers, if they have fixed salaries, not depending upon voluntary contributions, it seems, may be admitted or restored to their stations, if wrongfully kept out, by a writ of *mandamus*. 1 Will. 11. S. C. Rex v Bishop of London, 1 Term Rep. 331. Rex v Field, 4 Term Rep. 125. Rex. v. Bishop of London, 2 Str. 1192.

So, this writ lies to restore a curate to a chapel which is a donative, and endowed with lands. Rex v. Blower, 2 Burr. 1043.

So,

2 Ld. Ray. 1206. 2 Barnard K. B. 366.

So, it lies to the biſhop to grant a licence to a curate, if it be refuſed without juſt reaſon.

Rex v. Biſhop of Carliſle, 2 Burn's E. L. 103.

Rex v. Barker, 3 Burr. 1265. 1 Bl. Rep. 300. 352. S. C.

So, ſince the act of toleration, it will lie to admit or reſtore a diſſenting miniſter where there is an endowment.

Rex v. Jotham, 3 Term Rep. *Qu.* Whether the party applying ſhould not ſhew his compliance with the requiſitions of the toleration act?

Rex v. Inhabitants of Croydon, 5 Term Rep. 713.

A *mandamus* hath been refuſed to admit a veſtry clerk, his office being merely of a private nature, and not being fixed and permanent, but depending entirely on the will of the inhabitants, who may chooſe a different clerk at each veſtry.

Caſe of Scriven and Turner 2 Str. 832, Page 532

A *mandamus* was granted to the court of alderman in *London*, to reſtore a perſon to the office of yeoman of the wood-wharf, on an affidavit of its being an ancient office, and a freehold.

(*A mandamus was granted,*) 2 Term Rep. 182. note S. C.

Rex v. Mayor of London, 2 Term Rep. 177. Page 533

So, it ſeems, a *mandamus* will lie to reſtore to the office of clerk of the Bridge-houſe eſtates in *London*, ſuch office being an ancient office for life, the duty of which is to ſuperintend certain eſtates which are appropriated by the corporation for the ſupport of *London* bridge.

(*It ſeems to be*) But the law is not in theſe caſes, as here ſtated, for the court of King's Bench have clearly a juriſdiction over hoſpitals and colleges of phyſick. Rex v. Dr. Aſkew. 4 Burr. 2187. Rex v. Mayor of Glouceſter, Mich. 1 W. & M. cited in And. 184.

(*And this ſeems*) So, Rex v. Biſhop of Ely, 5 Term Rep. 475.

(*A mandamus to reſtore*) It has been ſince determined, that a *mandamus* for this purpoſe will lie to a viſitor. Rex v. Biſhop of Lincoln, 2 Term Rep. 338. note.

Rex v. Biſhop of Cheſter, 2 Str. 797.

A *mandamus* was granted, directed to the biſhop of *Cheſter*, as warden of *Mancheſter* College, to admit a chaplain, upon the ground that the biſhop being viſitor of this college, which was of royal foundation, and having been alſo appointed warden, could not viſit himſelf, and, conſequently, the viſitatorial power was ſuſpended and the remedy was in the court of King's Bench to prevent a failure of juſtice. But the right of the court of King's Bench to interfere in this caſe ſeems to be at leaſt queſtionable: for where there is a defect of the viſitatorial power in private eleemoſynary lay-foundations, it hath been ſince ſolemnly determined, that the right of viſitation devolves upon the king, in his perſonal, not in his politick capacity, and muſt be exerciſed by him in his court o ſChancery.

Rex v. Maſter and Fellows of St. Catherine's Hall, 4 Term Rep. 233.

(*a*) Note, for an obſolete remedy as by aſſiſe, is conſidered as an exception to the rule. 1 Term Rep. 404. 3 Term Rep. 632.

It is, in general (*a*), a ſufficient reaſon with the court to refuſe a *mandamus*, that the party applying for it has another legal, ſpecifick remedy. Therefore, they have refuſed it to the Bank (*b*), to compel them to transfer ſtock, becauſe the party had a remedy by action on the caſe. So, to old churchwardens (*c*) to deliver over the pariſh books to the new ones; for they might have a right to keep them, and that right might be tried by an iſſue at law. So, to the benchers of an inn of court (*d*) to call a perſon to the bar; for the proper remedy, in ſuch caſe, is by appeal. So, to a mayor (*e*) to admit to the office of recorder; becauſe there was a recorder

b

facto, and the party had another remedy by *quo warranto*. So, to a ſurer of a county *(f)* to reimburſe conſtables monies expended by them conveying rogues, *&c.* under 17 *G.* 2. *c.* 5.; for the quarter ſeſſions e juriſdiction under the act over the conſtables' accounts. So, where e were two claimants of the ſame perpetual curacy *(g)*, the court re- ed an application for a *mandamus* to the biſhop to licenſe, becauſe each another ſpecifick remedy by *quare impedit*. And for the ſame reaſon, ould ſeem, notwithſtanding ſome authorities to the contrary, that a *damus* ought not to be granted to admit to a prebend *(h)*.

(*b*) Rex v. Bank of England, Dougl. 524. (*c*) Rex v. Street, 8 Mod. 58. (*d*) Rex v. Gray's Inn, Dougl 353. (*e*) Rex v.

yor of Colchester, 2 Term Rep 259. (*f*) Rex v. Erle, 2 Burr. 1197. (*g*) Rex v Biſhop of ſter, 1 Term Rep. 396. (*h*) The caſe of Clarke v Biſhop of Sarum, 2 Str. 1082. Andr. 20. where ſuch a *mandamus* is granted, is held not to be law in Powell v. Milbank, 1 Term Rep. note. The caſes of the King v. Dean and Chapter of Armagh, Rex v. Dean and Chapter of wich, 1 Str. 159. and Rex v. Dean and Chapter of Dublin, *Id.* 536. are cited in the report in rews, of Clarke v. Biſhop of Sarum, in ſupport of the rule But in the caſe of the Dean and pter of Norwich, Dr. Sherlock was prebendary by virtue of an act of parliament, and he no means but a *mandamus* to get into his ſtall. In the caſe of the Dean and Chapter of Dublin, e was no determination on the point, but the majority of the judges inclined a ainſt the *manda-*

That the court will not grant a *mandamus* where a *quare impedit* lies, appears alſo from Rex v. quis of Stafford, 3 Term Rep. 646.

Hence ariſes a difference between a *mandamus to admit*, and a *mandamus* 3 Term *ſtore*. The former is granted merely to enable to party the try his Rep. 578. t, without which he would have no legal remedy. But the court have ays looked much more ſtrictly to the right of the party applying for a *damus* to be reſtored. In theſe caſes, he muſt ſhew a *primâ facie* title; if he has been before regularly admitted, he may try his right by bring- an action for money had and received for the profits. Therefore, in r to entitle himſelf to this extraordinary remedy, he muſt lay ſuch s before the court as will warrant them in preſuming that the right is im.

) Where it lies to inferior Courts, and Magiſtrates, to oblige them to do that Juſtice which the Publick Good requires, and the Laws enjoin.

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The court) 1 Str. 552. 1 Bl. Rep. 600.

A *mandamus* iſſues *ex debito juſtitiæ*, to oblige the ordinary and his re- Rex v. ar to deliver up an adminiſtration bond for the purpoſe of enabling the Johnſon & t of kin, or a creditor, to put it in ſuit. others, East 29 G. 3

Archbiſhop of Canterbury v. Houſe. Comp 140.

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If by the cuſtom) 1 Burr. 127. And now by 12 Geo. 3 c. 21. "Where any perſon ſhall be titled to be admitted to his freedom; and ſhall apply to the mayor, or other officer who ath authority to admit freemen, to be admitted a freeman, and ſhall give notice ſpecifying e nature of his claim to ſuch mayor, or other officer; that ſuch mayor or other officer do not mit ſuch perſon within *one month* from the time of ſuch notice, the court of King's Bench ill be applied to for a *mandamus* to compel his admiſſion; if ſuch mayor, or other officer ſhall, ter ſuch notice, refuſe or neglect to admit ſuch perſon, writ of *mandamus* ſhall iſſue to com- l ſuch mayor, &c. to admit ſuch perſon, &c."

A *mandamus* has been granted to admit a Quaker, having made his af- Rex v. Tur- ation, into the *Turkey* Company, without taking the oath preſcribed by key Com- G. 2. *c.* 18. pany, 2 Burr. 999.

So,

Green v. Pope, 1 Ld. Raym. 125. Rex v. Juſtices of Derbyſhire, 1 Bl Rep. 606.

So, a *mandamus* lies to the regiſtrar of a biſhop, or the juſtices at ſeſſions to regiſter the certificate of a place for the meeting of proteſtant diſſenters according to the act of toleration. And as the regiſtrar and juſtices, in recording the certificate, are merely miniſterial; it does not ſeem to be neceſſary for the parties certifying to ſhew their having complied with the requiſitions of the act.

(*So a mandamus*) But a *mandamus* does not lie to make an equal rate, for the remedy is by appeal to the ſeſſions. Rex v. the Guardians of the Poor in Canterbury, 1 Bl. Rep. 667. 4 Burr. 2133. Rex v. Churchwardens of Weobly, 2 Str. 1259. Rex v. Churchwardens of Freſhford And. 24. 1 Str 393, 3 Dougl. on Elect. 142. note. So, to juſtices of the peace to make a warrant of diſtreſs to levy a rate. 1 Wilſ. 153.

(*So, mandamuſes*) So, to give judgment in an exciſe caſe. Rex v. Tod, 1 Str. 530. So, to take ſecurity on articles of the peace. Rex v. Lewis, 2 Str. 855. 1 Barnard. B. R. 166. S. C. Fitzg. 85. S. C.

Rex v. Juſtices of Wilts. 3 Burr. 1530. 1 Bl. Rep. 467. S. C. Rex v. Horton, 1 Term Rep. 374.

So, a *mandamus* has been granted to county juſtices, to receive and proceed upon a general traverſe to a preſentment by a juſtice of the peace upon view of a highway being out of repair. So, to appoint overſeers. So, it has been granted to compel two juſtices to receive and proceed on a complaint againſt an overſeer for not paying over the balance of the pariſh money in his hands, notwithſtanding there has been an appeal to the ſeſſions. Rex v. Carter, 4 Term Rep. 246.

(*b*) Rex v. Vice Chancellour, &c. of Cambridge, 3 Burr. 1647. 1 Bl. Rep. 547. S. C.

So, a *mandamus* has been granted (*b*) to the keepers of the common ſeal of the univerſity of *Cambridge*, commanding them to affix it to the appointment of high ſteward: to the warden of a college (*c*), to compel him to put the common ſeal to an anſwer of the fellows in Chancery, contrary to his own ſeparate anſwer: to commiſſioners of the land-tax to elect a clerk (*d*).

(*c*) Rex v. Wyndham, Cowp. 377. (*d*) 1 Term Rep. 146.

(*And this general*) Dougl 191. 3 Term Rep. 504.

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(*But though*) Therefore, it will not be granted to compel obedience to an order of ſeſſions. Rex v. Briſtow, 6 Term Rep. 168.

(*A mandamus*) rawford v. Powell, 3 Burr. 1013. 1 Bl. Rep. 229.

Bull. N. P. 201.

This being a beneficial law for the ſubject, the court have been very liberal in the conſtruction of it, and therefore have granted a *mandamus* to the election of a mayor, though there had not been any legal mayor for four years preceding.

Id. ibid. Caſe of the Borough of Tintagel, *infra*, E. 2 Str. 1003. Caſe of

So, they have granted a *mandamus* where there was a mayor *de facto* at the time, it appearing clearly there had not been a due election. But where it is at all doubtful whether the prior election be legal, the court will not grant ſuch a *mandamus*, till the validity of the prior election has been determined in a proper manner by information.

Aberyſtwith, 2 Str. 1157. Caſe of the Corporation of Scarborough, *id.* 1180. Rex v. Mayor, &c. of Cambridge, 4 Burr. 2008. Rex v. Newſham, Say. Rep. 211. But the mayor *de facto* muſt be made party to the rule to ſhew cauſe. Rex v. Bankes, 3 Burr. 1452. 1 Bl. Rep. 445. 452.

Caſe of the Corporation of Scarborough. 2 Str. 1180.

So, they have granted it to go to the election not only of the head officer, but of other annual officers, who were conſtitutent parts of the corporation.

See Rex v. Woodrow, 2 Term Rep. 732.

So, they have granted it, to a ſteward of a court-leet, to hold a court-et and ſwear a jury, that they may preſent a perſon duly elected mayor, at is, as duly elected mayor. Rex v. Willis, Andr. 279.

(E) Of the Authority by which it iſſues: And herein of the diſcretionary Power in the Court of granting or refuſing it. Page 540

O, they will not grant it to reſtore a perſon, where it is *confeſſed* he was *rightly* removed, even though he had no notice at the time. Rex v. Mayor, &c. of Axbridge Cowp. 523.

(F) To whom to be directed.

(*The writ is to be*) The court will not ſpecify to whom by name, a *mandamus* ſhall be directed. Burr. 784. *Id.* 798.

Where the *mandamus* was directed to the *mayor, aldermen, and commonalty of* Rippon, and they returned that they were incorporated by the name of the mayor, *burgeſſes*, and commonalty of *Rippon*, the court held the writ bad, becauſe directed to the corporation by a wrong name. Rex v. Mayor, &c. of Rippon, 2 Salk. 433.

The writ muſt be directed either to that part of the corporation who are to do the act, or to the corporation at large; for if it be directed to a part of the corporation who are not to do the act, it ſhall be quaſhed. Therefore, where a *mandamus*, to admit a perſon to the office of town-clerk, was directed to the mayor and aldermen of *Hereford*, and in fact, the mayor only was to admit, the writ was quaſhed. Rex v. Mayor, &c. of Abingdon, 2 Salk. 699. Reg. v. Mayor, &c. of Hereford, *Id.* 701.

So, where the *mandamus* was directed to the mayor, aldermen, *and common council of Norwich*, to proceed to the election of a town-clerk, the court granted a *ſuperſedeas*, it appearing, that the right of election was in the mayor and aldermen, and the writ was not directed to them, neither was it directed to the corporation by their corporate name. Rex v. Mayor, &c. of Norwich, 1 Str. 55.

But, where the power of amotion was in the mayor, aldermen, *and others of the common council*, the mayor and aldermen being part of the common council, and the writ was directed to the mayor, aldermen, and common council, it was moved to quaſh it for this direction, becauſe it ſeemed to infer that the mayor and aldermen were no part of the common council: the court ſaid, here is nobody in this direction who muſt not join in the act: this is only repeating the ſeveral conſtituent parts of the coporation; and the mentioning the entire common council after the mayor and corporation, is but a repetition *quoad* the mayor and aldermen. Pees v. Mayor, &c. of Leeds, 1 Str. 640.

The writ need not ſet out that the perſon to whom it is directed, is the perſon to do the act for which the *mandamus* is granted; for if it is miſdirected, it ſhould be ſo returned. Rex v. Ward, 2 Str. 893.

Of

(H) Of the Manner of enforcing Obedience to the Writ, and compelling a Return.

Caſe of the Bailiffs of Bridge-north, 2 Str. 808. 1 Barnard B. R. 53. S. C.

A *Mandamus* was directed to the two bailiffs, one of whom was for obeying the writ, but the other would not, nor join in the return. The court granted an attachment againſt both; for they ſaid, it would be endleſs to try in all caſes which was in the right, and it would be always uſed for a handle of delay.

S C. Where a writ was directed to the mayor and jurats of Rye to admit and ſwear a jurat, and the mayor claimed an excluſive right to the nomination of him, and the jurats denied any ſuch right in the mayor, ſo that they could never join in a return, it was conſented to try the right in a feigned iſſue. Rex v. Mayor, &c. of Rye, 2 Burr. 798.

(I) What ſhall be ſaid a good Return.

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(*As every mandamus*) But certainty to a certain intent in general is all that is requiſite here, which means, what, upon a fair and reaſonable conſtruction, may be called certain, without recurring to *poſſible* facts, which do not appear. If the return be certain upon the face of it, *that* is ſufficient, and the court cannot intend facts inconſiſtent with it, for the purpoſe of making it bad. If preſumptions were to be allowed, certainty in every particular would be neceſſary, and no man could draw a valid and ſufficient return. Beſides, preſumption and intendment, as far as they go, muſt be in favour of returns, not againſt them. *Per* Buller, J. Dougl. 159.

(*To a mandamus*) See *acc.* Wright v. Fawcett, 4 Burr. 2041. Rex v. Churchwardens of Taunton, St. James's Cowp. 414. Where ſeveral cauſes returned to a *mandamus* are inconſiſtent, the whole muſt be quaſhed, becauſe the court cannot know which to believe, and it is an objection to the whole return. It is like a declaration in which two inconſiſtent counts are joined; there, the plaintiff cannot have judgment. But where a return conſiſts of ſeveral independent matters not inconſiſtent with each other, ſome of which are good at law, and ſome bad, the court may quaſh the return as to ſuch as are bad, and put the proſecutor to plead to or traverſe the reſt. Rex v. Mayor, &c of Cambridge, 2 Term Rep. 456. Rex v. Mayor, &c. of York, 5 Term Rep. 66. Rex. v. Archbiſhop of York, 6 Term Rep. 493.

Rex v. Mayor, &c. of York, 5 Term Rep. 66

So, where a writ of *mandamus*, to certify the election of a recorder, ſtated, that the corporation, being duly aſſembled, proceeded to the election of a recorder; a return, that they were not duly aſſembled to proceed to the election of a recorder, was holden bad, as being a negative pregnant.

(*But if the*) 2 Str. 1235. S. P. 1 Show. 253. S. P. Andr. 105 S P. on a *mandamus* to reſtore. But ſee 2 Str 895. and Dougl. 82. A return to a *mandamus* ſtating in the words of the writ, that the proſecutor was not DULY ELECTED, *admitted, and ſworn*. was holden to be bad. *Secus*, perhaps, if it had been not duly elected, *or* admitted, *or* ſworn. Rex v. Lyme Regis, Dougl. 79.

Rex v. Mayor, &c. of York 5 Term Rep. 66.

If a writ ſet forth all the proceedings of the election, and conclude, by reaſon whereof *A.* was elected;" it is a bad return to ſay "that he "was not elected; the defendant ſhould traverſe one of the facts alle "ged."

Per Lord Mansfield, 2 Burr. 731.

Where an amotion is returned, the return muſt ſet out all the neceſſary facts preciſely, to ſhew that the perſon is removed in a legal and proper manner, and for a legal cauſe. It is not ſufficient to ſet out concluſions only; the facts themſelves muſt be ſet out preciſely, that the court may be able to judge of the matter. And ſo it is as to the *cauſe* of amotion; *that* muſt be ſet out in the ſame manner, that the court may judge of it.

Therefore

Therefore, where to a *mandamus* to reſtore *J.* S. to the place of com- *Ibid.*
n councilman of *L.*, the defendants returned generally the cauſe of the
otion by the common council, who were in due manner met and aſſem-
d; the court held the return to be bad; for that they were ſo duly aſ-
bled was a concluſion of law; that they ſhould have ſet out the facts,
. that they had as a ſelect body the power of amotion: that all the
mbers were ſummoned by regular and proper notice: and that *J.* S.
nſelf was alſo regularly ſummoned and heard in his defence.

So, if the amotion were by a part of a corporation, the return ſhould Rex v.
w how they have ſuch authority, whether by charter or preſcription; Mayor, &c
as the power of amotion is by the general law in the whole corporation of Doncaſter, Say.
arge, it ſhould appear how the ſelect part is entitled to it. Rep. 37.

But the power of amotion being generally in the whole corporation, it Rex v.
obvious, that if it is ſtated, that the party was removed by the corpo- Lyme
e body at large, it is unneceſſary to aver that the power was veſted in Regis,
m. Dougl. 149.

A return in general terms is bad; as, that the party had obſtinately re- Rex v.
ed to obey the rules and orders of the corporation, contrary to the duty Mayor,
his office, without ſtating what the rules and orders were. &c of Doncaſter,
2 I.d. Raym. 1564.

So, a return of removal for neglect of duty, without ſtating the particu- Say. Rep.
inſtances of neglect, has been holden to be bad. 37.

On a *mandamus* to reſtore to the office of a capital burgeſs, if the re- Rex v.
n ſtate the ground of diſfranchiſement to have been, the non-attendance Lyme
he proſecutor at a meeting to which he was ſummoned for the election Regis,
a capital burgeſs, an averment, that the right of ſuch election is in the Dougl. 177.
ital burgeſſes being the common council, does not aſſert with ſufficient
tainty, that he had a right to concur in the election, and ought to have
yed the ſummons, becauſe, conſiſtently with ſuch an averment, he
ght not have that right, it not appearing thereby that all the capital bur-
ſes are members of the common council.

If a writ be directed to a corporation by a wrong name, they may re- 2 Salk.
n this ſpecial matter, and rely upon it; but if they anſwer the exigen- 434-5.
of the writ, they cannot take advantage of the miſnomer.

If the ſuppoſal of the writ be falſe in not truly ſtating the conſtitution of 2 Salk. 431.
corporation, it will not be ſufficient for the return to ſtate it truly; the
fendants muſt alſo deny the ſuppoſal of the writ

L) Of the Party's Remedy for a falſe Return.

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(*It is clearly*) An action will lie for a *ſuppreſſio veri* in a return, as well as for an *allegatio falſi*.
ugl. 149.

The return need not be under the ſeal of the corporation, nor need the Rex v.
yor ſign it; and if an action be brought againſt the mayor for a falſe Mayor of
urn, it will be a ſufficient evidence againſt him, that the *mandamus* was Exeter,
ivered to him, and has ſuch a return, unleſs he can ſhew the contrary. 1 Ld. Raym.
In an action for a falſe return the plaintiff ſet out, that he was choſen 223. Bull.
on the firſt of *October*, according to the cuſtom. Upon evidence it ap- N. P. 209.
ared, that the cuſtom was to chooſe upon the 29th of *September*, and Vaughan
that v. Lewis,

Carth, 228. that the plaintiff was then choſen; and this was holden ſufficient to ſup-
port the declaration; for the day in the declaration is but form.

Green v. Pope, 1 Ld. Raym. 126. In an action for a falſe return, it is not material whether the writ iſſue properly or not.

Rex v. Lyme Regis Dougl. 135. Clerical miſtakes in returns may be amended after they are filed.

(M) Of awarding a peremptory *Mandamus.*

Foot v. Prowſe. 2 Str. 697. THE judgment of the Exchequer-chamber, whereby the judgment of *B. R. pro defendente* was reverſed, being affirmed in parliament, the plaintiff moved for a peremptory *mandamus*, inſiſting, that he had now falſified the return, and, conſequently, ſet aſide the defendant's excuſe. But it was objected, that no peremptory *mandamus* ought to go, unleſs, beſides the reverſal of the judgment given for the defendant, there had been alſo a new judgment given for the plaintiff; that a peremptory *mandamus* is a judicial writ, and muſt be founded upon ſome judgment eſtabliſhing the right of the party who applies for it: *P. C. Philips* v. *Bury*, 2 *Salk.* 431. *Cro. Ja.* 206. *Yelv.* 74. 2 *Ventr.* 295. *P.* 10 *Ann. Lidd* v. *Rod*, *Tr.* 7 *Ann. Hicks* v. *Sherburn*, 1 *Br. P. C.* 328. But *per curiam*—A peremptory *mandamus* ought to go; for this is not a judicial writ founded upon the record, but is a mandatory writ, which the court always grant, when they are ſatisfied of the party's right. The reverſal of the judgment is a declaration by the ſuperior court, that the plaintiff had a right; and there is no occaſion for any new judgment. We every day grant peremptory *mandamuſes* on producing the *poſtea*, which ſhews a form judgment is not neceſſary. A peremptory *mandamus* was awarded.

Ruding v. Newel, 2Str. 983. But a peremptory *mandamus* is not grantable pending a writ of error.

It is enacted by ſtat. 9 *Ann. c.* 20. § 2. that "where any *mandamus* "ſhall iſſue to admit or reſtore any burgeſſes, *&c.*, and a return ſhall be "made, and a verdict be found for the perſons ſuing ſuch *mandamus*, or judg-"ment be given for them, a peremptory *mandamus* ſhall be granted "without delay, as if ſuch return had been adjudged inſufficient."

Dean, &c. of Dublin, v. Dowgatt, 1 P. Wms. 348. 8 Mod. 27 S. C. 1 Str. 536. S. C. 2 Br. P. C. 554. S. C. Since this ſtatute a *mandamus* is in nature of an action, ſpecial replications and pleadings therein being admitted, and coſts given to either ſide that prevails, and error lies upon a judgment given therein. Yet it has been ſolemnly determined, that no writ of error will lie on a peremptory *mandamus*; for ſuch a conſtruction would entirely defeat the end of the ſtatute, and prevent the officer, who was choſen annually, from having any fruit of the *mandamus*.

Pender v Herle, 3 Br. P. C. 178. S. P. upon the authority of the above caſe of Dean, &c. Dublin v. Dowgatt.

Maſte

Maſter and Servant.

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Of the Manner of Hiring and Binding a Perſon Servant or Apprentice.

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And as an Apprentice.) By 5 G. 3. c. 46. § 18. the chamberlain, or other proper officer of city, &c. where any apprentice obtains his freedom by ſervitude, ſhall enroll the name of apprentice, who ſhall be placed out within ſuch city, the name of the maſter and miſtreſs, apprentice fee, the trade, and the dates of the indenture, on pain of twenty pounds. And by all printed indentures ſhall have the notice or memorandum deſcribed in the act, printed under the ſame.

By 5 *Eliz. c.* 4. § 25. an apprenticeſhip can only be created by INDENTURE: therefore, where the writing by which one perſon agreed to ſerve another for ſeven years began, "THIS INDENTURE witneſſeth," but was in fact a *deed poll*, and not an indenture, it was holden, that the maſter could not maintain any action upon it againſt a perſon for enticing away and detaining *his* APPRENTICE. Smith v. Birch, 1 Seſſ. Ca. 222.

So, an *agreement* to execute indentures of apprenticeſhip will not conſtitute a ſufficient binding under 5 *Eliz. c.* 4. although a ſervice of ſeven years be performed under it; for there muſt be an *indenture* duly executed: and of courſe, where there is neither indenture nor agreement, but only a binding by parol, there can be no apprenticeſhip. Rex v. Stratton, Burr. Sett. Ca. 272. Rex v. Whitchurch Caſe of St. Saviour's, Southwark, 1 Conſt's Bott's P. L. 463. pl. 648.

Quorum, 1 Conſt's Bott's P. L. 464. pl. 650. S. P. Rex v. Mannam, Burr. Set. Ca. 290.

An indenture, however, though loſt, ſhall be ſufficient, on proof being made, that it was duly executed; but a declaration of the mother, that ſhe heard the apprentice's father ſay, he was bound by indenture, is not ſufficient evidence of the fact.

It is provided by 31 *G.* 2. *c.* 11. that although the inſtrument by which the contract is formed ſhould not be indented, the apprentice ſhall nevertheleſs gain a ſettlement under it.

By the ſeveral ſtamp acts, the indenture (except in the caſe of a pariſh apprentice) muſt be ſtamped with a ſix ſhilling ſtamp, or it cannot be given in evidence.

And by 8 *Ann. c.* 9. § 32. a duty is impoſed of ſixpence for every forty ſhillings for every ſum of fifty pounds, or under, and one ſhilling for all ſums above fifty pounds, given, paid, contracted, or agreed for, to, or in relation to every clerk, apprentice, or ſervant; and proportionably for greater or leſs ſums; which duty ſhall be paid by the maſter or miſtreſs.

By

By § 33. this duty ſhall be under the management of the commiſſioners of the ſtamp office.

By § 35. the monies paid or agreed to be paid with every clerk, apprentice, and ſervant, ſhall be truly inſerted and written in words at length in the indenture or other writing which contains the covenants, &c. for ſuch ſervice; and ſuch indenture or writing ſhall bear date upon the day of ſigning, ſealing, or otherwiſe executing the ſame upon pain to every maſter or miſtreſs of double the ſum given, one moiety to the king, and the other to the informer; with full coſts to be recovered by action, &c. within one year after the term appointed for the ſervice is expired.

By § 36. the commiſſioners of the ſtamp-office are to provide two additional ſtamps, denoting the *ſixpenny* and *ſhilling* duties; and all indentures &c executed in the bills of mortality, ſhall be ſtamped at the head ſtamp-office, and the duties paid to the Receiver-General within one month from the date of the indenture.

By § 37. all ſuch indentures, &c. executed in any other part of Great *Britain* ſhall, at the option of the party, be ſent either to the head ſtamp-office within the bills of mortality, or to ſome of the collectors reſiding without the bills of mortality, within two months after the date of ſuch indentures and the duties paid thereon: and in caſe the ſaid payment ſhall be made immediately to the Receiver-General, the indenture ſhall be forthwith ſtamped with one of the new ſtamps; but, if made to the collector, he ſhall indorſe on ſuch indenture a receipt for the monies ſo paid in words at length, bearing date the day on which ſuch payment ſhall be made, and ſubſcribe his name thereto, and then deliver back the indenture to the bringer thereof.

By § 38. the indenture, &c. ſo indorſed, if made within fifty miles from the bills of mortality, ſhall, within three months after the date thereof, be brought or ſent to the ſtamp-office in *London*, and immediately ſtamped as the caſe ſhall require.

By § 39. all indentures, &c. wherein ſhall not be truly inſerted the full ſum received with ſuch apprentice, &c, or which ſhall not be ſtamped according to the tenor of this act, within the time limited, ſhall be void, and not available in any court; and the apprentice be incapable of being free of any city, &c., or of following the intended trade.

But by § 40. this act ſhall not extend to apprentices put out at the common publick charge of any pariſh.

By § 43. no indenture required by this act to be ſtamped, ſhall be given in evidence in any ſuit btought by the parties, unleſs the party producing do firſt make an oath, that the ſums inſerted were all that were paid on the half of the apprentice.

And by § 45. where any thing, not being money, ſhall be given, &c. to any maſter or miſtreſs with any apprentice for whom a duty is chargable by this act, the duty ſhall be paid to the full value of the thing given.

By 9 *Ann. c.* 21. § 66. if any maſter or miſtreſs ſhall neglect to pay the rates or duties, they ſhall forfeit fifty pounds, one moiety to the king, the other to him who ſhall ſue for the ſame, &c.

Cuerden v. Leland, 1 Bott's P. L. 483. pl. 679.

If a perſon agrees to go apprentice to another, and enters upon the ſervice accordingly, and after a trial of three months is bound apprentice by indenture, but the indentures are dated at the time he entered on the ſervice

ice, and not at the time of the execution, the indentures are abſolutely oid to all intents and purpoſes, by 8 *Ann. c.* 9. § 35.

So alſo, where a mother bound her ſon apprentice, and paid twenty illings to the maſter, which ſum was recited in the indenture purſuant to *Ann. c.* 9. § 45 but the ſixpence duty was never paid, nor the inden- res ſtamped with the additional ſtamp, they were held void. *Ib. ibid.*

So alſo, if on production of the indentures, they are not ſtamped ough the duty paid. Rex v. Lanvari Dyffryn Clwyd, Burr. Set. Ca. 236. Rex v. Ditchingham, 4 Bur. Set. Ca. 4 Term Rep. 769.

So, an agreement of apprenticeſhip, entered into with a view to ſave e expences of indentures, and to avoid the payment of the duties impoſed the above ſtatute of 8 *Anne*, is void and of no effect. Rex v. Highnam, 1 Conſt's Bott's P. L. 495. pl. 689.

But, in caſes where the indenture is not produced, and evidence is given at indentures actually exiſted, and were duly executed, the court will eſume that they were regularly ſtamped, and the duty paid. Rex. v. Eaſt Knoyle, Burr. Set. Ca. 151.

But, before parol evidence is given of the contents of indentures, proof uſt be made of their being loſt; and it ſeems, that ſome evidence ought be given, not only that they were duly executed, but that the duty was id. Rex v. Badly, 1 Conſt's Bott's P. L. 490. pl. 687.

The additional ſtamp is only required, where the money, or other thing, given, paid, contracted, or agreed for, with, or in relation to, the ap- entice; and therefore, when the mother of a lad propoſed to put him t an apprentice, but the intended maſter refuſed to take him, becauſe wanted clothes, and the grandfather agreed to give the maſter thirty illings, which the maſter was to, and did, lay out for the boy in clothes, e court held, that there was not any ſtamp neceſſary on this account; for e ſtatute means money given for the benefit of the maſter; and, in this ſe, he laid out the money merely as an agent to the boy's friends. Rex v. Northow- ram, 2 Str. 1132. Rex v. St. Pe- ter's, Cheſ- ter, 1 Conſt's Bott's P. L. 486. pl. 682. S P. Rex. v. St. Petrox, in Dartmouth, 4 Term Rep. 196. S. P.

So, where in an indenture ſixpence was the ſum mentioned to have been ven to the maſter, as a fee with the apprentice; the court reſolved, that e ſtatute intended, that when more than fifty pounds were paid, a twen- th part thereof ſhould be paid for duty, and a fortieth part when the ſum s under fifty pounds; but that in the preſent caſe, there would not, un- r this mode of calculation, be any coin ſmall enough to pay the duty in; d *de minimis non curat lex*. Baxter v. Faulam, 1 Wilſ. 129. Rex v. Yarmouth, Burr. Sett. Ca. 379. S. P.

So alſo, where in indentures of apprenticeſhip, there was a covenant, at the father would provide the apprentice meat, drink, waſhing, lodg- , and clothes, and that the maſter ſhould pay the apprentice five pounds ear in conſideration of his faithful ſervices and of the due performance the covenants; the court ſeemed to think, that the indentures did not uire a ſtamp under the ſtatute of 8 *Anne*. Pennington v. Sudal, 1 Conſt's Bott's P. L. 488. pl. 686.

But this point was afterwards more ſolemnly decided. Thus, where it s agreed in the indentures, that "ſufficient meat, drink, apparel of all kinds, phyſick, ſurgery, and lodging, and all other neceſſaries during the term, ſhould be found and provided for the apprentice by the father, for which purpoſe the maſter was to allow him four ſhillings a-week dur- Rex v. Portſea, Burr. Sett. Ca. 834.

" ing the term ;" the court held the indentures good, although they were not ſtamped, and no duty paid.

Rex v. Walton Dale, 3 Term Rep. 515.

So alſo, where in an indenture the apprentice covenanted, that " " would at his own expence provide for himſelf meat, drink, wash " lodging, apparel, and phyſick, at all times during the term ; and " maſter covenanted to pay him five ſhillings a-week for the firſt " years, and ſeven ſhillings a-week for the remainder of the term ;" was ruled, that the indenture did not require the additional ſtamp impoſed by 8 *Anne*.

Rex v. Leighton, 4 Term Rep. 732.

And where an indenture was, that the father of the apprentice would at his own charge, find and provide for his own ſon good, competent, ſufficient meat, drink, and lodging, every *Sunday* in the year during the term ; and would provide him with clothes and apparel of all ſorts (except working aprons and ſhoes) ; and the maſter covenanted to provide him with meat, drink, and lodging, except on *Sundays*, during the term ; the court thought the point ſo clearly ſettled, that they would not ſuffer it to be argued.

Rex v. St. Petrox, in Dartmouth, 4 Term Rep. 196.

So alſo, money given by pariſh officers (in the caſe of a voluntary binding), as the conſideration of the pauper's being taken apprentice, is not able to the duty impoſed by the 8 *Anne* : for it comes within the exception of § 40. as being at the publick charge of the pariſh.

By 18 *G.* 2. *c.* 22. § 24. if any maſter or miſtreſs neglect to pay the rates and duties within the reſpective times limited by 8 *Ann. c.* 9. and 9 *Ann. c.* 21. they ſhall further forfeit for every neglect double the rates and duties charged.

By 18 *G.* 2. *c.* 22. § 25. if any apprentice, *&c.* on the neglect of his maſter or miſtreſs to pay the rates and duties, ſhall, on notice to his maſter or miſtreſs, pay the ſaid rates and duties, and alſo the penalties and forfeitures of this act, within one year after the ſame became incurred, ſuch apprentice may, within three months afterwards, demand back the apprentice-fee ; and if the ſame be not paid within three months after ſuch demand, he may recover the ſame by action, and ſhall be diſcharged from his apprenticeſhip.

And by § 26. ſuch apprentice ſhall have the ſame benefit of the time he ſhall have ſerved, as he could have had in caſe of any aſſignment or turning-over to any new maſter or miſtreſs.

By 20 *G* 2. *c.* 45. § 5. if any maſter or miſtreſs, who ſhall become liable to the double duties, ſhall pay them to the perſons who ought to receive them ; and alſo render the indentures to be ſtamped at any time within two years after the end of the apprenticeſhip, and before any ſuit for them is commenced, the indentures ſhall be good and available in law and equity, and the apprentice as capable of following his trade, as if the ſingle duties had been regularly paid.

By §6. if any apprentice ſhall, after ſuch double duties incurred, make requeſt in writing before one witneſs, to his maſter or miſtreſs to pay them, and ſhall, on the neglect of his maſter or miſtreſs to pay the ſaid double duties within three months after ſuch requeſt, pay the ſame at any time within two years after the determination of his apprenticeſhip, he may within three months after ſuch payment, demand of his maſter or miſtreſs double the apprentice-fee ; and if the ſame be not paid within three months after ſuch demand, he may recover the ſame by action, and ſhall, immediately after ſuch payment, and upon ſignifying by writing under his hand

t he deſires to be diſcharged from his apprenticeſhip, be diſcharged from ſame.

And by § 7. he ſhall have the ſame benefit of the time ſerved, as if he d been aſſigned or turned over.

But by § 8. if, where any proſecution ſhall be commenced againſt any ſter or miſtreſs for penalties, the apprentice ſhall pay ſuch double duties thin two years after his apprenticeſhip expires, the indenture ſhall be od, *&c.*

By the ſtatute of 8. *Ann. c.* 9. a duty is laid upon the maſter in conſide- ion of the premium received by him with the apprentice: it is incum- nt upon him therefore to take care that the premium be inſerted in the denture, and that it be properly ſtamped. If this be not done, he can- t ſupport any action for the apprentice fee, although he has in fact main- ned the apprentice for ſome time, and until he abſconded. Jackſon v. Warwick, 7 Term Rep. 121.

(B) Who may ſerve, or are capable of binding themſelves Servants or Apprentices.

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(*It ſeems clearly*) 8 Mod. 190. Dougl. 518.
(*But notwithſtanding*) Whitby v. Loſtus, 8 Mod. 459. S. P. Brand v. Ewington, Dougl. 518. P.

Although an infant cannot bind himſelf apprentice ſo as to entitle his ſter to an action of covenant for breach of any of the clauſes in the in- nture, yet it ſhould ſeem (but the point has never been directly deter- ined,) that if in fact he does bind himſelf, he is not afterwards at liberty avoid a contract ſo notoriouſly for his benefit. St. Nicholas and St. Peter, in Ipſwich. 2 Str. 1066. Burr. Sett. Ca. 91.

C. Ca. temp. Hardw. 323. S. C. Rex v. Evered, Cald, 26. Rex v. Hindringham, 6 Term p. 557. Aſhcroft v. Bertles, *id.* 652.

It has been determined, that an indenture of apprenticeſhip *to* an infant not void, but only voidable. Rex v. Petrox, in Dartmouth, 4 Term Rep. 196.

If an infant bind himſelf for a term which will not expire till after he s attained twenty-one, yet he is entitled to be diſcharged upon his at- ining that age. *Ex parte* Davis, 6 Term Rep. 715.

(C) Of the Juriſdiction of Juſtices of Peace in binding out Apprentices, in obliging Maſters to provide for them, in compelling them to refund the Money had with them, and in diſcharging Apprentices from their Maſters.

BY § 47. juſtices are authorized to grant warrants to apprehend appren- tices or ſervants, who ſhall abſcond from ſervice, and to impriſon hem, until they demean themſelves properly. An apprentice apprehended under this act cannot ob-

ct, in his defence, that he had been bound contrary to the directions of the act, and had there- re run away to avoid the indentures. Rex v. Evered, Cald. 26.

By 20 G. 2. c. 19. § 3. "any two juſtices where the maſter dwe
"may, upon complaint of any pariſh apprentice, or of any other appre
"tice upon whoſe binding no larger a ſum than five pounds was pai
"ſummon ſuch maſter and examine the caſe, and upon proof on oath
"the fact alledged, may, whether the maſter be preſent or not, if the ſ
"vice of the ſummons be proved, diſcharge ſuch apprentice by a cert
"cate under their hands and ſeals. And by § 4. the two juſtices, up
"complaint by the maſter on oath, may examine the ſame, and comm
"the apprentice to the houſe of correction to hard labour for any time n
(a) Enlarged to *three* months by 32 Geo. 3. c. 57. § 13. "exceeding a calendar month (*a*), or may diſcharge ſuch apprentice
"aforeſaid." By § 5. "Perſons grieved may appeal to the next gene
"quarter ſeſſions, where the matter ſhall be finally determined, and ſu
"coſts paid to the appellant or reſpondent as the ſeſſions ſhall think reaſ
"able, not exceeding forty ſhillings."

By 6 G. 3. c. 25. "If any apprentice, except ſuch with whom t
"ſum of ten pounds was paid, ſhall abſent himſelf during the term,
"ſhall ſerve for ſo long a time as he ſhall abſent himſelf over and beyo
"the term of his apprenticeſhip, unleſs he ſhall make ſatisfaction to h
"maſter for the loſs he ſhall have ſuſtained by his abſence; and if he r
"fuſe ſo to do, one juſtice, on complaint of the maſter, may apprehe
"ſuch apprentice, and on hearing the complaint, determine the ſatisf
"tion that ſhall be made; and if the apprentice do not conform to ſ
"determination, the juſtice may commit him to the houſe of correc
"for any time not exceeding three months." By § 3. "the applica
"of the maſter to compel ſatisfaction for abſence as aforeſaid, muſt
"made within ſeven years next after the expiration of the term of
"prenticeſhip." And by § 5. "the party grieved may appeal to
"next general quarter ſeſſions, on giving ſix days notice of his inten
"to bring ſuch appeal, and of the cauſe and motive thereof, to ſuch
"tice, and entering into a recognizance within three days after ſuch
"tice, to try ſuch appeal; and the ſeſſions ſhall finally determine
"ſame, and award coſts." But by § 6. "neither the ſtannaries nor
"juriſdiction of the chamberlain, nor any other court within the city,
"be affected by this act."

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(*By the* 43 *Eliz.*) But by 18 Geo. 3. c. 4. "the apprenticeſhip of a *male* child put out purſu
to the 43 Eliz. ſhall be for no longer term than till ſuch child ſhall come to the age of *twen*
years."

(*By the* 8 & 9 *W.* 3.) By 20 G. 3. c. 36. the ſame proviſions are enacted with reſpect to p
perſons put out apprentices in any particular diſtrict of England by virtue of any private act of
liament for the regulating and ordering of the poor.

(*That by* 5 *Eliz.*) Although the ſeveral reporters, who have given us the hiſtory of the ca
the King v. Fairfax, aſſign different reaſons for the judgment of the court in that particular
yet they all agree, that the three judges, *contra* Holt, C. J. were of opinion that the ſtat. 43
having empowered the churchwardens and overſeers, with the aſſent of two Juſtices, to bind
riſh apprentices where they ſhould ſee convenient, the order for that purpoſe was compulſory
the maſter.

(*That though*) Rex v. Saltern, Eaſt. 24 G. 3. 1 Bot. P. L. 555. pl. 791. S. P.

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(*And as the juſtices*) But the indictment muſt ſtate, that the binding or appointment was a bi
ing or appointment within the 43 Eliz. c. 2. Rex v. Trevilian, 2 Str. 1268.

(*The juſtices*) Nor can he ſend him away on account of his being ſick, or ſo lame as to be
able to work, or having the king's evil to ſuch a degree as to be deemed incurable. Rex v. H
Owen, 1 Str. 99. Neither can the ſeſſions diſcharge an apprentice on *general allegations of*
uſage by the maſter, and the declaration of the maſter that he will not take his apprentice

by 5 Eliz. c. 4 § 35. the *particular cauſe* of the diſcharge muſt be ſtated in the order. Rex v. vis, 2 Str. 704. Rex v. Heaſeman, Ca temp. Hardw. 101. 2 Str. 1014 S. C. But a neglect the part of the maſter to inſtruct his apprentice in the myſteries of that trade he was bound to rn, is a ſufficient cauſe of diſcharge. Rex. v. Amies, 1 Conſt's Bott's P. L. 515. pl. 731. t the contrary is now ſettled, Rex v. Amies, *ubi ſupra*. Rex. v. Collingburne. 1 Str. 663.

(*It hath been*) But in Rex v. Vandeleer, 1 Str. 69., juſtices cannot order monies to be returned diſcharge of an apprentice.

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(*If the maſter*) But the maſter muſt be ſummoned. Watkins v. Edwards, 1 Mod. 286. And muſt appear on the face of the order, that the maſter either appeared, or was ſummoned. Reg. Rutter, 1 Conſt's Bott's P. L. 513. pl. 723. Rex v. Gill, 1 Str. 143. But it is ſaid that although there muſt be a ſummons, it need not be ſet forth in the order; nor need the order ſtate, that the maſter was heard, for that ſummons and default is equal to appearance, Rex. v. Amies, Conſt's Bott's P. L 515. pl. 731. But *qu.* of this opinion, for the ſtatute expreſsly requires appearance, and Lord Hardwicke quaſhed an order, becauſe it did not appear on the face of it, that the maſter had appeared *or* made default. Rex v. Heaſeman, Ca. temp. Hardw. 101.

The order muſt ſtate the reaſon of the judgment, for the ſtatute requires the ſeſſions to expreſs the cauſe of the diſcharge. Rex v. Heaſeman, Ca. temp. Hardw. 101.

It muſt alſo be enrolled among the records of the ſeſſions. Rex v. Hales-Owen, 1 Str. 99.

The ſeſſions of the place where the parties *live* have juriſdiction on this ſubject; and therefore, where *A.* was bound and enrolled apprentice to a freeman in *London*, but lived with his maſter in the county of *Middleſex*, it was holden, that the ſeſſions of the county have a concurrent juriſdiction with the ſeſſions of the city, and may diſcharge the apprentice in *Middleſex* for cauſes ariſing in *London*. Rex v. Collingburne, 1 Str. 663.

It is ſaid to have been the opinion of all the judges, that a pariſh apprentice may be put to a clergyman. 1 Conſt's Bott's P. L. 540. pl. 771.

So, a female pariſh apprentice bound to a day-labourer to learn the art and myſtery of a houſewife, has been holden good. Rex v. St. Margaret's, Lincoln, 1 Conſt's Bott's P. L. 549. pl. 787.

A perſon occupying land in a pariſh (*a*), but living out of it, is compellable to receive a pariſh apprentice. And a cuſtom to bind only to occupiers of a particular deſcription is not good. Rex v. Clapp, 3 Term Rep. 107. Rex v. St. Nicholas, in Nottingham, 2 Term Rep. 726. Rex v. Saltern, 1 Conſt's Bott's P. L. 555. pl. 791. (*a*) It is ſaid, *generally*, that the binding of pariſh apprentices may be to a perſon reſiding in another pariſh. Rex v. St. Margaret's, Lincoln, 1 Conſt's Bott's P. L. 549.

In binding apprentices under 20 *G.* 3. *c* 36. it is not neceſſary that the maſter ſhould actually reſide within the pariſh: if he be an occupier there, it is ſufficient; for *inhabitant* and *occupier* are for this purpoſe ſynonymous. Rex v. Tunſtead, 3 Term Rep. 523.

It is ſaid, that an order of apprenticeſhip need not ſtate the trade to which the pauper is intended to be bound. Rex v. Gillifler, Sir T. Raym. 63.

But the juſtices cannot order, nor can the indentures covenant that the maſter, at the end of the term, ſhall give his apprentice two ſuits of clothes, one for holidays, and the other for working days; for this ſounds like *wages*, and they can only order *maintenance*; and not even that after the term is ended. Rex v. Wagſtaffe, Foley, 245.

A pariſh

Rex v. Chalbury, 1 Conſt's Bott's P. L. 543. pl. 779.

A pariſh apprentice may be bound for a ſhorter, but not for a longer time than the ſtatutes require; and if the indenture (*a*) be not for any certain time, it is not therefore bad; for with reſpect to the time, the ſtatute is only directory.

(*a*) Rex v. Woolſtanton, *id.* pl, 780.

Rex v. St. Petrox, Burr. Sett. Ca. 249.

So, an indenture binding a poor girl an apprentice is not void for want of the alternative, "or till married."

Id. ibid.

And neither a pariſh indenture, nor a common indenture, though voidable, can be avoided but by the parties to it.

Rex v. Hamſtall Redware, 3 Term Rep. 380.

Pariſh indentures muſt be aſſented to by two juſtices in the preſence of each other; for if it be done by them ſeparately, the indenture is void.

Rex v. Fleet, Cald. 31. 2 Conſt's Bott's P. L. 547. pl. 482.

It is not neceſſary to the validity of the indentures of a pariſh apprentice, that the maſter ſhould ſign the counterpart But after the maſter has ſigned the counterpart, he cannot appeal to the ſeſſions (*b*).

(*b*) Rex v. Saltern, 1 Conſt's Bott's P. L. 555. pl 791.

Rex v St. Nicholas, in Nottingham, 2 Term Rep. 726.

Nor is it neceſſary to their validity, that the apprentice ſhould ſign the deed.

Rex v. Langham, Cald. 126.

An infant pariſh apprentice and his maſter cannot by themſelves, without the aſſent of the pariſh officers, vacate the indentures. *Secùs*, after the apprentice has attained twenty one years of age (*c*).

(*c*) Rex v. Harburton, 1 Conſt's Bott's P. L. 558. pl. 792

By 32 *G.* 3. *c.* 57. § 11. "in every caſe where a pariſh apprentice ſhall "be diſcharged under the 20 *G.* 2. *c* 19. the two juſtices ſhall order the "maſter or miſtreſs to deliver up the apprentice's clothes, and to pay a "ſum not exceeding ten pounds to the pariſh officers, for the purpoſe of "placing ſuch apprentice out again. And the two juſtices may compel the "pariſh officers to enter into a recognizance to proſecute the maſter or "miſtreſs of any ſuch pariſh apprentice for ill-treatment of the appren-"tice."

By § 12. "the juſtices may order any maſter convicted under 20 *G.* "2. *c.* 19 when liable to take a pariſh apprentice, to pay to the pariſh of-"ficers a ſum not exceeding ten pounds, nor leſs than five pounds, for the "binding out ſuch poor child. But ſuch maſter may appeal to the quar-"ter ſeſſions, on giving notice, *&c.*"

By § 8. "if any maſter or miſtreſs become inſolvent, two juſtices, "where ſuch maſter or miſtreſs live, may, on the application of ſuch "maſter or miſtreſs, diſcharge any ſuch apprentice from the indentures, "if upon inquiry they find the allegation of inſolvency to be true." But by § 9. "this ſhall not extend to any indenture under the 43 *Eliz* *c.* 2. where a larger ſum than five pounds ſhall have been given."

Rex v. Barwick, 7 Term Rep. 33.

Where ſeveral perſons hold land in partnerſhip, ſome of whom actually reſide upon, and occupy it, and others reſide at a diſtance in another pariſh, the latter as well as the former are bound to take pariſh apprentices, if in other reſpects they are fit perſons to take them.

(D) Of

(D) Of the Neceſſity of ſerving an Apprenticeſhip, as a Qualification to follow a Trade within the 5 *Eliz. c.* 4.

BUT by the 15 *Car.* 2. *c.* 15. hemp-workers of all kinds, net-makers, and makers of tapeſtry hangings, may ſet up without having ſerved ſeven years.

By 24 *G.* 3. *ſeſſ.* 2 *c.* 6. § 1. 4. all officers, mariners, and ſoldiers, who have been in the land or ſea ſervice, or in the marines, or in the militia, or any corps of fencibles, ſince the ſecond year of his majeſty's reign, and have not deſerted, their wives and children, may exerciſe ſuch trades as they are apt for, in any town or place.

By 26 *G.* 3. *c.* 107. §. 131. every perſon having ſerved in the militia, when drawn out into actual ſervice, being a married man, may exerciſe any trade in any town or place.

By 6 & 7 *W.* 3. *c.* 17. an apprentice diſcovering two offenders guilty of coining, ſo as they be convicted, ſhall be deemed a freeman, and may exerciſe his trade, as if he had ſerved out his time.

And by the 17 *G.* 3. *c.* 33. it ſhall be lawful for any perſon carrying on or uſing the trade of a dyer within the counties of *Middleſex*, *Eſſex*, *Surry*, and *Kent*, to employ journeymen who have not ſerved an apprenticeſhip to the trade, without incurring any penalty.

The like liberty is given to hatters *generally* by the 17 *G.* 3. *c.* 55. § 5. and to woolcombers by 35 *G.* 3. *c.* 124.

It hath been objected, that the uſing of a trade in a country village, is not within the ſtatute; and in the caſe of *Rex* v. *Langley*, *H.* 6 *G.* 2. Mr. J. *Page* ſaid, he had known indictments quaſhed upon ſuch exception. It is ſaid however (*c*) by a very reſpectable author, that he doth not apprehend it would be now allowed; for, in ſuch caſe, at the ſittings at *Weſtminſter* it was mentioned, but Lord Ch. J. *Lee* made ſlight of the objection.

1 Mod. 26. 2 Keb. 583. 1 Ventr. 51. (*c*) Bull. N. P. 192.

In a ſubſequent caſe (*d*), on motion to quaſh an information againſt the defendant for exerciſing the trade of a baker without having ſerved an apprenticeſhip at the pariſh of *S.* in *Kent*, one objection was, that it did not appear on the record that the offence was committed in a city, borough, or market-town; but the court held, that neither the enacting part of the ſtatute, nor the preamble, gave any foundation for this objection, and that the offence was clearly well laid; though they ſaid, if it came out in evidence, that the defendant followed the buſineſs only in a ſmall village, it had been the common practice to find for him.

(*d*) Ball v. Cobus, 1 Burr. 366.

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(*So if a man*) But if it be an exerciſing of the trade by the maſter, it cannot be alſo an exerciſing of it by the journeyman, ſo as to expoſe him to the penalties of the ſtatute. Beach v. Turner, 4 Burr. 2449.

But if a perſon brought up to the trade take a partner, who hath not ſerved an apprenticeſhip to the trade, ſuch partner, if he ſhare only in the profits or loſs of the buſineſs, and do not actually exerciſe the buſineſs, is not liable to the penalties of this act.

Raynard v Chaſe. 1 Burr. 2. 2 Wilſ. 40. S.C.

So, it hath been holden, that if any man as a maſter has exerciſed and followed any trade as a maſter without interruption or impediment for the term of ſeven years, he is not liable to be proſecuted on this ſtatute. So, if he hath worked at or followed two or more different trades for the term of ſeven years or more.

French v. Adams, 2 Wilſ. 168. Wallen v. Holton, 1 Bl Rep. 233. If he has exerciſed a trade for ſeven years without any proſecution with effect.

(*To*

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(*Yet it hath*) Sse 4 Term Rep. 109.

(*It hath been*) So, they may proceed by information. Cowp. 369.

(*The plaintiff*) Such allegation not neceſſary. 1 Burr. 367.

Rex v. Pemberton, 2 Burr. 1035. 1 Bl. Rep. 230 S. C.

In an indictment on this ſtatute it is not neceſſary to ſpecify and aver the want of other qualifications allowed by ſubſequent ſtatutes, for ſuch other qualifications or exceptions ought to be ſhewn by the defendant.

(E) Of aſſigning and turning over Apprentices to other Maſters.

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(*But it hath*) They cannot judge of an aſſignment, for they cannot try the validity of a deed. Rex v. Barnes, 1 Str. 48.

By 32 *Geo.* 3. *c.* 57. § 5. any maſter or miſtreſs taking a pariſh apprentice under the 8 & 9 *W.* 3. *c.* 30. § 5. may, by indorſement on the indentures, or by other inſtrument in writing, and with the conſent of two juſtices, teſtified by ſuch juſtices under their hands, aſſign ſuch apprentice for the reſidue of the term. And by § 7. the perſon to whom ſuch apprentice is intended to be aſſigned, ſhall, at the ſame time, on the counterpart of the indentures, &c., declare his acceptance of ſuch apprentice, and acknowledge himſelf bound by the covenants in the indenture; and ſuch maſter or miſtreſs, ſo taking an apprentice by aſſignment, may, from time to time, aſſign ſuch apprentice over to any other maſter or miſtreſs.

(F) Of making Apprentices free.

(*Wherever by the*) By the 12 G. 3. c. 21. where any perſon entitled to his freedom ſhall apply to the mayor, &c. to be admitted, giving notice and ſpecifying the nature of his claim, and the mayor, &c. ſhall not admit him within a month afterwards, a *mandamus* ſhall go, and if he be admitted, the mayor, &c. ſhall pay coſts.

(*So where*) Rex v. Turkey Company, 2 Burr. 1004. S. P.

(*Alſo it is*) 1 Ld. Raym. 382.

Page 557 (G) How Apprentices are to be taken Care of when their Maſters happen to (*a*) die.

1 Conſt's Bott's P. L. 524. pl 745. Cro. El. 553.

(*It ſeems agreed,*) For there is a great difference between a covenant to *maintain*, and a covenant to inſtruct; the firſt is a lien upon the executor, though not named, in right of the teſtator's aſſets being come to his hands; but the other is a *fiduciary* truſt annexed to the perſon of the maſter.

By

By 32 G. 3. c. 57. § 1. if the maſter or miſtreſs of any pariſh appren-
die during the term of ſuch apprenticeſhip, upon whoſe binding no
er ſum than five pounds ſhall have been paid, the covenant in the in-
ture for the maintenance of ſuch apprentice ſhall not continue in force
er than three calendar months after the death of ſuch maſter or miſ-
; during which three months the apprentice ſhall continue to live with
ſerve the executors or adminiſtrators, or with ſuch perſon as they ſhall
oint. And in all ſuch pariſh indentures of apprenticeſhip there ſhall be
xed to the covenant for maintenance, a proviſo that ſuch covenant
not continue longer than three calendar months after the death of
maſter or miſtreſs; but if ſuch proviſo be omitted, the covenant on
part of the maſter or miſtreſs to maintain the apprentice ſhall continue
for three calendar months after his or her death: within which three
dar months, by § 2. two juſtices of the peace where the maſter or
s died, ſhall, on the application of the widow of ſuch maſter, or
uſband of ſuch miſtreſs, or of any ſon, daughter, brother, or ſiſter, or
y executor or executrix, adminſtrator or adminſtratrix, of the deceaſed,
dorſement on the indenture, direct the apprentice to ſerve another maſter
he remainder of his term. And by § 3. the ſame regulations which are
directed to take place on the death of any original maſter or miſtreſs,
alſo takeplace on the death of any ſubſequent maſter or miſtreſs. By § 4.
application be made to two juſtices within the three months, or if, on ap-
ion, the two juſtices ſhould not think fit to continue ſuch apprenticeſhip,
ndentures ſhall be void. But by § 5. this act ſhall not extend to any
apprentice not living with and ſerving ſuch original or ſubſequent maſ-
miſtreſs at the time of his or her death. By § 6. if the original maſter
ſtreſs, or any ſubſequent maſter or miſtreſs, or the perſonal repreſenta-
f ſuch maſter or miſtreſs, having aſſets, during the three months, ſhall
or neglect to maintain and provide for ſuch apprentice according to the
of ſuch covenant, two juſtices, on complaint of the apprentice, or the
officers, may levy ſufficient for the purpoſe by diſtreſs and ſale of the
or aſſets of ſuch maſter or miſtreſs.

H) Of Servants' Wages, how recoverable.

ath been holden, that this ſtatute extends to covenant-ſervants, if in
ſbandry. Reg. v. Cecil', 2 Ld. Raym. 1305. 11 Mod. 266. S. C.

if the order bear upon the face of it, that it was made upon the oath *Id. ibid.*
ſervant, it will be quaſhed; for there is no neceſſity to reſort to the oath
party in this caſe, ſince evidence may be given of the ſervice.

What Acts of the Servant are deemed the Maſter's, for which the Maſter may take Advantage.

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rvant) Where a clerk had embezzled notes and money belonging to his maſter to a con-
amount, which he had paid away to the defendant, in the inſurance of tickets in the lot-
tery,

tery, which insurance was contrary to the statute of 12 Geo. 3. c. 3. § 36. it was holden, that these notes and money were not paid *bona fide*, but for an illegal consideration, and their identity could be traced, the master should recover them. Clarke v. Shee, Cowp. 197.

(K) What Acts of the Servant shall be deemed the Master's, for which the Master shall answer and be bound.

Page 561 (*Two are constituted*) This opinion of the three judges hath since been confirmed by the decision of the court of K. B., in Whitfield v. Lord Le Despencer, Cowp. 754. in which case it was holden, that the postmaster was liable only for personal neglect or misconduct.

Brucker v. Fromont, 6 Term Rep. 659. It was lately ruled on the authority of the precedent in *Turberville v. Stampe*, 1 *Ld. Raym.* 264. 3 *Ld Raym.* 375. that a declaration charging the *master*, the defendant, with having negligently driven his cart against the plaintiffs horse, was supported by evidence, that the *servant* drove the defendant's cart.

(M) For What Acts of his shall the Servant answer, and be responsible to his Master: And herein.

By 15 *G.* 2. *c.* 13. § 12. "if any officer or servant of the Bank of England, being intrusted with any note, bill, dividend, warrant, bond, deed, or any security or effects of any other person lodged or deposited with the said company, or with him as an officer or servant of the said company, shall secrete, embezzle, or run away with the same, or with any part thereof, he shall suffer death without benefit of clergy."

By 5 *G.* 3. *c.* 35. § 17. and 7 *G.* 3. *c.* 50 "if any deputy, clerk, agent, letter-carrier, post-boy, or rider, or any other officer or person whatsoever employed in receiving, stamping, sorting, charging, carrying, conveying, or delivering letters or packets, or in any other business relating to the post office, shall secrete, embezzle, or destroy any letter, packet, or bag of letters, which he shall be entrusted with, or which shall have come to his possession, containing any bank-note, bank post-bill, bill of exchange, East-India chequer-bill, South-sea or East-India bond, dividend warrant, navy, victualling, or transport-bill, ordnance debenture, seaman's ticket, stamp, lottery ticket or certificate, Bank receipt for payment on any loan, note of assignment of stock in the funds, letter of attorney for receiving annuity or dividends, or for selling stock in the funds, or belonging to any company, society, or corporation, or of the Bank, South-sea, East-India or any other company, or society, or corporation, *American* provincial bill of credit, goldsmith's or banker's letter of credit, or note for or relating to the payment of money or other bond or warrant, draught, bill, or promissory note whatsoever for the payment of the money, or shall steal and take away of the same out of any letter or packet that shall come to his possession, he shall suffer death without clergy."

By 7 *Ja.* 1. *c.* 7. and 17 *G.* 3. *c.* 56. "persons employed in the hat, woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mohair, silk, dying manufactures, who shall embezzle or clandestinely dye any of the materials

materials with which they are intruſted, and any perſons who ſhall knowingly buy, ſell, pawn, or diſpoſe of the ſame, ſhall be liable to be puniſhed by fine, whipping, and impriſonment.

D) Of the Maſter's Remedies againſt others for enticing away, and other Injuries done in relation to his Servant.

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It is clearly) Treſpaſs will lie for enticing him away; and this though he be only a journeyman. rt v. Aldridge, Cowp. 54.

If a daughter, who is under age, and lives with her father, be ſeduced, the her may maintain an action againſt the ſeducer to recover a compenſation the loſs of her ſervice; and he may do ſo, whatever be her age, if ſhe lived h him at the time, and acts of ſervice be proved; and the ſlighteſt acts of vice will ſuffice. 3 Burr. 1878. 3 Wilſ. 18. 2 Term Rep. 166.

Marriage and Divorce.

OME ancient nations appear to have been more ſenſible of the importance of marriage inſtitutions than we are. The *Spartans* obliged their zens to marry by penalties, and the *Romans* encouraged theirs by the *trium liberorum*. A man, who had no child, was entitled by the *Roman* only to one-half of any legacy that ſhould be left him, that is, at the ſt, could only receive one-half of the teſtator's fortune. With us, the s hold out no temptation to marriage, and prudence will, in general, commend celibacy.

A) What (*a*) Perſons may marry, and particularly within the Levitical Degrees.

T is enacted by 26 G 2. *c.* 33. § 11. that "all marriages, ſolemnized by "licence, where either of the parties, not being a widow or widower, ſhall be under the age of 21 years, which ſhall be had without the conſent of the father of ſuch of the parties ſo under age, (if then living,) firſt had and obtained, or if dead, of the guardian or guardians of the perſon of the party ſo under age, lawfully appointed, or one of them; and in caſe there ſhall be no ſuch guardian or guardians, then of the mother, if living and unmarried; or, if there ſhall be no mother living and unmarried; then of a guardian or guardians of the perſon appointed by the court of Chancery, ſhall be abſolutely null and void to all intents and purpoſes whatſoever. But, by § 12. "in caſe any guardian or mother whoſe conſent is made neceſſary as aforeſaid, ſhall be *non compos mentis*, or beyond ſea, or withhold his or her conſent to the marriage of any perſon, ſuch perſon deſirous to marry may apply by petition to the Lord Chancellour, who may proceed upon ſuch petition in a ſummary way; and if the marriage propoſed ſhall on examination appear to be proper, he ſhall judicially declare the ſame to be ſo, by an order of court, and ſuch order ſhall be as effectual, as if ſuch guardian or mother had conſented."

This has been adjudged to comprehend the marriages of illegitimate perſons under the age of twenty-one years. Rex v. Hodnett, 1 Term Rep. 96.

The

The marriages of the royal family being excepted from the ſalutary re-
" ſtraints of this act, it is enacted by ſtat. 12 *G.* 3. *c.* 11. that no deſcendant
" of the body of King *George* the ſecond, male or female, (other than the
" iſſue of princeſſes who have married, or may hereafter marry, into foreign
" families,) ſhall be capable of contracting matrimony without the previous
" conſent of his majeſty, his heirs or ſucceſſors, ſignified under the great ſeal
" and declared in council, (which conſent, to preſerve the memory thereof,
" is hereby directed to be ſet out in the licence and regiſter of ſuch marriage,
" and to be entered in the books of the privy council); and that every marri-
" age or matrimonial contract, of any ſuch deſcendant, without ſuch con-
" ſent firſt had and obtained, ſhall be null and void to all intents and pur-
" poſes whatſoever."

" Provided, that in caſe any ſuch deſcendant, being above the age of twen-
" ty-five years, ſhall perſiſt in his or her reſolution to contract a marriage
" diſapproved of, or diſſented from, by the king, his heirs or ſucceſſors; that
" then ſuch deſcendant, giving notice to the king's privy council, which no-
" tice is hereby directed to be entered in the books thereof, may, at any time
" from the expiration of twelve calendar months after ſuch notice given to
" the privy council as aforeſaid, contract ſuch marriage; and his or her mar-
" riage with the perſon before propoſed, and rejected, may be duly ſolemni-
" zed without the previous conſent of his majeſty, his heirs or ſucceſſors,
" and ſuch marriage ſhall be good, as if this act had never been made, unleſs
" both houſes of parliament ſhall, before the expiration of the ſaid twelve
" months, expreſsly declare their diſapprobation of ſuch intended mar-
" riage."

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(*Thoſe prohibited*) Mr. Hume obſerves, that " the natural reaſon, why marriage in certain de-
" grees is prohibited by the civil laws, and condemned by the moral ſentiments of all nations, is
" derived from men's care to preſerve purity of manners; while they reflect, that if a commerce
" of love were authoriſed between the neareſt relations, the frequent opportunities of intimate
" converſation, eſpecially during early youth, would introduce an univerſal diſſoluteneſs and
" corruption. But as the cuſtoms of countries vary conſiderably, and open an intercourſe,
" more or leſs reſtrained, between different families, or between the ſeveral members of the ſame
" family, ſo we find, that the moral precept, varying with its cauſe, is ſuſceptible, without any
" inconvenience, of very different latitude in the ſeveral ages and nations of the world. The
" extreme delicacy of the Greeks permitted no converſe between perſons of the two ſexes, except
" where they lived under the ſame roof; and even the apartments of a ſtep-mother, and her daugh-
" ters, were almoſt as much ſhut up againſt viſits from the huſband's ſons, as againſt thoſe from
" any ſtrangers or more remote relations. Hence, in that nation, it was lawful for a man to
" marry, not only his niece, but his half-ſiſter: a liberty unknown to the Romans, and other
" nations, where a more open intercourſe was authoriſed between the ſexes." Hiſt. vol. 4 to.

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(*On a motion*) Com. Rep. 2. S. C. 1 Ld Raym. 68. S. C. This objection of being *nullius filius*, and therefore having no conſanguinity, muſt be underſtood only as to civil purpoſes, and is to be confined chiefly to inheritances, 1 Term Rep. 101. for there is a relation as to moral purpoſes; and hence a baſtard cannot marry his own mother, or baſtard ſiſter. 3 Salk. 66.

(B) Of Eſpouſals and Marriage Contracts: And herein of the Difference between Contracts *præſenti* and *futuro*, and the Remedies for the Violation thereof.

(*A contract in præſenti*) In general, common reputation, and cohabitation as man and wife, the acknowledgment of the parties, may be admitted as evidence of marriage in the temporal courts. Comb. 202. Cowp. 232. 2 Bl. Rep. 877. Eſpin. Ni. Pr. Caſ. 213. A jury alſo are the proper judges of the fact of a marriage denied by an anſwer in Chancery, and always leave it

upport the proof of it, in favour of a juſt creditor, ſuing for a debt contracted during cohabitation. 2 Vez. 270. And it is for the moſt part incumbent on thoſe who would impeach a reputed marriage, to ſhew wherein its irregularity conſiſts. Burr. Set. Ca. 232. 1 Salk. 119.

(C) Of the Solemnization and Ceremonies requiſite to a complete Marriage: And herein of the Offence of performing the Ceremony without due Authority or Licence.

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(*In order*) Marriages in England during the uſurpation were ſolemnized before juſtices of the peace, but for what purpoſe this novelty was introduced, except to degrade the clergy, does not appear.

(*Alſo, though the*) It is only mentioned as a doubt in Roll's Abridgment, whether marriages by dureſs are not merely void: ſurely they are not ſo before ſentence. They are marriages *de facto*. Bro. Car. 493, And Mr. Noy held them good, Dy. 13. in marg.

By 26 *G.* 2. *c.* 33. § 2. No miniſter ſhall be obliged to publiſh the banns of matrimony between any perſons whatſoever; unleſs they ſhall ſeven days, at the leaſt, before the time required for the firſt publication, deliver or cauſe to be delivered to him a notice in writing of their true chriſtian and ſurnames, and of the houſes of their reſpective abodes, within ſuch pariſh, chapelry, or extraparochial place, where the banns are to be publiſhed, and of the time, during which they have inhabited or lodged in ſuch houſes reſpectively.

The uſe of matrimonial banns is ſaid to have been firſt introduced in the Gallican church though ſomething like it obtained even in the primitive times, and it is this Tertullian is ſuppoſed to mean by *nundina pro-mulgatio*.

All banns of matrimony ſhall be publiſhed in the pariſh church, or in ſome publick chapel, wherein banns of matrimony have been uſually publiſhed, of the pariſh or chapelry wherein the perſons to be married ſhall dwell. § 1.

And where the perſons to be married ſhall dwell in divers pariſhes or chapelries, the banns ſhall be publiſhed in the church or chapel belonging to ſuch pariſh or chapelry wherein each of the ſaid perſons ſhall dwell.

And where both or either of the perſons to be married ſhall dwell in any extraparochial place, (having no church or chapel wherein banns have been uſually publiſhed,) then the banns ſhall be publiſhed in the pariſh church or chapel belonging to ſome pariſh or chapelry adjoining to ſuch extraparochial place.

Note—That all pariſhes, where there ſhall be no pariſh church or chapel thereto, or none, wherein divine ſervice ſhall be uſually celebrated every Sunday, may be deemed extraparochial places for the purpoſes of this act, but for no other purpoſe. § 5.

Provided, That after the ſolemnization of any marriage under a publication of banns, it ſhall not be neceſſary, in ſupport of ſuch marriage, to give any proof of the actual dwelling of the parties in the reſpective pariſhes or chapelries wherein the banns of matrimony were publiſhed, nor ſhall any evidence in ſuch caſe be received to prove the contrary in any ſuit touching the validity of ſuch marriage. § 10.

And the ſaid banns ſhall be publiſhed upon three *Sundays* preceding the ſolemnization of marriage, during the time of morning ſervice, or of the evening § 1.

evening ſervice, if there be no morning ſervice, in ſuch church or chapel on any of thoſe *Sundays* immediately after the ſecond leſſon.

Lindw.271. Whilſt the marriage is contracting, the miniſters ſhall inquire of the people by three publick banns, concerning the freedom of the parties from all lawful impediments. And if any miniſter do otherwiſe, he ſhall be ſuſpended for three years.

St. 26. G. 2. c. 33. § 3. And in caſe the parents or guardians, or one of them, of either of the parties, who ſhall be under the age of 21 years, ſhall openly and publickly declare, or cauſe to be declared, in the church or chapel where the banns ſhall be ſo publiſhed, at the time of ſuch publication his diſſent to ſuch marriage, ſuch publication ſhall be void.

Rubr. And where the parties dwell in divers pariſhes, the curate of the one pariſh ſhall not ſolemnize matrimony betwixt them, without a certificate of the banns being thrice aſked from the curate of the other pariſh.

And by the 26 *Geo.* 2. *c.* 33. § 1. Where the banns ſhall be publiſhed in any church or chapel belonging to any pariſh adjoining to any extraparochial place as aforeſaid, the miniſter, publiſhing ſuch banns, ſhall in writing, under his hand, certify the publication thereof, in ſuch manner, as if either of the parties to be married dwelt in ſuch adjoining pariſh.

Johnſ. 194. As to licences, ſome have queſtioned the biſhop's power to grant licences for marrying without banns firſt publiſhed; becauſe this is diſpenſing with an act of parliament: for the marriage office, which requires banns, is part of the ſtatute law. But this power of diſpenſing is granted to the biſhop by ſtatute law too, *viz.* by the 25 *H.* 8. *c.* 21. by which all biſhops are allowed to diſpenſe, as they were wont to do, and ſuch diſpenſations have been granted by biſhops ever ſince Archbiſhop *Mepham*'s time at leaſt.

By *Can.* 101. no faculty or licence ſhall be granted for ſolemnization of matrimony, without publication of banns by any perſon exerciſing any eccleſiaſtical juriſdiction, or claiming any privileges in the right of their churches; but only by ſuch as have epiſcopal authority, or the commiſſary for faculties, vicars-general of the archbiſhops and biſhops, *ſede plena*; or, *ſede vacante*, the guardian of the ſpiritualties, or ordinaries exerciſing of right epiſcopal juriſdiction in the ſeveral juriſdictions reſpectively.

And by the 26 *G.* 2. *c.* 33. § 7. No ſurrogate deputed by any eccleſiaſtical judge, who hath power to grant licences of marriage, ſhall grant any ſuch licence before he hath taken an oath before the ſaid judge, faithfully to execute his office according to law to the beſt of his knowledge; and hath given ſecurity by his bond in the ſum of 100*l.* to the biſhop of the dioceſe, for the due and faithful execution of the ſaid office.

Can. 101. And no licence ſhall be granted, but to ſuch perſons only as be of good quality.

Id. And no licence ſhall be granted, but upon good caution and ſecurity taken.

Can. 101. Which ſecurity ſhall contain theſe conditions, 1. That at the time of granting ſuch licence there is not any impediment of pre-contract, conſanguinity, affinity, or other lawful cauſe to hinder the ſaid marriage. 2. That there is not any controverſy or ſuit depending in any court before any eccleſiaſtical judge touching any contract or marriage of either of the ſaid parties with any other. 3. That they have obtained thereto the expreſs conſent of their parents (if they be living), or otherwiſe, of their guardians or governors,

overnors. Laſtly, That they ſhall celebrate the ſaid matrimony publickly in the pariſh church or chapel, where one of them dwelleth; and in no other place; and that, between the hours of eight and twelve in the forenoon.

And for the avoiding of all fraud and colluſion in the obtaining of ſuch licences and diſpenſations; before ſuch licence ſhall be granted, it ſhall appear to the judge by the oaths of two ſufficient witneſſes, (one of them to be known either to the judge himſelf or to ſome other perſon of good reputation then preſent, and known likewiſe to the ſaid judge,) that the expreſs conſent of the parents, or parent (if one of them be dead), or guardians or guardian of the parties is thereunto had and obtained: and furthermore, that one of the parties ſhall perſonally ſwear that he believeth, that there is no let or impediment of precontract, kindred, or alliance, or of any other lawful cauſe whatſoever, nor any ſuit commenced in any eccleſiaſtical court, to bar or hinder the proceeding of the the ſaid matrimony, according to the tenor of the aforeſaid licence. Can. 103.

But if both parties who are to marry, being in widowhood, do ſeek a faculty for the forbearing of banns, then the clauſes before mentioned requiring the parents conſents may be omitted; but the pariſhes, where they dwell, ſhall both be expreſſed in the licence, as alſo the pariſh named where the marriage ſhall be celebrated. And if any commiſſary for faculties, vicars-general, or other the ſaid ordinaries, ſhall offend in the premiſes, or any part thereof, he ſhall, for every time ſo offending, be ſuſpended from the execution of his office for the ſpace of ſix months; and every ſuch licence or diſpenſation ſhall be held void to all effects and purpoſes, as if there had never been any ſuch granted; and the parties marrying by virtue thereof, ſhall be ſubject to the puniſhments which are are appointed for clandeſtine marriages. Can. 104.

This clauſe, ſaith Dr. Burn, declaring the licence void to all effects and purpoſes, as if there had never been any ſuch granted, ſeemeth to render it a matter of great importance, that the aforeſaid pre-requiſites be ſtrictly obſerved; for although before the ſtatute of 26 G. 2. only the licence in ſuch caſe was void, and the parties marrying by virtue thereof were liable to be puniſhed, as for a clandeſtine marriage; yet, now by that ſtatute, the marriage alſo will be void, and the other conſequences of clandeſtine marriages will enſue. 2 Burn. E. L. 427.

By the 5 *W. c.* 21 § 3. for every ſkin or piece of vellum or parchment, or ſheet or piece of paper, upon which any licence for marriage ſhall be engroſſed or written, ſhall be paid a ſtamp duty of 5*s*.

No licence of marriage ſhall be granted by any archbiſhop, biſhop, or other ordinary, or perſon having authority to grant the ſame, to ſolemnize any marriage in any other church or chapel than in the pariſh church or publick chapel of the pariſh or chapelry, within which the uſual place of abode of one of the perſons to be married, ſhall have been for the ſpace of four weeks immediately before the granting of ſuch licence; or, where both, or either, of the parties ſhall dwell in the extraparochial place, having no church or chapel wherein banns have been uſually publiſhed, then in the pariſh church or chapel belonging to ſome pariſh, or chapelry, adjoining to ſuch extraparochial place, and in no other place whatſoever. St. 26 G. 2. c. 33. § 4.

Provided, that where the marriage is by licence, it ſhall not be neceſſary, in ſupport of ſuch marriage, to give any proof that the uſual place of abode of one of the parties, for the ſpace of four weeks as aforeſaid, was in the pariſh or chapelry where the marriage was ſolemnized; nor ſhall any evidence § 10.

in

in ſuch caſe be received to prove the contrary in any ſuit touching the va
dity of ſuch marriage. That is to ſay, adds Dr. *Burn*, this ſhall not ex
ſo as to render the marriage null and void; but nevertheleſs the ſurroga
who granteth ſuch licence contrary to the tenor of this act, ſeemeth to in
the violation of his oath and forfeiture of his bond given to the ſpiritu
judge, and is liable to be otherwiſe puniſhed for his contempt of th
law.

6. Alſo, this ſhall not extend to deprive the Archbiſhop of *Canterbury*, an
his proper officers, of the right which hath hitherto been uſed in virtue
the ſtatute of the 25 *H.* 8 *c.* 21. of granting ſpecial licences to marry
any convenient time or place.

By which ſtatute of 25 *H.* 8. power is given to the Archbiſhop of *Cante
bury* to grant faculties, diſpenſations, and licences, as the pope had do
before. And by the ſame ſtatutes, it is enacted, that all children procr
ated after ſolemnization of any marriages, to be had by virtue of a licen
of diſpenſation from the Archbiſhop of *Canterbury*, ſhall be admitted, rep
ted, and taken, legitimate in all courts and other places, and inherit the i
heritance of their parents and anceſtors.

§ 16. If any perſon ſhall falſely make, alter, forge, or counterfeit any ſuc
licence of marriage, or cauſe or procure the ſame to be done, or aſſiſt ther
in, or utter or publiſh the ſame as true, knowing the ſame to be falſe, alte
ed, forged, or counterfeited; he ſhall be guilty of felony without bene
of clergy.

§ 1. In all caſes, where banns ſhall have been publiſhed, the marriage ſh
be ſolemnized in one of the pariſh churches or chapels where ſuch banns ha
been publiſhed, and in no other place.

§ 4 And no licence-marriage ſhall be ſolemnized in any other church or cha
pel, than where the uſual place of abode of one of the parties hath been f
the ſpace of four weeks next before the granting of ſuch licence.

And by *Can.* 63, every miniſter who ſhall celebrate marriage betwe
any perſons contrary to the canons aforeſaid, or any part thereof, und
colour of any peculiar liberty or privilege claimed to appertain to certa
churches and chapels, ſhall be ſuſpended for three years by the ordinary
the place where the offence ſhall be committed; and if any ſuch minis
ſhall afterwards remove from the place, where he hath committed the fau
before he be ſuſpended, then ſhall the biſhop of the dioceſe, or ordinary
the place where he remaineth, upon certificate, under the hand and ſeal
the other ordinary from whoſe juriſdiction he removed, execute that cenſ
upon him.

By a conſtitution of Archbiſhop *Reynolds*, matrimony ſhall be ſolemnize
reverently, and in the face of the church.

And by the words, in the beginning of the office of matrimony, it is ſu
poſed to be done in the face of the congregation.

(*a*) Whether clandeſtine marriages in Scotland, of Engliſh parties, who reſort thither to evade the Engliſh law, ſhall be ſuſ-

By the 26 *G.* 2. *c.* 33. 8. "If any perſon ſhall ſolemnize marriage in a
"other place than a church or publick chapel, where banns have been u
"ally publiſhed, unleſs by ſpecial licence from the Archbiſhop of *Canter*
"or ſhall ſolemnize matrimony without publication of banns, unleſs licen
"be firſt had from ſome perſon having authority to grant the ſame; e
"perſon knowingly and wilfully ſo offending, and being lawfully convi
"thereof, ſhall be adjudged guilty of felony, and tranſported for fourt
"years;" the proſecution for which felony is by § 9. to be commenc
within three years after the offence committed. And by § 8, "All ma
"riages ſolemnized in any other place than a church or ſuch publick cha
"

unleſs by ſpecial licence aforeſaid. or that ſhall be ſolemnized without tained in
blication of banns, or licence of marriage from a perſon or perſons England,
having authority to grant the ſame firſt had and obtained, ſhall be null hath been
and void to all intents and purpoſes whatſoever.' But by § 18. it is pro- doubted.
ed, that this act ſhall not extend to *Scotland* (*a*), nor to any marriages And very
ong Quakers or Jews, where both the parties ſhall be Quakers or Jews, learned men
to marriages ſolemnized beyond the ſeas. have queſ-
tioned,
notwith-
ding that ſuch marriages are valid by the law of Scotland, whether they are effective
England. Where parties are bound, by the laws of their own country, to execute any import-
act or contract with certain ſolemnities, it is doubted, whether they can elude their
n law by going purpoſely to another country where ſuch ſolemnities are not eſſential, and then
rning immediately when the act is done. It is a queſtion of publick law; and the moſt cele-
ed writers on publick law have holden, that ſuch an act is fraudulent, it is *fraudem facere legi*,
ch the laws of all nations diſalow. In the caſe of Robinſon v. Bland, 2 Burr. 1079. which
a ſecurity given in France for money there loſt at play, wherein the locality of the tranſacti-
ame in queſtion, there is an *obiter* obſervation of Lord Mansfield very remarkable. "As to
he money won at law, by the rule of the law of England, no action can be maintained for it.
To this it has been objected, that the contract was made in France: therefore, the law of
rance muſt prevail, and be the rule of determination; by which law, it is alleged, that the
noney is there recoverable before the marſhals of France, who can enforce obedience to their
ntences by impriſonment. I admit that there are many caſes, where the law of the place of
he tranſaction ſhall be the rule; and the law of England is as liberal in this reſpect, as other
ws are. It has been laid down at the bar, that a *marriage* in a foreign country muſt be go-
erned by the law of that country where the marriage was had. Which, in general, is true.
ut the marriages in Scotland of perſons going from hence for that purpoſe, were inſtanced by
ay of example. *They* may come under a very different conſideration, according to the opi-
ion of Huberus, p. 33. and other writers. No ſuch caſe has yet been litigated in England,
xcept one, of a marriage at Oſtend, which came before Lord Hardwicke, who ordered it to
e tried in the eccleſiaſtical court: but the young man came of age, and the parties were mar-
ied over again; and ſo the matter was never brought to a trial." 2 Burn's E. L. 438. But
uller's Niſi Prius. 113. there is a ſhort note of a caſe, wherein this point was afterwards de-
mined, upon an appeal to the delegates, viz. Crompton v. Bearcroft, Dec. 1, 1768. The ap-
ant and reſpondent, both Engliſh ſubjects, and the appellant being under age, ran away with
the conſent of her guardian, and were married in Scotland; and on a ſuit brought in the ſpi-
al court to annul the marriage, it was holden, that the marriage was good.

The above act of 26 *G.* 3. *c.* 33. § 8. having enacted, That the cere- Rex v.
y ſhall be ſolemnized in no other place than a publick church or chapel, Northfield,
re banns have been uſually publiſhed, except by ſpecial diſpenſation from Dougl. 659.
Archbiſhop of *Canterbury*, it was holden, that a marriage, which had
n had in a chapel, erected ſince the act, was invalid. A ſtatute, however, St. 21 G. 3.
immediately paſſed for confirming marriages in ſuch new churches and c. 53.
pels, with a retroſpect, but including the time to come only up to the firſt
Auguſt 1781.

By ſtat. 26. *G.* 2. *c.* 33. § 15. all marriages ſhall be ſolemnized in the
ence of two credible witneſſes at the leaſt, beſides the miniſter who ſhall
brate the ſame; and, immediately after the celebration of every mar-
e, an entry thereof ſhall be made in the regiſter directed by § 14. to be
; in which entry it ſhall be expreſſed, that the marriage was celebra-
by banns or licences; and if both or either of the parties married by
nce be under age, with conſent of the parents or guardians, as the caſe
l be; and ſhall be ſigned by the miniſter with his proper addition, and
by the parties married, and atteſted by ſuch two witneſſes.

If the marriage has been regularly ſolemnized, any ſubſequent irregulari- St. Devo-
n the entry ſhall not effect its validity. reux v.
Much Dew-
church, Burr. Set. Ca. 506. Bull. N. P. 114. S. C.

Rex v. Preſton next Feverſham. Burr. Set. Ca. 486. 1 Bl Rep. 192. S. C. Bull. N. P. 114. S. C.

The above ſtatute doth not take away the evidence of preſumption from cohabitation: though if the evidence be clear, that the marriage was not celebrated according to the requiſitions of the act, (as, where in a marriage by licence, one of the parties is under age, and no conſent has been had) it is totally void, and no declaratory ſentence in the eccleſiaſtical court neceſſary.

(*And by* § 4) It has been determined, that, notwithſtanding this ſtatute, the eccleſiaſtical court is ſtill at liberty to impoſe ſpiritual cenſures upon any perſon marrying without licence, or publication of banns. Middleton v. Croft, 2 Str. 1056. Vin. Abr. tit. Canons, pl. 14. S. C. 2 Atk. 650. S. C.

Page 576 (D) Of Offences againſt the Rights of Marriage. And herein,

Hicks v. Gore, 3 Mod. 84.

In this ſtatute it hath been reſolved, that the marriage muſt be clandeſtine, and to the diſparagement of the heireſs.

Rex v. Cornforth, 2 Str. 1162.

That a baſtard under the care of her putative father is within the act.

1 Bott. P. L. by Conſt. 405. pl. 536. S. C.

Rex v. Moor, 2 Mod. 128.

That the offence is within the juriſdiction of the court of King's Bench.

2 Lev. 179. S. C. 1 Freem. 444. S. C. 3 Keb. 708. S. C.

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(*And on this foundation*) And this though entered into after marriage. Toth. 27. 1 Ch. Rep. 87.

Stribblehill v. Brett, 2 Vern. 445. Lord Hardwicke, ſpeaking of this caſe, ſays, "the "Lords "did a ve "ry extra- "ordinary "thing, de- "termin- "ing con- "trary, & "without "regard to "the ver- "dicts. "They "muſt "have been "of opini-

The defendant had a leaſe made, by *Thomas Thynne*, of the impropriation of *Thame* for two lives in reverſion, after another leaſe for life of Mr. *Thynne* of *Egham*. On the death of Mr. *Thynne* without iſſue, the eſtate came to Lord *Weymouth*, who had made a leaſe, under which the plaintiff claimed. The plaintiff's bill was to ſet aſide the defendant's leaſe upon ſurmiſe, that the conſideration of the leaſe was the defendant's undertaking to procure a marriage between Mr. *Thynne* and lady *Ogle*. It was objected, that the Lord *Weymouth* being a remainder-man, claimed by ſettlement paramount, and came not in privity of eſtate; and therefore neither he nor his leſſee were entitled to controvert, whether the leaſe was made on good conſideration or not. But by the court—If the leaſe was gained by fraud, or an unjuſt conſideration, it is to be deemed void, and the eſtate to be diſcharged of it, as if no ſuch leaſe had been made. An iſſue was directed to be tried at the bar of the court of Common Pleas, whether the leaſe was made in conſideration of defendant's aſſiſting to effect or procure the ſaid marriage. Two verdicts were given in favour of the defendant, whereupon the bill was diſmiſſed. Upon an appeal to the Lords in Parliament, the decree was reverſed, and without regard to the verdicts, the leaſe was ſet aſide.

"on the iſſues were directed in ſome improper ſhape; for it cannot be ſuppoſed, they ſet it aſide "as a marriage-brokage contract upon the proofs."

Upon

Upon motion for an injunction to reſtrain the defendant either from bring- a action on a promiſſory note given by the plaintiff to the defendant in ol. for undertaking to procure him a marriage with a lady, or that the endant may be reſtrained from aſſigning it over to any other perſon, Lord rdwicke ſaid, As it is not only charged by the bill to be a marriage-bro- e agreement, but the charge is ſupported by an affidavit, I will make an r upon the defendant to keep the note in his own poſſeſſion, and not ſign or indorſe it over to any perſon whomſoever; but I will not ex- the injunction ſo far as to prevent him from proceeding at law. Smith v. Ayckwell, 3 Atk. 66. Ambl. 66. S. C.

On a treaty of marriage between *P. B.* and Miſs *H.*, then about 20 years articles were entered into, to which the intended huſband and wife, defendant, who was the intended wife's ſervant, and *R. A.* were made ies. The firſt clauſe therein was for ſecuring an annuity of 100*l.* to the ndant out of the wife's eſtate; but every other proviſion therein for the fit of the wife and iſſue of the marriage was made revocable by the wife, r the marriage ſhould be had. About the ſame time with the articles, nd was given by *P. B.* before the marriage to pay the defendant 1000*l.*, ch bond was afterwards delivered up to be cancelled; but at what par- lar time did not appear. A recovery was ſuffered to the uſe of the ar- s. And ſubſequent to the marriage, a new grant was made to the de- dant of this annuity; which was continued to be paid for ſome time after wife's death. A bill was brought to ſet it aſide; and Lord *Hardwicke* fted three iſſues: Firſt, Whether the bond was executed in conſi- tion of, or as a premium for, defendant's procuring or aſſiſting plaintiff is marriage, or on any other, and what conſideration? Second, Whe- the 1000*l* were thereby made payable at or on the marriage, or at any r, and what time? Third, Whether the annuity or rent-charge was ted in conſideration of the bond, or procuring or aſſiſting plaintiff in marriage, or for any other, and what conſideration? Cole v. Gibſon, 1 Vez. 506.

nd as contracts of this kind are avoided on reaſons of publick inconve- ce, it hath been therefore adjudged, that they will not admit of ſubſe- nt confirmation by the party. Shirley v. Martin, Excheq. 14th Nov. 1779. 3 Cox's P. Wms. 74. note.

o, any private agreement or treaty infringing the open and publick agree- t on the marriage, is conſidered as fraudulent; as, in the following s: Sir *J. B.* being executor of the plaintiff *Peyton's* mother, and having haſed an eſtate which belonged to the plaintiff's mother, and promiſed, he would not only ſettle ſuch eſtate upon the plaintiff, but alſo other s of 300*l.* a-year, if a convenient match could be found for the plaintiff. 1676, Sir *J. B.* treated a marriage for him with the niece of the plain- Sir *J. R.* and *Denham*, and it was agreed between him and Sir *J. R.*, Sir *J. R.* ſhould give his niece 2500*l.* portion, to be laid out in lands r his death, and that Sir *J. B.* ſhould ſettle lands of the value of 300*l.* ar, whereof 200*l.* *per annum* ſhould be ſettled for the jointure, and that would alſo ſettle other lands of 100*l.* *per annum* on himſelf for life, re- nder on plaintiff *Peyton* and his heirs. Accordingly, by leaſe and re- e, Sir *J. B.*, in conſideration of a bond entered into by Sir *J. R.* to pay ol. after his and his wife's death for the marriage portion, conveyed ds ſtated in the deed to be 300*l.* a-year; and as to 200*l.* a-year thereof, ſame were limited for the jointure of the wife of plaintiff *Peyton*, re- nder to the heirs male of their two bodies, remainder to *Peyton* in tail, mainder to him in fee; and as to the reſidue, to plaintiff *Peyton* in tail, Peyton v. Bladwell, 1 Vern. 240

remainder to him in fee. And Sir *J. B.* thereby covenanted, that the jointure lands were 200*l.* a-year, and that within two years then next would ſettle other lands of 100*l.* a-year, and worth 1700*l.*, to be ſold, the uſe of himſelf for life, remainder to plaintiff *Peyton* in fee. After the marriage, Sir *J. B.* prevailed on plaintiff *Peyton*, who was very young, by promiſes of leaving him a greater eſtate by his will than he had promiſed to ſettle upon him, and by other inſinuations, to execute a writing, whereby Sir *J. B.* was to receive the profits of the whole eſtate, allowing the plaintiff *Peyton* only 100*l.* a-year, and to aſſign over to him Sir *J. R.*'s bond, and alſo to releaſe and diſcharge the agreement for 100*l. per annum* on him and his heirs after the death of Sir *J. B.* The plaintiff's bill was to be relieved againſt theſe agreements, which had been extorted from the plaintiff *Peyton*, and to have the jointure made good, the lands ſettled for the jointure not being of the value of 200*l.* a-year. After long debate, the Lord Keeper decreed, that the defendant *Bladwell*, notwithſtanding the agreement with plaintiff *Peyton*, ſhould account for all the profits of the eſtate which Sir *J. B.* had been in poſſeſſion of under that agreement, over and above the 120*l. per annum*, and the Maſter was to ſee what was the value of the jointure lands at the time of the ſettlement; and the defendant was decreed to make good ſo much as the jointure lands fell ſhort of 200*l. per annum* at the time of the ſettlement made. And Sir *J. B.* having deviſed ſome lands to the plaintiff *Peyton*, the defendant was decreed to make up thoſe lands, and to ſettle them according to the marriage agreement. And although it was ſtrongly inſiſted by the defendant's counſel, that the agreement being to ſettle 100*l. per annum* on plaintiff *Peyton* and his heirs, he had power to releaſe and diſcharge that agreement: and there was no benefit thereby intended to the wife or iſſue of that marriage; and in caſe the ſettlement had been made, it had been in plaintiff *Peyton*'s power to have ſold or given away thoſe lands (the ſettlement being to be made to him and to his heirs after the death of Sir *J. B.*), and therefore he might well releaſe the agreement as to the 100*l. per annum*, and no one could be ſaid to be injured by it, any more than if he had deviſed away or ſold thoſe lands; yet the court declared in deteſtation of ſuch under hand agreements; and that it was a deceit and fraud to Sir *J. R.*, who was drawn in to give a great portion with his niece, in expectation of a ſettlement adequate to it, which by this means is to be fruſtrated: for though plaintiff *Peyton* could have diſpoſed of the lands, which were to have been ſettled on him and his heirs, yet that is frequently done in marriage ſettlements, the father by that means being left at liberty to provide for his younger children, and to reward them moſt, who behave themſelves beſt; and ſtill there is a benefit intended to the iſſue of the marriage, and it is a part of the conſideration for which the portion was given; and therefore they declared this underhand agreement and releaſe to be fraudulent, and ſet the ſame aſide, and decreed the agreement to be performed, as to the 100*l. per annum.*

Upon a treaty for a marriage between *C. R.* and the plaintiff, the plaintiff's father would not conſent to the match, by reaſon that *C. R.* was indebted in the ſum of 200*l.* to one *B.*, for which he and his mother ſtood bound in a bond. To remove this obſtruction, *H. R.* (younger brother to *C. R.*) and the mother gave a new bond to *B.* for the payment of this debt, and thereupon the bond in which *C. R.* was bound was given up to be cancelled. But *C. R.* gave his brother *H. R.* a counter-bond to indemnify him againſt the debt, and paid the intereſt of the 200*l.* to *B.* during his life. It was in proof, that the plaintiff, the widow of *C. R.*, was privy to all the

ter, and that she, being in love with *C. R.*, contrived this way to satisfather, that the marriage might take effect: but now being sued by *H* on the counter-bond, as administratrix to her husband, she brought her to be relieved. Lord Chancellour said, This is a plain fraud, and by contrivance the father of the plaintiff was drawn in to give the greater ion; and he absolutely refused to marry his daughter, till *C. R.* was e a clear man, and, particularly, discharged of this very debt; and though *R.* had no obligation upon him to become bound for his elder brother's t, yet it was all one to the plaintiff's father which way that debt became harged; but that was to be first done, let it be one way or other. And Lordship declared, that in case *C. R.* himself had been the plaintiff, he ld have been relieved; but the case was stronger, because if this bond ld be suffered to lie on *C. R.*'s estate, it might swallow the assets, and raud his creditors; as it also injured the plaintiff in the right she had by custom of *London* to the personal estate of her husband; and therefore decreed the bond to be delivered up

Upon a treaty of marriage between one *G.* and the sister of *W. P.*, the man not having so great a fortune as the man insisted upon, she prevailed h her brother *W. P.* to let her have 160*l.* to make up her portion, and e him a bond for the repayment of it, upon which the marriage was had. e husband, who knew nothing of the bond, died without issue, and his survived him, and afterwards died, having made her will, and the ntiff executor. *W. P.*, the brother, dies, and makes the defendant his cutor, who put the bond in suit against the plaintiff as executor of the ow, to recover the 160*l.*, and thereupon he brings his bill to be re-ed.—For the defendant, it was insisted, that although this might be a d, as against the husband or any issue of his, who were to have the be-t of the marriage agreement, yet the husband being dead, and there be-no issue, the bond was good against the woman herself, and, by conse-nce, against her executor, there being no creditors in the case, nor any ciency of assets pretended. Lord Chancellour.—You admit the husband ht have been relieved on a bill brought by him and his wife; that which once a fraud will be always so; and the accident of the woman's sur-ng the husband will not better the case. Decreed the bond to be delivered and a perpetual injunction against it. Gale v. Lindo, 1 Vern. 475

Lamlee the mother having a jointure in part, and 10*l. per annum* devised er by her husband, and charged upon the other part of the premises in stion, on the marriage of *Lamlee* the son, joined in the settlement, and epted 15*l. per annum* in lieu thereof. The day before the settlement, she taken a security from her son for 10*l. per annum* out of the leasehold te, which was not comprised in the marriage settlement, and the son enanted to pay it. The son died; the plaintiff, his widow, took out inistration to him. The defendant brought an action of covenant against for the non-payment of the 10*l. per ann.* The bill was to be relieved inst this action on the ground of fraud; and the court, upon the authority he above cases, decreed a perpetual injunction. Lamlee v. Hanman, 2. Vern. 499.

A. made an absolute conveyance of lands to *B.* and his heirs, in consi-ation of 1500*l.*, which sum was at that time the full value. On the next *B.* executed a defeasance; declaring, that if *A.* or his heirs should, hin 16 years, pay to B. the 1500*l.* the conveyance should be void. *B.* ered and enjoyed the lands, and about three years afterwards, upon his riage, settled them as an absolute estate on his wife and her issue. To settlement *A.* was privy, but took no notice of the defeasance, or ever attempted Webber v. Farmer, 2 Br. P. C. 88. Mr. Viner says, that the decree was affirmed in the House

of Lords by eight Lords againſt ſeven; Cowper and Harcourt againſt the decree, and Parker for it; that in a manuſcript report of it, ſaid to be Lord Harcourt's, there is added a note, that the wife's father had notice of the defeaſance before the ſettlement made; a circumſtance which is taken notice of in the argument for the appellant in 2 Br. P. C. 90. Vin. Abr. tit. Fraud, H. pl. 3.

attempted to refute the general opinion, that *B.* was the ſole and abſolute owner of the eſtate. Upon *B.*'s death, *A.* ſet up the defeaſance, and filed a bill to redeem, to which the ſon and heir of *B.* pleaded the purchase deeds and his father's marriage ſettlement. It was in proof, that *A.* made the conveyance to enable *B.* to obtain a marriage and a conſiderable fortune, though not with the particular lady whom he married. A perpetual injunction was decreed againſt *A.*, to ſtop all proceedings under the defeaſance.

Morriſon v. Arbuthnot, H L. 1728 1 Br. Ch. Rep. 458. note.

On a treaty of marriage between Lord *Arbuthnot*, then a minor, and the daughter of *Morriſon*, it was agreed, that *Morriſon* ſhould pay 50,000 marks as a portion for his daughter, and a ſettlement was agreed to be made by Lord *Arbuthnot* and his friends in conſideration of that fortune. The night before the execution of the articles, *Morriſon* prevailed on Lord *Arbuthnot* privately to ſign a writing, purporting that the real agreement was for 40,000 marks only, and that *Morriſon* had agreed to the contract for 50,000 upon the expreſs granting of this private obligation, by which Lord *Arbuthnot* bound himſelf to releaſe *Morriſon* from 10,000 marks, part of the 50,000. When Lord *Arbuthnot* came of age, he brought his action to have this obligation reduced, on two grounds, 1. That it was granted him, whilſt a minor, without the conſent of his guardians. 2. That it was *contra fidem tabularum nuptialium*, to elicit ſuch a writing clandeſtinely, contrary to a ſolemn contract entered into in the preſence of his friends. The Lords of Seſſion ſuſtained the reaſon of reduction, and held the obligation null. Againſt their decree, *Morriſon* appealed to the Houſe of Lords, where it was affirmed with 80l. coſts.

Pitcairne v Ogbourn, 2 Vez. 375

A treaty was entered into between the plaintiff and his ſon of the one part, and *R. G.* and her uncle of the other part, for the marriage of the plaintiff's ſon and *R. G.* The uncle was treated with *in loco parentis*; the intended wife's whole dependance was upon him; ſhe continued to live with him till the time of his death, and ſhe took an ample proviſion under his will. Upon this treaty an annuity bond was entered into by the plaintiff, by which he ſtipulated to pay 150*l. per annum* to the huſband and to the wife, if ſhe ſurvived him. The wife ſurvived the huſband. The plaintiff filed his bill to reduce the payment to 100*l. per annum*, upon an agreement ſaid to be entered into between the plaintiff, and the huſband and wife, but to which the uncle was not privy; whereby, though the bond was to import payment for 150*l.*, yet for reaſons given on the tranſaction, the actual agreement was agreement to be for 100*l.* only. The Maſter of the Rolls diſmiſſed the bill, conſidering the private agreement as a fraud upon a material party.

Neville v. Wilkinſon, 1 Br. Ch. Rep. 543.

Where a bond was entered into by the plaintiff to the defendant, before the plaintiff's treaty of marriage, but the defendant, by the plaintiff's deſire, upon the occaſion of ſuch treaty, miſrepreſented to the wife's father the amount of the plaintiff's debts, and particularly concealed from him the bond in queſtion; Lord *Thurlowe* relieved by injunction againſt the bond, although it did not appear, that there was any actual ſtipulation on the part of the wife's father in reſpect of the amount of the plaintiff's debts.

A bill

A bill was brought to be relieved against a bond drawn in common form, for payment of money; but proved to be made on an agreement, that the plaintiff should either marry her servant, or should, by way of forfeiture, pay him the sum of money mentioned in the condition of the bond. The court decreed the bond to be delivered up to cancelled, it being contrary to the nature and design of marriage, which ought to proceed from a free choice, and not from any compulsion. Key v. Bradshaw, 2 Vern. 102.

Joseph Montefiori, a Jew, being engaged in a marriage treaty; his brother *Moses*, to assist him in his designs, and represent him as a man of fortune, gave him a note for a large sum of money, as the balance of accounts between him and his brother *Joseph*; which balance he (*Moses*) acknowledged to have in his hands; though, in truth, no such balance, or any thing like it, existed. After the marriage had, *Moses* reclaimed this note, as being given on no consideration; and the matter was referred to arbitration. The arbitrators awarded the note to be delivered up, which *Joseph* refused to do; upon which the court was moved for an attachment against him for non-performance of this award; and on his part, a cross motion was made, to set aside the award, on a suggestion, that the arbitrators were mistaken in point of law. Lord *Mansfield*.—The law is, that where, upon propositions of marriage, third persons represent any thing material, in a light different from the truth, even though it be by collusion with the husband, they shall be bound to make good the thing, in the manner in which they represented it. *It shall be*, as represented to be. And the husband alone is entitled to relief, as well as when the fortune, *&c.* so misrepresented have been specifically settled on the wife: for no man shall set up his own iniquity as a defence, any more than as a cause of action. The arbitrators therefore being clearly mistaken in point of law, the award must be set aside. The rule for the attachment was discharged, and the rule for setting aside the award made absolute. Montefiori v. Montefiori, 1 Bl. Rep. 363. 1 Br. Ch. Rep. 548. S. C. cited by Lord Thurlowe.

A mother who was guardian to her daughter, took a bond from the husband to give her a release of all accounts of the mesne profits of the estate within two years after the marriage. The court held such bond to be of the same nature with a marriage-brokage bond, and decreed it to be delivered up: for if a bond to *give* money if such a marriage could be obtained, was ill; by the same reason, a bond to *forgive* a sum of money must be ill also. Duke Hamilton v. Lord Mohun, 1 Abr. Eq. Ca. 90. 1 P. Wms. 118. S. C. mentions it a release to be given within two years after the marriage, in pursuance of a covenant in the marriage-articles, which were made on great deliberation; and that Cowper, C. relieved against the covenant, saying, That to tolerate such an agreement would be paving a way to guardians to sell infants under their wardship. 1 Salk. 158. S. C.

The defendant, who was a taylor by trade, and entitled to a small real estate of about 14*l. per annum*, in 1730, made his addresses to the plaintiff, who was then about the age of 26 years, and was the daughter of a man esteemed in the neighbourhood as a man of substance, and who could give her about 500*l.* for her fortune; the courtship had been carried on some time, before it came to her father's knowledge, who, as soon as he was acquainted with it, declared a great dislike of the match, and forbade the plaintiff giving the defendant any encouragement; notwithstanding which, the courtship was carried on in a clandestine manner till *January* 1732, when the defendant met the plaintiff at a market-town in the neighbourhood, and there, at an ale-house the following bonds were executed, nobody being present except the witnesses, who were two strangers, and were called in for that purpose, *videlicet*, A bond from the plaintiff in the penalty of 600*l.*, with condition, that "if she Woodhouse v. Shepley, 2 Atk. 535.

"did

" did, on or before the expiration of thirteen months after the deceaſe of her " father, according to the uſage and ceremony of the church of *England*, eſ- " pouſe and marry the defendant, if the defendant would thereunto aſſent, " and the laws of the realm permit the ſame, or if it ſhould happen the plain- " tiff ſhould not, nor would not marry and take to huſband the defendant " as aforeſaid, but ſhould marry with ſome other perſon, then the plaintiff " ſhould and would well and truly pay, or cauſe to be paid, unto the defen- " dant the ſum of 500*l.* of lawful *Britiſh* money, at or immediately after " failure of ſuch marriage; but if it ſhould happen that the plaintiff ſhould " die before the time limited and appointed for the ſaid marriage, then the " plaintiff ſhould leave and give the defendant 10*l.* as a token of her love, " to buy him a ſuit of mourning with; then the obligation to be void, elſe, " *&c.*"—A bond from the defendant in the like penalty, with condition, that " if he did, on or before the expiration of thirteen months after the de- " ceaſe of the plaintiff's father according to the uſage and ceremony of the " church of *Eugland*, eſpouſe and marry the plaintiff, if the plaintiff ſhould " thereunto aſſent, and the laws of the realm permit; or if it ſhould happen " the defendant ſhould not, nor would not marry and take to wife the plain- " tiff as aforeſaid, but ſhould happen to marry with ſome other woman, then " the defendant did thereby covenant and agree to forfeit, ſurrender, and " yield up unto the plaintiff for her own uſe, all his eſtate real and perſonal " in *M.* and *S*, or elſewhere by ſea or land; but if it ſhould happen the de- " fendant ſhould die *fore* the time limited and appointed for the ſaid marri- " riage, then the plaintiff was to have to her own uſe one half of all the de- " fendant's eſtate, both real and perſonal, that he ſhould be poſſeſſed of at " the time of his deceaſe; then the obligation to be void, elſe, *&c.*"—An indorſement on the back of defendant's bond: " Memorandum, That before " the ſealing of this bond, *R. Shepley* doth promiſe, covenant, and agree, " that he will ſettle and aſſure the within-named *H. Woodhouſe* a yearly dow- " er, according to what portion ſhe ſhall have, and make her a good aſſu- " rance as the law directeth, either of lands, money, or living, that ſhall pleaſe " her; if this ſaid *H. Woodhouſe* ſhall have a child or children, then ſhe ſhall " have one half of his eſtate, and the child or children the other half that " he ſhall die poſſeſſed of, or that by any means belong to him, or his inhe- " ritance, that may either fall to him by ſea or land; and if this ſaid *H.* " *Woodhouſe* ſhall marry this *R Shepley*, and have no children by him, then " ſhe ſhall pay to *Sarah Shepley* 20*l.* of lawful money as a legacy, and then " all his lands, livings, goods, chattels, money, and any thing that ſhall ever " belong to him, or that ever did in his lifetime, that has not been received, " ſhe ſhall have and peaceably enjoy, and take for her own uſe, and at her " own diſpoſing, both in her life and at her death, unto which I have put my " hand. *R. S.*" Upon the examination of the witneſſes to the bonds, it appeared they differed in their accounts of the execution; one ſaying, the bonds were read over before execution; the other, that they were not; one, that they were exchanged; the other, that they both remained in the cuſtody of the defendant; and in fact, at the time the anſwer was put in, they were both in the hands of the defendant. After this tranſaction, the execution of theſe bonds remained unknown; and the intercourſe was continued till *May* 1736, when the plaintiff's father died, who by his will left her a fortune of about 340*l.* The thirteen months expired, and then the plaintiff filed the original bill to be relieved againſt her bond, and dying ſoon after, the cauſe was revived by her adminiſtrator. The croſs bill was brought by the defendant to have ſatisfaction of this bond out of the aſſets of *H. Woodhouſe*, alleging, he was always

ays ready and willing to have married her, but was prevented from having y acceſs to her by her brothers. Lord *Hardwicke* refuſed to decree ſa-faction of this bond on the croſs bill, but directed it to be delivered up to cancelled on the original bill; grounding his decree upon publick and ge-eral conſiderations, the encouragement which tranſactions of this kind, if lowed, would give to diſobedience, and the *fraud* upon parents.

But where a father treated for the marriage of his ſon; and in the ſet- Roberts v. ement on the ſon, there was a power reſerved to the father to jointure Roberts, hom he ſhould marry, in 200*l. per annum*, paying 1000*l.* to the ſon; and 3 P. Wms. e father afterwards treating about marrying a ſecond wife, the ſon agreed 66. ith the ſecond wife's relations to releaſe the 1000*l.*, and actually did re-aſe it; but took a bond from the father, without the privity of the ſecond ife's relations, for the payment of this 1000*l.*; equity refuſed to ſet this nd aſide, becauſe it would be injurious to the firſt marriage, which, being ior in time, was to be preferred.

E) Marriage how long to continue: And herein of the ſeveral Kinds of Divorces; and here in,

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(*Marriage for the*) But in this caſe, if the wife, whilſt ſhe is living apart from her huſband, mmit adultery, it hath been holden, that the huſband is not bound to receive her again, and, nſequently, not liable for neceſſaries provided for her ſubſequent to the time of her being guilty adultery. Govier v. Hancock, 6 Term Rep. 603.

(*Alſo, if a woman*) 6 Term Rep. 604.

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(*And as the*) Force and violence being in law ſuppoſed to accompany this atrocious injury to husband, the courts, it ſhould ſeem, proceeded upon this principle, when they formerly held, t the huſband's conſent, as to the commiſſion of an unlawful action, was not available as a ification; and that the defendant could not plead in bar, that the fact was by the plaintiff's nce; though it might be given in evidence in mitigation of damages. 12 Mod. 232. But it ms now thought that the huſband's privity will defeat the action, though it doth not appear to any where ſaid, that it is pleadable. Bull. N. P. 27. 4 Term Rep. 651.

In this action, it is neceſſary to bring proof of the actual ſolemnization of Morris v. marriage; cohabitation and reputation are not ſufficient, nor is any col- Miller, eral proof whatever. But a copy of the regiſter (*a*) is ſufficient evidence 4 Burr. the fact of marriage; and the identity of the parties married may be prov- 3057. by other means, and other perſons, beſides the miniſter, clerk, and ſub- 1 Bl. Rep. ibing witneſſes. 632.

(*a*) Birt v. Barlow, gl 171. But among ſome diſſenters, marriages are not regiſtered, in which caſe other proof ſt neceſſarily be admitted. *Ibid.* The fact of a marriage may be eſtabliſhed by the ſentence foreign court, having competent juriſdiction, in a ſuit properly inſtituted there. 1 Vez. 159.

In an action for criminal converſation, the marriage was proved by a per- Howard v. who was preſent when it was ſolemnized in the *Fleet*, in the year 1737, Burton- the plaintiff's counſel offered to give in evidence the *Fleet* regiſter, as wood, C. B. confirmation of the teſtimony. *De Grey*, C. J. rejected the evidence, for Sittings at t the whole of the tranſaction was illegal, and the regiſter made by a per- Weſtminſt. under no tie, and therefore not entitled to credit. Tr. 1776. Eſpin. N. P. 343.

It has been doubted whether the ceremony muſt not be performed ac- Woolſton v. ding to the rites of the church; but as this is an action againſt a wrong- Scott, *per* er, and not a claim of right, it ſeems ſufficient, if the plaintiff is of any Denniſon, J. gious ſect, to prove the marriage according to the religious form of that at Thet- t. ford, 1735, where plaintiff was an Anabaptiſt, and recovered 500*l.* Bull. N. P. 28.

The

Barker v. Morley, Guildhall, 1739, Bull. N. P. 28

The confeſſion of the wife will be no evidence againſt the defendant; but a diſcourſe between her and the defendant may be proved. So, letters written to her by the defendant may be read as evidence againſt him, but her letters to him will be no evidence for him.

Cooke v. Sayer, Bull. N. P 28. 2 Burr. 753

In actions of aſſault, the time of limitation is *four* years; but the criminal converſation, and not the aſſault, being the giſt of this action, not guilty within *ſix* years is the proper plea to it under the ſtatute of limitations.

(*o*) Batchelor v. Bigg, 3 Wilſ 319 2 Bl. Rep. 155.

And upon the ſame principle, the defendant is entitled to his coſts, though the damages ſhould be under forty ſhillings (*a*).

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(*A Divorce Propter*) So laid down as to the point of dower, Tr. 10 E. 3. pl. 24. 1 Ro. Rep. 426. *arguend*, and Powell v. Weeks, Noy, 108. Godb. 145. S.C. by the name of Lady Stowell's caſe, 1 R. Abr. tit. Baron and Feme, A. pl. 21 S.C. by the name of Stowel v. Wikes, and Cro. Car. 463. S.C. cited. But Mr. Hargrave, in note 9, on Co Litt. 32. a. ſaith, that according to Rolle's report of this laſt caſe, 1 R. Abr. 681., it was adjudged, that the divorce for adultery was a bar of dower. And Lord Thurlowe, in the debate in the Houſe of Lords upon Shadwell's Divorce Bill, is reported to have ſaid that in a divorce *a mensâ et thoro* for adultery a woman forfeits her dower. Woodf. Parl. Rep. vol. 11. p. 339.——The reaſon why a divorce *propter adulterium* does not diſſolve the marriage is, that the eccleſiaſtical court cannot divorce *a vinculo matrimonii* for any cauſe ariſing *ſubſequent* to the marriage: for if there has been a marriage *de jure*, it is not competent to the court to reſcind it. In fact, the ſentence of the ſpiritual court in a divorce *a vinculo matrimonii* is not ſo properly a diſſolution of the contract, as a declaration of its abſolute nullity *ab initio*. But the legiſlature, uncircumſcribed in its powers, has frequently for adultery wholly diſſolved the conjugal union. It has gone ſo far too in ſome caſes as to baſtardize children born after a certain time prior to the paſſing of the act, ſee Wakeman's and Briſcoe's Divorce Bills, in 1796; and though it has in general made ſome proviſion for the unhappy woman whoſe criminal conduct has occaſioned its interference, yet, where the caſe has been of a very atrocious nature, it has left her wholly at the mercy of her injured huſband. See Shadwell's Divorce Bill, in 1796, and Woodf. Parl Rep. *ubi ſupra*.——In the debate which took place upon Mr. Shadwell's Bill, the Lord Thurlowe, Loughborough, and Grenville expreſſed a wiſh, that the ſubject of divorce for adultery were ſubmitted by an enactment of the legiſlature to ſome regular judicial court, where the crime and the provocation to the crime would be carefully balanced, where facts and circumſtances could be inveſtigated with the temper, the deliberation, the caution, that ought to accompany ſuch an inveſtigation.

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Merchant and Merchandize.

Wilkins' Angl. Sax. Leg. Judicia Civitatis Lond. p. 71.

THE protection of trade was very early a favourite object of the laws of this country. In the time of King *Athelſtan* we find a very remarkable law, which ſays, that any merchant who has made three voyages upon his own account, beyond the *Britiſh* channel, or narrow ſeas, ſhall be entitled to the privilege of a thane. *Et ſi mercator tamen ſit, qui per trans altum mare per facultates proprias abeat, ille poſtea jure thanus ſit dignus.*

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(*And as the freedom*) Theſe cuſtoms were firſt eſtabliſhed to ſupply the want of laws, and afterwards admitted as laws.

) Of Policies of Inſurance: And herein,

1. Of Marine Inſurances.
2. Of Inſurances upon Lives.
3. Of Inſurances againſt Fire.

M) Of Bills of Lading.
N) Of the Proviſions for the Encouragement of Shipping and Navigation.

(A) Of Alien Merchants. Page 586

BUT no action can be maintained by or in favour of an alien enemy. Therefore it was adjudged, that alienage was pleadable to an action a policy of inſurance brought in the name of an *Engliſh* agent for his incipal an alien enemy, ſuch intereſt appearing on the record; and that replication to ſuch a plea, that the alien was indebted to the agent (the intiff) in more money than the value of the property inſured, could not ſupported. Brandon v. Neſbitt, 6 Term Rep. 23.

(B) Of Principals and Factors. Page 587

BUT it has been long ſettled, that a factor has a lien on goods conſigned to him not only for incident charges, but as an *item* of mutual account for the general balance due to him. And though it be in general ue, that by parting with the poſſeſſion of the goods he parts with the lien, t (*a*), if the factor ſell the goods, he has ſtill a lien on the price of em in the hands of the buyer; for though he has not the actual poſſeſſion ſuch caſe, yet as he has the power of giving a diſcharge, or bringing an tion for them, he muſt alſo have a right to retain the money for them. Krutzer v. Wilcox, in Canc 12th March 1754. Gardiner v. Coleman, 2d June 1755. Godin v. London Aſſurance Company, 1 Burr. 493.——(*a*) Drinkwater v. Goodwin, Cowp 251.

But though the general rule of law be, that a factor has a lien on the oods of his principal for the general balance, yet this, like other general les, may be controlled by the agreement of the parties: as, if *A.* depoſit oods with *B.* for ſale, and *B.* promiſe to pay the proceeds to *A.* when ld, *B.* has no lien on theſe goods (if not ſold), for the balance of his eneral account ariſing from other articles, the expreſs ſtipulation in this ſe negativing the general rule of law. Walker v. Birch, 6 Term Rep. 258.

A factor has no authority to pledge the goods of his principal as a ſecuty for his own debt, nor even to the amount of his lien for a general baance. Where he has done ſo (*b*), the principal has recovered the value the goods in trover againſt the pledgee, on tendering to the factor what as due to him, without making any tender to the pledgee. Paterſon v. Taſh, 2 Str. 1178. (*b*) Daubigny v. Duval, 5 Term Rep. 96. *per* Buller and Groſe, J., *hæſitante* Kenyon, C. J. who inclined to think, that the principal ught to tender to the pledgee the ſum for which they are pledged, if under or to the amount of e money due from him to the factor, but not more.

Where

Gonzales v. Sladen, Tr. 1 Ann. Guildhall, Salk. MSS. Bull. N. P. 130.

Where a factor to one beyond the ſea buys or ſells goods for the perſon to whom he is factor, an action will lie againſt or for him in his own name; for the credit will be preſumed to be given to him in the firſt caſe, and in the laſt, the promiſe will be preſumed to be made to him; and the rather ſo, as it is ſo much for the benefit of trade. If a factor who receives clothes, and is authoriſed to ſell them in his own name, makes the buyer debtor to himſelf; though he is not anſwerable for the debt, yet he has a right to receive the money. His receipt is a diſcharge to the buyer, and he has a right to bring an action againſt him to compel the payment; and it will be no defence for the buyer in that action to ſay, that, as between him and the principal, he (the buyer) ought to have that money, becauſe the principal is indebted to him in more than that ſum; for the principal himſelf can never ſay that, but where the factor has nothing due to him.

Cowp. 255-6.

Bull. N. P. 130. Cowp. 255. (a) Scrimſhire v. Alderton, 2 Str. 1182.

However, a factor's ſale by the general rule of law creates a contract between the owner and the buyer; and therefore if a factor ſell for payment at a future day, if the owner give notice to the buyer to pay him and not the factor, the buyer will not be juſtified in afterwards paying the factor; and it is the ſame, notwithſtanding the factor acts upon a *del credere* commiſſion (*a*), as in the following caſes.

A *del credere* commiſſion is, where a factor in conſideration of an additional premium, acts as an inſurer, and takes upon himſelf all riſks. Thus, the common factorage between St. Peterſburgh and London is 2 *per cent.*; but in conſideration of an additional 3 *per cent*, the factor engages to ſtand as the middle man, and to run the hazard of bad debts. Commiſſions *del credere* are more common in this country, than perhaps in any other, the characters of the buyers being better known, and the riſk of courſe leſs.

Eſcot v. Milward, Sittings at Guildhall, after Mich. Term, 1783. Co. Bankrupt Laws, 456.

The plaintiffs were merchants in *London*, and in *June* 1783 had a quantity of wheat conſigned to them from *Oſtend*, the ſale of which they intruſted to one *Farrer*, as their factor. The factor in the corn trade, like thoſe in the linen trade, receive a *del credere* commiſſion, beſides their factorage, and never communicate the names of the purchaſers to the owners, except in caſe of the factor's failure. *Farrer*, on the 9th *June* 1783, ſold 211 quarters of the plaintiff's wheat to the defendant *Milward*. On the 16th *June*, *Farrer*, being about to ſtop payment, gave up the wheat under his care to the plaintiffs, and ſent them the names of the buyers. On the 20th *June*, *Farrer* ſtopt payment, and a ſhort time afterwards his creditors executed a deed of compoſition. On the 21ſt *June*, the plaintiffs delivered the defendant a bill of parcels of the wheat ſold to him by *Farrer*, as their factor, and deſired him to accept a bill at a month for the amount, which he refuſed, inſiſting, that he had a right to ſet off a debt due to him from *Farrer*, againſt the price of the wheat.—Mr. Juſtice *Buller*, in his charge to the jury, declared the doctrine laid down by Lord Chief Juſtice *Lee*, in *Scrimſhire* v. *Alderton*, to be law, and the plaintiffs recovered a verdict.

Ex parte Murray, Dec. 1783. Co. Bankrupt Laws, 457.

Again, one *Murray* of *Belfaſt*, in 1782, conſigned a quantity of linens to *Bate* and *Henkell* of *London*, to be diſpoſed of by them as his factors, upon a *del credere* commiſſion. *Bate* and *Henkell* ſold the linens for 192*l.* 14*s.*, and before they received the money became bankrupts. The aſſignees afterwards received the money of the purchaſer, which *Murray* demanded of the aſſignees, who refuſed to pay it, inſiſting, that *Murray* might come in as a creditor under the commiſſion. *Murray* preſented a petition to the Lord Chancellour, praying, that the aſſignees might be ordered to pay him the money his linen ſold for, after deducting the commiſſions

iſſions and charges, and a ſmall ſum due from *Murray* to the bankrupts, n another account. His Lordſhip, after hearing the point of law argued, as clearly of opinion, that the purchaſer, not being paid for the linens revious to the bankruptcy, *Murray* the conſignor was entitled to receive e price of the linens, and accordingly ordered the aſſignees to pay him e money.

Upon this principle it has been determined, that goods of the principal und in the poſſeſſion of the factor at the time of his becoming bankrupt, ough he have a *del credere* commiſſion, will not paſs by the aſſignment. Garrett v. Cullum, Bull. N. P. 5th ed. 42. Godfrey v. urzo, 3 P. Wms. 185. *Ex parte* Dumas, 2 Vez. 586. 1 Atk. 232. *Ex parte* Ourſell, Ambl. 7.

So, bills remitted by the principal to his factor, whilſt unpaid, are in e nature of goods unſold, and if the factor become bankrupt, the prin- pal may recover them in an action for money had and received, ſubject ſuch lien as the factor may have upon them. Zinck v. Walker, 2 Bl. Rep. 1154.

But a *del credere* commiſſion will have the effect of enabling a policy- roker, under the clauſe in the 5 *G.* 2. *c.* 30. for ſetting mutual debts one ainſt the other, to give in evidence upon the general iſſue, a loſs upon a olicy happening before the bankruptcy in an action by the aſſignees of the nderwriter, for premiums upon policies underwritten by him. Grove v. Dubois, 1 Term Rep. 112. Bize v. Dickſon, *id.* 285.

hat without a *del credere* commiſſion, he cannot ſet off the loſſes on goods which he inſured for her perſons, the debts being properly due to them, and not to the broker. Wilſon v. Watſon, Eſpin. 274.

If a factor, who ſells under a *del credere* commiſſion, ſells goods as his wn, and the buyer knows nothing of the principal, the buyer may ſet off y demand he may have on the factor againſt the demand for the goods ade by the principal. George v. Clagett, B. R. Tr. 37 G. 3.

(C) Of Partners and Joint-Traders.

PARTNERS are joint-tenants in all the ſtock and partnerſhip effects; and they are ſo not only of the particular ſtock in being at the time entering into the partnerſhip, but they continue joint-tenants through- t, whatever changes may take place in the courſe of trade; for if it ere otherwiſe, it would be impoſſible to carry on partnerſhip trade. ence aſſignees under a commiſſion of bankrupt againſt one partner, can ly be tenants in common of an undivided ſhare, ſubject to all the rights the other partner. And if a creditor of one partner takes out execution ainſt the partnerſhip effects, he can only have the undivided ſhare of his btor; and muſt take it in the ſame manner the debtor himſelf had it, d ſubject to the rights of the other partner. So that one partner can ve no right againſt the other, in his capacity of partner, but to what is e from him out of the joint ſtock, after making all juſt allowances, let e fluctuations of trade be what they may. The whole of this doctrine ems to ariſe out of the very principle upon which partnerſhip is founded, mely, probable profit, and the riſk of loſs; the advantages or diſadvan- ges of which cannot, in common juſtice, be confined to one ſide only, t muſt be reciprocal throughout. 1 Vez. 242. Cowp. 449. 12 Mod. 446.

If

Willett v. Chambera, Cowp. 814.

If two are *partners* as *attornies* and *conveyancers*, and *one* of them receives money to be laid out on mortgage, the *other* is *liable* for the amount, though his partner ſhould even have given a *ſeparate receipt* for it.

Grace v. Smith, 2 Bl. Rep. 998.

On a motion for a new trial, the following facts were diſcloſed: An action was brought againſt *Smith* alone as a ſecret partner with one *Robinſon*, to whom the goods were delivered, and who became bankrupt in 1770. On the 30th of *March* 1767, *Smith* and *Robinſon* entered into partnerſhip for ſeven years, but in *November* afterwards, ſome diſputes ariſing, they agreed to diſſolve the partnerſhip. The articles were not cancelled; but the diſſolution was open and notorious, and was notified to the publick on the 17th of *November* 1767. The terms of the diſſolution were, that all the ſtock in trade and debts due to the partnerſhip ſhould be carried to the account of *Robinſon* only. *Smith* was to have back 4200*l.* which he brought into the trade, and 1000*l.* for the profits then accrued, ſince the commencement of the partnerſhip: He was to lend *Robinſon* 4000*l.* part of this 5200*l.*, or let it remain in his hands for ſeven years at five *per cent.* intereſt, and an annuity of 300*l.* *per ann.* for the ſame ſeven years. For all this *Robinſon* gave a bond to *Smith*. In *June* 1768, *Robinſon* advanced to *Smith* 600*l.* for two years' payment of the annuity and other ſums by way of intereſt, and gratuities, and other large ſums at different times to enable him to pay the partnerſhip debts, *Smith* having agreed to receive all that was due to the partnerſhip, and to pay its debts, but at the hazard of *Robinſon*. On the 1ſt of *Auguſt* 1768, the demands of *Smith* were all liquidated and conſolidated into one, *viz.* 5200*l.* due to him on the diſſolution of the partnerſhip; 1500*l.* for the remaining five years of the annuity, and 300*l.* for *Smith*'s ſhare of a ſhip: in all 7000*l.*; for which *Robinſon* gave a bond to *Smith*. On the 22d of *Auguſt* 1769, an aſſignment was made of all *Robinſon*'s effects to ſecure the balance then due to *Smith*, which was ſtated to be 10,000*l.* Soon after the commiſſion was awarded.

De Grey, C. J.—The only queſtion is, What conſtitutes a ſecret partnerſhip? Every man who has a ſhare of the profits of a trade, ought alſo to bear his ſhare of the loſs. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trade relies for his payment. If any one advances or lends money to a trader, it is not lent on his general perſonal ſecurity. It is no ſpecifick lien upon the profits of the trade, and yet the lender is generally intereſted in thoſe profits; he relies on them for repayment: and there is no difference whether that money be lent *de novo*, or *left behind* in trade by one of the partners who retires: and, whether the terms of that loan be kind or harſh, makes alſo no manner of difference. I think the true criterion is, to inquire whether *Smith* agreed to ſhare the profits of the trade with *Robinſon*, or whether he only relied on thoſe profits, as a fund of payment; a diſtinction not more nice, than uſually occurs in queſtions of trade or uſury. The jury have ſaid this is not payable out of the profits; and I think there is no foundation for granting a new trial.—*Blackſtone*, J. concurring in opinion with the Chief Juſtice, ſaid, I think the true criterion (when money is advanced to a trader) is to conſider whether the profit or premium is certain and defined, or caſual, indefinite, and depending on the accidents of trade. In the former caſe it is a *loan* (whether uſurious or not, is not material to the queſtion), in the latter a *partnerſhip*. The hazard of loſs and profit is not equal and reciprocal, if the lender can receive only a limited ſum for the

e profits of his loan, and yet is made liable to all the loſſes, all the ebts contracted in trade, to any amount.

Where the defendant had been partner with one *Brooke*, and they agreed ſeparate, and *Brooke* agreed to give him his bond for 2485*l.* with inter- i, which ſum had been brought by the defendant into trade, and an an- ity of 200*l.* for ſeven years, if *Brooke* ſo long lived, and in lieu of the rofits of the trade; and the defendant had at all times liberty to inſpect rooke's books; he was adjudged to be a partner and liable; for the arge had reference to the profits; it was *caſual* as depending on *Brooke's* e, and his right to inſpect the books was that of a partner. Bloxham v. Pell, 2 Bl. Rep. 998.

But, in order to conſtitute a partnerſhip, and to make a perſon liable as partner, there muſt be an agreement between him and the oſtenſible per- n to *ſhare in all riſks of profit or loſs*, or he muſt have permitted the other uſe his credit, and to hold him out as jointly liable with himſelf. A an entering into an agreement, and afterwards ſubdividing his beneficial tereſt under it, among others, is alone liable to the performance, and e ſubcontract does not conſtitute a partnerſhip Thus, an action was ought by the plaintiffs, who were the owners of a *Greenland* ſhip, againſt e defendants, upon an agreement to purchaſe a cargo of oil. The de- aration ſtated, that on the 29th of *Auguſt* 1786, the plaintiffs ſold the rgo to the defendants, at the rate of 20*l. per* ton, to be received as ſoon it was boiled and ready. That by way of collateral ſecurity, two bills exchange were depoſited in the hands of the plaintiffs, one of which s accepted by the defendants *Eyre*, *Atkinſon*, and *Walton*. That the e being ſo made, and it being expected that the defendants would not e away the oil purſuant to the terms of the ſale, it was afterwards agreed tween the plaintiffs and defendants, by the name of *Benjamin Eyre* and ., that the plaintiffs ſhould keep the oil in their poſſeſſion, till the 1ſt of nuary following; and if the defendants did not pay for it on or before t day, the plaintiffs were to be at liberty to authoriſe the broker to re- l it at the beſt price he could get; and if upon ſuch reſale, the oil ſhould produce 20*l. per* ton, with all charges, the plaintiffs were to deduct difference of the price out of the bills placed in their hands as a colla- l ſecurity. The declaration then ſtated, that the defendants neither d for the oil, nor took it away, and therefore the plaintiffs authoriſed broker to reſell it. That the deficiencies upon the reſale amounted to 0*l.* beſides brokerage, *&c.* 100*l.*, and that the bill of exchange by the fendants was preſented to them for payment, and refuſed. Before this ion was brought, *Eyre* and Co. had become bankrupts. It appeared in idence on the trial, that on the 24th of *Auguſt* 1786, the defendants, re for himſelf and partners, who were *Atkinſon* and *Walton*, general rchants, *Hatterſley* for himſelf and *Stephens*, who were oil merchants, l *Pugh* for himſelf and ſon, who were alſo oil merchants, agreed to rchaſe jointly as much oil as they could procure, on a proſpect that the ce of that commodity would riſe; that *Eyre* ſhould be the oſtenſible buy- and the others ſhare in his purchaſe, at the ſame price which he might e. *Hatterſley* and Co. were to have one-fourth, *Pugh* one-fourth, and re and Co. the remaining moiety. That they bought large quantities oil, belonging to other ſhips, and other traders, beſides the plaintiffs, the name of *Eyre* and Co. That *Hatterſley* and *Pugh* occaſionally e forwards, and gave directions as to the delivery of the oils, and erwiſe interfered in the tranſaction; and alſo made many declarations, they were all jointly intereſted in the different purchaſes, and that Coope v. Eyre, 1. H. Bl. 37.

there

there was a general concern between them. On the part of the defendants it was inſiſted, that the contract of ſale was made between the plaintiffs and *Eyre* and Co. only; and that the agreement entered into between themſelves was only a ſubcontract, and did not conſtitute a partnerſhip; and the learned Judge who tried the cauſe being of the ſame opinion, directed a verdict to be found for the defendants, which was accordingly done. The plaintiffs therefore moved the court for a new trial, on the ground of miſdirection; and after the cauſe had been fully argued, the court refuſed to grant a new trial, being of opinion that the verdict was proper. For as this was an action on a contract of ſale, the vendor can have no remedy againſt any perſon with whom he has not contracted, unleſs there be a partnerſhip; in which caſe all the partners are liable as one individual. It was juſtly obſerved, that a ſecret partnerſhip can be no conſideration to the vendor, though, for reaſons of policy and general expedience, the law is poſitive with reſpect to the ſecret partner, that when diſcovered he ſhall be liable to the whole extent. In many parts of *Europe* limited partnerſhips are allowed, provided they be entered on a regiſter; but the law of *England* is otherwiſe, the rule being, that if a partner ſhares in advantages, he alſo ſhares in all diſadvantages. In order to conſtitute a partnerſhip, a communion of profit and loſs is eſſential: and the ſhares muſt be joint, though it is not neceſſary that they ſhould be equal. If the parties be jointly concerned in the purchaſe, they muſt alſo be jointly concerned in the future ſale; otherwiſe they are not partners. In the preſent caſe *Eyre* was a mere ſpeculator, and the other defendants were to ſhare in the purchaſe, but were not jointly intereſted in any ſubſequent diſpoſition of the property. Though they may by other purchaſes have concluded themſelves as to ſome particular vendors, yet in the tranſaction in queſtion there was not that communion between them, which is neceſſary to make them partners; their agreement was a ſubcontract, which may be executory; as it was to ſhare in a purchaſe to be made. The ſeller looked to no other ſecurity than *Eyre* and Co. To them the credit was given, and they only were liable.

2 Ch. Ca. 38. Two entered into articles of copartnerſhip, and each brought in 1000*l.* ſtock. There was to be no benefit of ſurvivorſhip, neither was to become indebted without the other, nor either to take out of the ſtock without the other. One became *indebted without the conſent of his partner*, and made his wife executrix, and died. The wife *confeſſed judgment* for the debt. The other ſues for an account and relief againſt the creditor and the wife. They confeſs the *articles*, and the obtaining judgment. Lord Chancellour granted an injunction againſt the judgment, becauſe the debt related not to the partnerſhip, ſaying, if this be ſuffered, no trade could be in ſuch caſe.

Minnitt v. Whitney, Vin. Abr. tit Partners (A), pl. 12. So, where three perſons entered into partnerſhip in the trade of ſugar-boiling, and agreed that no ſugars ſhould be brought without the conſent of the majority; one of them afterwards makes a proteſt that he would no longer be concerned in partnerſhip with them: the two other perſons after make a contract for ſugars: the ſeller having notice that the third had diſclaimed the partnerſhip, he ſhall not be charged.

Eddie v. Davidſon, Dougl. 650. The *defendant* was partner with one *Bernie*, againſt whom a commiſſion of bankrupt had iſſued, but, before the bankruptcy, the *plaintiff* had ſued out execution on a bond of the *defendant*'s for 700*l.*, and the ſheriff had levied on the partnerſhip effects. *Bernie*'s aſſignees obtained this rule, to ſhew cauſe why the ſheriff ſhould not pay them a moiety of the money ariſing from the ſale of the goods ſo taken in execution, upon an affidavit of

Bernie's

rnie's, that he was entitled to an equal ſhare of the partnerſhip effects, partner with *Davidſon*. The *plaintiff's affidavit*, on ſhewing cauſe, de- ed that *Bernie* had an equal ſhare in the partnerſhip effects, and ſtated at he had embezzled the joint ſtock to a conſiderable amount. The urt directed that it ſhould be referred to the maſter to take an account the ſhare of the partnerſhip effects to which *Bernie* was entitled; and at the ſheriff ſhould pay a part of the money levied, equal to the amount ſuch ſhare, to the aſſignees.

Judgment was entered againſt one of two partners, and upon a *fieri* Jacky v. *cias*, all the goods, being undivided, were ſeized in execution. Upon Butler, plication to the King's Bench, by him againſt whom the judgment was 2 Ld. t, the court held, that the ſheriff could not ſell more than a moiety, for Raym. 871. e property of the other moiety was not effected by the judgment, nor by e execution.

Richardſons ſenior and junior, and one *Janſon* were partners together Richardſon trade, and *Janſon* embezzled and waſted the joint ſtock, and contract- v. Good- private debts became a bankrupt. The court ſeemed to think, that out win, 2 the produce of the goods, the debts owing to the joint trade ought to Vern. 293. paid in the firſt place; and that, out of *Janſon's* ſhare, ſatisfaction ſt be made for what *Janſon* had waſted or embezzled; and that the ignees could be in no better caſe than the bankrupt himſelf, and were titled only to what his third part would amount unto, clear after debts id, and deductions for his embezzlement.

A bill was brought, ſetting forth that *Goſs*, *Neaulme*, *Gromvegan*, and Goſs v. *revoſt* became partners: that *Prevoſt* was intruſted with the goods in the Dufreſney, op and warehouſe, but became profuſe, and embezzled the partnerſhip Dav. Bank- ck, and applied the ſame to his own uſe, and ſuffered the partnerſhip rupt Laws, bts to be unpaid; and having contracted private debts on his own ac- 371. unt, became a bankrupt, and a ſeparate commiſſion was taken out againſt m.

A queſtion was raiſed, whether *Prevoſt's* ſhare of the partnerſhip ſtock ght to be applied, in the firſt place, to pay what he was indebted to the rtnerſhip?

Lord *Talbot* ordered an account of what *Prevoſt* had embezzled of the rtnerſhip eſtate, and that the partnerſhip debts ſhould in the firſt place paid to the joint creditors in proportion to their debts, and as far as the rtnerſhip eſtate would extend; and that if any of the partnerſhip eſtate mained, after the joint debts were paid, then the ſame to be divided, d the partnerſhip to be paid out of *Prevoſt's* ſhare what he had embez- ed.

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(*Although*) But not without an order. 1 Atk. 68. pl. 23.

A. and *B.*, goldſmiths and partners, were bound to *J.* S. in a bond for Heath v. yment of 1000*l.* and intereſt in 1693. Afterwards in the ſame year Percival, y diſſolved the partnerſhip, when *A.* by money and bond ſecured to *B.* 1 P. Wms. ſhare of the ſtock, and took upon himſelf the partnerſhip debts. Pub- 682. k notice was given to creditors of the joint ſtock to receive their money, to look upon *A.* only as their paymaſter. *J. S.* in 1708 called in his oney from *A.*, but continued it on *A.'s* ſubſcribing the bond at 6 *per* *t.* *A.* was ſolvent till 1711, and till then *J.* S. might have had his oney when he pleaſed; but then *A.* became a bankrupt. Lord Chan- llour *Parker* held, that the executor of *B.* was ſtill liable; that the no-

tice was *res inter alios acta*, and could not bind *J. S.*: and that changing the intereſt did not alter the ſecurity; for ſtill it was the bond of both; but *B.*'s executor could not be liable to more than 5*l. per cent.* intereſt, and *J. S.* was decreed his debt and coſts.

Jacomb v. Harwood, 2 Vez. 265.

Gibſon and *Sutton* were partners in the buſineſs of a ſcrivener and banker. The mother of the plaintiff Mrs. *Jacomb*, and the mother of the plaintiff Mrs. *Long*, both kept caſh in this ſhop; and each of them, out of the caſh belonging to her, ordered a ſum to be written off from her account, and that a note or ſecurity for each of theſe ſums ſhould be given to each of the plaintiffs; which was done, and ſigned by the caſhier belonging to the partnerſhip. *Gibſon* ſurvived this about a year, and made *Sutton* and another executors. The caſhier, by his anſwer, (there being no other evidence,) believed, from entries in the books, that intereſt for this was paid to the death of *Gibſon*, and mentioned payments of intereſt alſo for three years at 4 *per cent.* by *Sutton* after *Gibſon*'s death, when in point of law the partnerſhip effects ſurvived to *Sutton*; but after that the two plaintiffs ſeparately called upon *Sutton* for a further ſecurity than thoſe bare notes; and therefore judgment was entered up in an action againſt him; not as executor of *Gibſon*, but as ſurviving partner for a partnerſhip debt. That judgment was defeaſanced by an inſtrument ſigned by the plaintiffs as to their reſpective demands, agreeing, that no execution ſhould be taken on either of theſe judgments till ſuch a time. In that agreement it was particularly inſerted, that theſe judgments thus obtained by the two plaintiffs ſhould not hinder either of them from any remedy they might be entitled to in a court of equity againſt *Gibſon*'s eſtate or effects, if they were not otherwiſe paid or diſcharged. Immediately before the reſpite of the execution expired, *Sutton* being called on, or knowing that the time was near, mortgaged part of a leaſehold eſtate, which was confeſſedly part of the ſeparate eſtate of *Gibſon* his deceaſed partner. The plaintiffs filed their bill, as copartnerſhip creditors, to ſubject the chattel intereſt in that mortgage to a ſatisfaction of both their demands, by a ſale thereof. It did not appear, otherwiſe than from the two notes, in what manner the money, that had been ordered by the mothers of the plaintiffs, to be carried from their two accounts, was left in the hands of the partners, whether, as caſh kept generally, or only thoſe two ſums. The Maſter of the Rolls ſtrongly inclined to think, that the debt, notwithſtanding the judgment, ſtill continued a partnerſhip debt, being obtained againſt defendant as ſurviving partner. But if not ſo, if it were his own debt, it was certain, that the defendant poſſeſſed as executor of the perſonal eſtate of *Gibſon*, might apply any part thereof even to the ſatisfaction of his own demand, unleſs there was fraud or colluſion, of which there was no evidence in the preſent caſe. The plaintiffs were moſt undoubtedly creditors unſatisfied; and therefore it was not an application of the ſeparate eſtate of *Gibſon* to demands, which ought not to be countenanced in equity, but to that which the executor had a right to apply it, and which perhaps that eſtate of his without this act of *Sutton* muſt have been ſubject to have made ſatisfaction; for the partnership creditors would have a right to go againſt the ſeparate eſtate of either of the partners after the partnerſhip effects. But that this was nothing to the juſtice of the plaintiffs' demands, who had uſed diligence to get at their money in a lawful and honeſt way; that they were not to be blamed, ſuppoſing their demands were againſt *Sutton* on the judgment, in getting the beſt ſecurity they could for their money, which was this mortgage. Honour therefore held them entitled to the relief they prayed.

One partner cannot bind the other partners by deed. Even a general partnerſhip agreement under ſeal will not authoriſe the partners to execute deeds for one another, unleſs a particular power be given for that purpoſe. If this were permitted, it would extend to mortgages, and would enable a partner to give to a favourite creditor a real lien on the eſtates of the other partners. Harriſon v. Jackſon, 7 Term Rep. 207.

One of two partners applied truſt-money in the trade with the privity of the other partner: they afterwards ſeparated, and the partnerſhip effects were aſſigned over to the firſt, who took upon himſelf the debts. This is no payment in diſcharge of the other partner, but both are liable to make good the truſt-money. Creditors cannot be bound by any private arrangement among partners. Smith v. Jameſon, 6 Term Rep. 601.

In a ſuit by one partner againſt the others charging them with embezzling, it was moved to appoint a receiver of the partnerſhip ſtock and debts. But the court thought that a receiver of the ſtock of a ſubſiſting partnerſhip, whilſt the trade is going on, could not be appointed, unleſs upon the very groſſeſt abuſe; for it muſt deſtroy the trade. Oliver v. Hamilton, Anſtr. 453.

At the commencement of a partnerſhip between two perſons, they both lived in the ſame houſe, and entertained the cuſtomers jointly: afterwards one of them removed, when the whole expence of entertaining the cuſtomers (which was neceſſary in the trade) fell upon the other. There was no clauſe in the co-partnerſhip deed to provide againſt this circumſtance, and the accounts were annually made up without any allowance for this article of expenditure. A court of equity cannot make the allowance. Thornton v. Proctor, Anſtr. 94.

A. and *B.* ſhip agents at different ports, enter into an agreement to ſhare, in certain proportions, the profits of their reſpective commiſſions, and the diſcount on the bills of tradeſmen whom they may employ in repairing the ſhips conſigned to them, *&c.* By this agreement they become liable as partners, to all perſons with whom either contracts us ſuch agent, though the agreement provides that neither ſhall be anſwerable for the acts or loſſes of the other, but each for his own. Waugh v. Carver, 2 H. Bl. 235.

(D) Of Partners and Maſters of ſhips. Page 591

(*If there are*) That the Admiralty have juriſdiction upon ſuch a ſtipulation, ſee Grave v. Hedges, Holt, 470. Lambert v. Aeretree, 1 Ld. Raym. 223. Blacket v. Anſley, *Id.* 235. Bimock v. Chandler, 2 Str. 890. Fitzg. 197. S. C. Ouſton v. Hebden, 1 Wilſ. 101.

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(*But this proving*) This act was made in conſequence of the caſe of Boucher v. Lawſon, H. 5 Geo 2. where the goods were loſt by the negligence or embezzlement of the maſter, and the maſter was entitled to the freight of thoſe goods for his own benefit, and the action was brought againſt the owners. The court thought, that it was not to be diſtinguiſhed from the common caſe of the carrier, and that the owner was liable for the act of the maſter where he acted within the compaſs of his employment. 1 Term Rep. 78.

Upon this ſtatute it hath been adjudged, that the owner of a ſhip is liable to the value of the ſhip and freight in the caſe of a robbery, in which one of the mariners is concerned, by giving intelligence, and afterwards ſharing the ſpoil, the latter part of the firſt ſection being ſufficiently comprehenſive to include a tranſaction of this nature. Sutton v. Mitchell, 1 Term Rep. 18.

However, by ſtat. 26 *G.* 3. *c.* 86. which is explanatory and in amendment of the above act of 7 *G.* 2. the owners are not liable beyond the value of the ſhip and freight for any goods ſhipped without their privity, although the maſter or mariners be in nowiſe concerned in or privy to the robbery, embezzlement, ſecreting, or making away therewith.

By § 2. no owners of any ſhip or veſſel ſhall be liable to anſwer for any loſs or damage which may happen by fire to any goods or merchandize that may be ſhipped on board. Nor by § 3. for any loſs or damage to any gold, ſilver, diamonds, watches, jewels, or precious ſtones, that may be ſhipped on board, by reaſon of any robbery, embezzlement, making away with, or ſecreting thereof, unleſs the owner or ſhipper thereof ſhall, at the time of ſhipping the ſame, inſert in his bill of lading, or otherwiſe declare in writing to the maſter, or owners of the ſhip or veſſel, the true nature, quality, and value of ſuch gold, &c.

By § 4. if the freighters or proprietors of any ſuch gold, &c. or other merchandize, ſhall ſuffer any loſs or damage by any of the means aforeſaid in the ſame voyage, (fire only excepted,) and the value of the ſhip or veſſel, with all her appurtenances, and the amount of the freight due or to grow due during ſuch voyage, ſhall not be ſufficient to make compenſation to all of them, then ſuch freighters or proprietors ſhall receive their ſatisfaction thereout in average, in proportion to their reſpective loſſes or damages. And in ſuch caſe the freighters or proprietors, or any of them, or on behalf of himſelf and all other the freighters or proprietors, or the owners of ſuch ſhip or veſſel, or any of them, or on behalf of himſelf and all other the part-owners, may exhibit a bill in any court of equity, for a diſcovery of the total amount of ſuch loſſes or damages, and alſo of the value of ſuch ſhip or veſſel, appurtenances, and freight, and for an equal diſtribution and payment thereof amongſt ſuch freighters or proprietors, in proportion to their reſpective loſſes or damages, according to the rules of equity; provided, that if any ſuch bill be exhibited on behalf of the part-owners of ſuch ſhip, the plaintiff ſhall annex an affidavit to ſuch bill, that he does not collude with any of the defendants thereto; and ſhall thereby offer to pay the value of the ſhip, appurtenances, and freight, as the court ſhall direct; and the court ſhall thereupon take ſuch method for aſcertaining the value as to them ſhall ſeem juſt, and ſhall direct the payment thereof, in like manner as is uſed and practiſed in caſes of bills of interpleader.

By § 5. it is provided, that this act ſhall not leſſen or diſcharge any remedy which any perſon now hath, or ſhall hereafter have, againſt any maſter or mariners for embezzlement, &c.

Pariſh v. Crawford, 2 Str. 1251. The defendant was ſole owner of a ſhip, which he let to *J. S.* for a voyage at a certain ſum, and *J. S.* was to have the benefit of carrying the goods. The plaintiff had ſhipped a quantity of moidors, and the bills of lading were ſigned by the captain: the moidors being loſt, an action was brought againſt the defendant as owner, to charge him under the ſtat. 7 G. 2. to the amount of the ſhip and freight. For the defendant it was inſiſted, that though the ſhip was his property, yet he was not *ſo* owner as to be liable to the plaintiff; and that *J. S.* was for this purpoſe the owner. But it appearing that the defendant had covenanted for the condition of the ſhip, and the behaviour of the maſter; the Chief Juſtice held, he was liable to the plaintiff, and the freight he had in general from *J. S.* was ſufficient, though the identical freight for the gold belonged to the other, and *J. S.* had only the uſe of the ſhip, and no ownerſhip.

Rich v. Coe, Cowp. 636. The maſter of a veſſel was leſſee of her for a term of years by agreement with the owners, in which there were covenants on *their* part, that he ſhould have the ſole management of the ſhip, and employ her for his own ſole benefit; and on *his* part, that he ſhould repair her at his own ſole coſt and charge, &c. It was holden, that notwithſtanding this agreement, the owners were liable for neceſſaries furniſhed for the ſhip by order of the maſter.

r, though without their knowledge, and though the owners were not known the perſons who ſupplied them.

In general, whoever ſupplies a ſhip with neceſſaries, has a *treble* (*a*) ſe- rity. 1. The perſon of the maſter. 2. The ſpecifick ſhip. 3. The per- nal ſecurity of the owners, whether they know of the ſupply or not. 1. he maſter is perſonally liable, as making the contract. 2. The owners e liable in conſequence of the maſter's act, becauſe they chooſe him: they n the riſk, and they ſay, whom they will truſt with the appointment and fice of maſter. Such is ſtated to be the general law, which however is ble to be varied by any private agreement between the maſter and owners. or if it appear, that the perſon ſupplying the neceſſaries gave credit to the aſter individually as the reſponſible perſon, or on the other hand, that he onſidered the maſter merely as a ſervant, and gave the credit to the owners ly, in either of thoſe caſes, he can have his remedy againſt that party only whom he originally looked for payment (*b*).

Ibid.

(*a*) But according to Mr. J. Buller, the creditor, when he advances his money, has only two ſecurities, viz. the body of the ſhip, and the perſon of the maſter. It is only in reſpect of the

p, that the maſter can bind the *owners*. If the owner keeps the ſhip, he keeps her ſubject to the arge the maſter has brought upon her. If he relinquiſh the ſhip, he is not liable to the charge. His keeping the ſhip is proof of his aſſent. Upon this ground, that learned judge diſſented om the reſt of the court, who held, that a promiſe by a captain on behalf of the owners, when e ſhip was taken, to pay monthly wages to one of the ſailors, in order to induce him to become oſtage, was binding upon the owners, although they abandoned the ſhip and cargo. Yates v ll, 1 Term Rep. 73. (*b*) Hoſkins v. Slayton, Ca. temp. Hardw. 376.

J. S. as maſter of the ſhip, of which the other defendants were part- wners, bought ſeveral goods of the plaintiffs; as, beef, biſcuit, ſails, and rdage. *J. S.* the maſter failed. The bill was brought to compel the de- ndants, the part-owners, to pay. They inſiſted, that *J. S.* only was lia- ; and, beſides, that he had money from them to pay the plaintiffs. *Per riam.*—*J. S.* the maſter was but a ſervant to the owners; and where a rvant buys, the maſter is liable. If the owners paid their ſervant, yet, if paid not the creditors, they muſt ſtand liable It was decreed, that the wners ſhould pay the plaintiffs their debts in proportion to their reſpective ares and intereſts in the ſhip.

Speering v. Degrave, 2 Vern. 643.

But, if the maſter borrow money to repair or victual the ſhip when there no occaſion for it, he alone is debtor, and not the owners.

Lex Mercat. 53. Hob. 11. Moor, 918.

By the law of nations the captain has power to ranſom. This is for the nefit of the owners: but it being doubted, whether it is for the benefit of e publick, it is taken away by ſtatute of 22 *G.* 3. *c.* 25.

(E) Of Mariners.

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(*By the civil*) So, if they refuſe aid and aſſiſtance to their companions on e ſea. So, if they do not help to ſave the goods, when the ſhip periſhes. , if they abſent themſelves, when the ſhip is ready to ſail.

Moll. Bk. 2. c. 3. Com. Dig. tit. Navigation I. 5.

By the cuſtom of merchants, mariners are entitled to wages at every de- ering port; and it hath been holden that they are ſo, though an agreement as made with them, that they ſhould not demand wages till the return of e ſhip to the port of *London*; when the freight was to be paid; and a pro- ion was made before the voyage, that, every ſix months, wages ſhould be id for one month, during the voyage.

Edwards v Child, 2 Vern. 727.

1 Ld. Raym. 639. It was ſaid by *Holt*, C. J. that if the ſhip be loſt before the firſt port of delivery, the ſeamen loſe all their wages: but, if after ſhe has been at the firſt port of delivery, then they loſe only thoſe from the laſt port of delivery. But if they run away, although they have been at a port of delivery, yet they loſe all their wages. It was alſo ruled by the ſame judge at *niſi prius*, that if a ſhip be bound for the *Eaſt Indies*, and thence to return to *England*, and the ſhip unlade at a port in the *Eaſt Indies*, and take freight to return to *England*, and in her return ſhe be captured; the mariners ſhall have their wages for their voyage to the *Eaſt Indies*, and for half the time that they ſtaid there to unlade, and no more. In an action brought for mariners' wages for a voyage from *Carolina* to *London*, it appeared, that the plaintiff ſerved three or four months, and before the ſhip came to *London*, which was the delivering port, he was impreſſed into the queen's ſervice; and afterwards the ſhip arrived at the delivering port. It was ruled by *Holt*, C. J. that the plaintiff ſhould recover *pro tanto* as he ſerved, the ſhip coming ſafe to the delivering port. But when afterwards, in ſuch an action between *Chandler* and *Meade*, it appeared, that the plaintiff was hired by the defendant at *Carolina* to ſerve on board the *Jane* ſloop, whereof the defendant was maſter, from *Carolina* to *England*, at 3*l.* *per* month; that he ſerved two months; that then the ſhip was taken by a *French* privateer and ranſomed; that juſt as ſhe came off *Plymouth*, the plaintiff was impreſſed; and then the ſhip came ſafe into the *Thames*, where ſhe diſpoſed of her cargo; it was ruled by *Holt*, that the plaintiff could have no wages, the ſhip having been captured and ranſomed. It was inſiſted by the plaintiff's counſel, that in that caſe he ſhould recover *pro ratâ*, and that the uſage among merchants was ſo; which *Holt* ſaid, if he could prove, it would do; but wanting proof of it, he was nonſuited.

Id. 739.

Wiggins v. Ingleton, 2 Ld. Raym. 1211.

Cutter v. Powell, 6 Term Rep. 320. If a ſailor hired for a voyage take a promiſſory note from his employer for a certain ſum, provided he proceed, continue, and do his duty on board for the voyage, this contract is indiviſible, and if he die before the arrival of the ſhip, no wages can be claimed either on the contract, or on a *quantum meruit*.

Hernamun v. Bawden, 3 Burr. 1844. In a voyage from *England* to *Newfoundland*, and thence with fiſh to *Spain*, *Newfoundland* is not the delivering port; and if the ſhip is taken between *Newfoundland* and *Spain*, the mariner loſes his wages.

Conſolat. del Mere Moll. Bk. 2 c. 3. § 7. If a ſhip be ſeized upon for debt, or otherwiſe become forfeited, the mariners muſt receive their wages, unleſs in ſome caſes, where their wages are forfeited as well as the ſhip; or, if they have letters of marque, and inſtead of that they commit piracy, by reaſon of which there becomes a forfeiture of all. But (*a*) lading prohibited goods aboard a ſhip, as wool and the like, though it ſubjects the veſſel to a forfeiture, yet it does not deprive the mariner of his wages, for the mariners having honeſtly performed their parts, the ſhip is tacitly obliged for their wages.

(*a*) For this Molloycites 1 Ro. Abr. 530. but nothing to this effect appears in that page of the book.

Minett v. Robbnſon, Bunb. 121. *A. B* libelled in the Admiralty court, as adminiſtratrix to her huſband, for his wages due as a mariner on board the *Prince Frederick*. *Minett* and *Heys* moved for a prohibition, upon a ſuggeſtion, that this ſhip was ſeized for importing wines from *Holland*, not being *Rheniſh* or *Hungarian* wines, and therefore forfeited by ſtat. 12 *Car.* 2.; that claim being put in by *Bowen* the maſter, an information was filed by the ſeizor, and *Bowen* pleaded the general iſſue; but before trial ſubmitted, and compounded according to the courſe of the court; and upon payment of 136*l.* to the informer, there-

here was judgment *quod vas deliberetur*, &c. It was likewiſe ſuggeſted, hat the libel was for wages due before the ſeizure. Upon this motion it vas inſiſted, that the act of parliament had ſo altered the property of the hip, that by the ſeizure, ſubmiſſion to a fine, and judgment *quod deliberetur* pon it, all precedent incumbrances were diſcharged. But the court diſharged the rule, though they admitted, if there had been a condemnatin, that would have been a good ground for a prohibition, and a diſcharge f all precedent incumbrances. But the reporter adds a *quære*, for the fine mplies a condemnation, although not actually given, but prevented by the ubmiſſion.

By 2 *G.* 2 *c.* 36. made perpetual by 2 *G.* 3. *c.* 31. no maſters of ſhips hall proceed on any voyage without firſt coming to an agreement with the mariners for their wages, which agreement ſhall be made in writing, declaring what wages each ſeaman or mariner is to have reſpectively during he whole voyage, or for ſo long time as he ſhall ſhip himſelf for, and ſhall alſo expreſs the voyage for which ſuch ſeaman was ſhipped, upon pain of forfeiting 5*l.* to the uſe of *Greenwich* Hoſpital.

This agreement every ſeaman ſhall ſign within three days after he ſhall § 2. have entered himſelf; and ſo ſigned, it ſhall be concluſive to all parties for he time contracted for.

And any ſeaman deſerting before or during the voyage, or refuſing to § 3. proceed on the voyage, after he has ſigned ſuch agreement, ſhall forfeit his wages; and further, upon complaint to any juſtice of the peace by the maſter or other perſon having charge of the ſhip, may be committed to the houſe § 4. of correction for any time not exceeding 30 days, nor leſs than 14.

If any ſeaman abſent himſelf from the ſhip without the leave of the maſ- § 5. ter or other officer having charge of the ſhip, he ſhall forfeit for every days' abſence two days pay to the uſe of *Greenwich* Hoſpital.

If any ſeaman, not entering into the king's ſervice, leave the veſſel, be- § 6. fore he ſhall have a diſcharge in writing from the maſter or other perſon having the charge of the ſhip, he ſhall forfeit one month's pay.

On the arrival of any veſſel in *Great Britain*, the maſter ſhall pay the ſea- § 7. men their wages, if demanded, in 30 days after the veſſel's being entered at the cuſtom houſe, (except when a covenant ſhall be entered into to the contrary,) or at the time the ſeamen ſhall be diſcharged, which ſhall firſt happen, deducting out of the wages the penalties by this act impoſed, under penalty of paying to ſuch ſeamen that ſhall be unpaid 20*s.* over and above the wages, to be recovered as the wages may be recovered; and ſuch payment ſhall be good in law, notwithſtanding any action, bill of ſale, attachment, or incumbrance whatſoever.

No ſeaman, by ſigning ſuch contract, ſhall be deprived of uſing any means § 8. for the recovery of wages, which he may now lawfully uſe; and where it ſhall be requiſite, that the contract in writing ſhall be produced in court, no obligation ſhall be upon any ſeaman to produce it, but on the maſter or owner of the ſhip; and no ſeaman ſhall fail in any action or proceſs for the recovery of wages, for want of ſuch contract being produced.

The maſters or owners of ſhips ſhall have power to deduct out of the wa- § 9. ges of any ſeaman all penalties incurred by this act, and to enter them in a book, and to make oath, if required, to the truth thereof; which book ſhall be ſigned by the maſter and two principal officers, belonging to ſuch ſhip, ſetting forth, that the penalties contained in ſuch book are the whole penalties ſtopped from any ſeaman during the voyage; which penalties (except the forfeiture of wages to the owners, on the deſertion of any ſeaman, or

on

on refuſing to proceed on the voyage) ſhall go to the uſe of *Greenwich* Hoſpital, to be paid and accounted for by the maſters of ſhips coming from beyond the ſeas, to the officer at any port who collects the 6*d. per* month deducted out of ſeaman's wages, for the uſe of the ſaid Hoſpital, which officer is empowered to adminiſter an oath to the maſter touching the truth of ſuch penalties.

§ 10. Any maſter or owner deducting the penalties as above, and not paying them to the officer collecting the 6*d. per* month in the port where the deduction ſhall be made, within three months after the deduction, ſhall forfeit treble the value to the uſe of the Hoſpital; which, together with the money deducted, ſhall be recovered by the ſame means as the penalties for not duly paying the 6*d. per* month.

By 8 *G.* 1. *c.* 24. § 7. (made perpetual by 2 *G.* 2. *c.* 28. § 7.) and alſo by 12 *G.* 2. *c.* 30. § 12. no maſter or owner of any merchant ſhip ſhall pay to any ſeaman beyond the ſeas any money or effects on account of wages, exceeding one *moiety* of the wages due at the time of ſuch payment, till ſuch ſhip ſhall return to *Great Britain*, *Ireland*, or the Plantations, or to ſome other of his Majeſty's dominions, whereto ſhe belongs, on forfeiture of double the money ſo paid, to be recovered in the high court of Admiralty by any perſon who ſhall firſt inform for the ſame.

Champion v. Nicholas 1 Str. 405. at *Niſi prius* in Middleſex. The cargo of a ſhip was loſt by the capture of a *Swediſh* privateer, who carried her into *Gottenburgh*: the maſter ſtaid there three months to refit the ſhip, and take in new lading; and to prevent the ſeamen from going away, he agreed to pay them ſo much *per* month, whilſt they ſtaid there. In an action for this, the maſter would have diſcharged himſelf, on the rule that freight is the mother of wages, and that none are ever paid whilſt the ſhip is lading and unlading; which the Chief Juſtice agreed to be the general doctrine; but he held it not ſufficient to controul a ſpecial agreement, as there was in this caſe, and where too there was ſo long a ſtay at *Gottenburgh*.

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(*So, a ſhipwright*) So, a carpenter. 2 Str. 707.

(*And if a*) 2 Wilſ. 265. S. C. cited, and approved of by the court.

Roſs v. Walker, 2 Wilſ. 264. But a pilot, though a mariner, who is ſent from *Graveſend*, and goes from thence on board a ſhip lying in *Sea-Reach*, and pilots her thence to her moorings at *Deptford*, cannot ſue in the Admiralty for the pilotage; for both the contract and the work are within the body of a county.

(*But if there be*) 2 Str. 968. Day v. Searle, S. P. 2 Barnard. K. B. 419. S. C. Howe v. Napier, 4 Burr. 1944. S. P. But ſee Beens v. Parre, 2 Ld Laym. 1206. and Roberts v. Cadd, Bunb. 247. Buggin v. Bennett, 4 Burr. 2035. Menetone v. Gibbons, 4 Term Rep. 267.

(*Nor can the*) Hence, the maſter has no lien on the ſhip for wages, ſtores, or repairs done in England. Wilkins v. Carmichael, Dougl. 101.

Reed v. Chapman, 2 Str. 937. Therefore, where a man went out mate, and upon the death of the maſter during the voyage, ſucceeded to the command of the ſhip; and upon his return ſued in the Admiralty for his wages as mate, and for a further allowance after he became maſter; the court granted a prohibition *quoad* the time he was maſter; and refuſed it *quoad* the time he was mate.

(F) Of

(F) Of Average.

THERE is another ſpecies of average called ſmall or petty averages. Petty average conſiſts in ſuch charges and diſburſements, as, accor-g to occurrences, and the cuſtom of every place, the maſter neceſſarily miſhes for the benefit of the ſhip and cargo, either at the place of loading unloading, or on the voyage. Theſe charges are lodemanage, or the e of a pilot for conducting the veſſel from one place to another; towage, otage, light-money, beaconage, anchorage, bridge-toll, quarantine, river rges, ſignals, inſtructions, paſſage-money by caſtles, expences for dig-g a ſhip out of ice when frozen up, that it may be brought into a proper rbour; and at *London*, by cuſtom, the fee paid at *Dover* pier.

A third ſpecies of average, is that we are accuſtomed to meet with in ls of lading, "paying ſo much freight for the ſaid goods, with primage or *average* accuſtomed." In this ſenſe it ſignifies a ſmall duty, which rchants, who ſend goods in the ſhips of other men, pay to the maſter, r and above the freight, for his care and attention to the goods ſo intruſt-to him.

Where a ſhip is obliged to go into port for the benefit of the whole con- Da Coſta v. n, the charges of loading and unloading the cargo, and taking care of it, Newnham d the wages and proviſions of the workmen hired for the repairs become 2 Term eral average. Rep. 407.

This rule is agreeable to the marine laws of *Wiſbuy*, which declare, that Leg. Wiſb. goods thrown overboard ſhall be brought into a groſs average, and ſhall Art. rated at the ſame price for which other merchandize of the ſame ſort, ſerved from the ſea or enemy, was ſold. This cuſtom mentioned by *lloy* was certainly new in *England* at the time he wrote; for it appears by Maly. Lex *lyne*, that in 1622 the diſtinction was obſerved of eſtimating the goods at Marc. 1ſt me coſt, if the jettiſon happened before half the voyage was performed; part. c. 26. if after, at the price the reſt of the goods ſold for at the place of diſ-rge. However, the authority of *Molloy* is confirmed by *Magens*, who , that the prevailing mode of ſettling averages now adopted in *England* conformable to that rule, which has aboliſhed the diſtinction.

In *England*, money and jewels fall into the general average at their full Molloy, tit. ce. Average, § 4.

1 Mag. 62. Peters v. Miligan, Sittings at Guildhall, 1787. *coram* Buller, J.

A ſpecial action on the caſe was brought by the owners of a packet hired Peters v. government againſt defendants, who were the ſhippers of bullion from the Miligan and *Indies* to this country, for their proportion of general average ariſing others, at n a loſs by cutting away a maſt. A bill of lading was given by the cap- Guildhall, at the time he received the bullion. It appeared that merchant ſhips *coram* Bul-e leſs for the conveyance of this article than packets, and theſe than men ler, J. Dec. war. Packets are allowed by government to receive bullion on board, 19th, 1787. captains of men of war are prohibited. Packets however are conſidered king's ſhips, they are under martial law. It appeared alſo that bullion board merchant ſhips always contributes to general average. But no ticular inſtances were in proof of ſuch an accident having happened to a ket with bullion on board, on which the general queſtion could ariſe. ſeveral witneſſes declared that they never heard of ſuch a demand, and y were likely to have known it, if it ever had been made.—*Bearcroft* for plaintiff

plaintiff in his reply contended, that this being a new queſtion in a cou it was as much in his favour as againſt him; for perhaps the demand w never before reſiſted. Wherever a bill of lading is given, it muſt be *cargo*, and cargo is always ſubject to general average. This muſt be con dered as cargo, and though packets are not allowed to carry cargo in gener yet *quoad* bullion they are. *Buller*, J.—There is a point ariſing in this ca and it is the only one which I can leave to the jury, which is new i court of juſtice; therefore it is neceſſary to ſtate it preciſely: the qu queſtion then is, whether any uſage in the particular caſe of packets h made an exception out of the general law with regard to general averag for as to the general law there can be no doubt but that bullion is ſubject t average like any other cargo paying freight. Before I come to the evidenc on this ſubject, I ſhall lay two circumſtances out of the caſe: 1ſt, Th though a captain of a man of war takes bullion on board, yet he does no receive any freight for it as ſuch, and if he does receive a reward for doi ſo, it is againſt poſitive orders. 2d, That difference of the premiums o inſurance between packets and merchantmen with bullion on board, becau the motive of the underwriter in requiring leſs in the one than in the othe caſe, is, becauſe the former is more ſecure and better manned than the la ter. There can be no doubt but that ſpecie is liable to general average. The law upon this ſubject has been diligently and ably collected by a gen-

Mr. Park. tleman who has lately written on the ſubject of inſurance. Every thing which pays freight muſt be liable to general average. A packet does carry bullion for freight; the captain gives bills of lading; government receives one-third of the freight; the owner another third, and the captain the third ſhare. The cargo of every veſſel carrying for freight muſt equally be liable to general average, whether employed by government or a ſubject: there can be no difference. Then the queſtion ariſes, whether there is any uſage in this caſe to vary the general law. This is the material conſideration. It has been ſaid by the witneſſes, that they never heard of any inſtance ſimilar to the preſent, in which ſuch a demand has been made. Whether negative uſage ought to weigh or not, depends very much upon the ſubject to which it is applied. In caſes of this ſort, where accidents muſt frequently have happened, negative uſage of non-claim is very ſtrong. Captain *Bull* of one of the packets, has ſaid, that very many inſtances have happened of packets cutting away their maſts. Now it muſt frequently have happened that bullion was on board in ſuch caſes. There are now 30 packets employed every year by government, and many have been ſo at leaſt from the time of Queen *Anne*, but I cannot now ſay at what time they were ſet up. Captain *Braithwayte* ſays, that they have larger freight for carrying bullion in the packets from *Liſbon* than the merchantmen have, becauſe the packets are a ſafer mode of conveyance; but the reaſon given by Captain *Bull* for the difference is, becauſe there is no general average allowed in that caſe. Then Mr. *Etherege*, who is clerk of the bullion office in the Bank, ſays, that he never knew of a demand of this ſort in the caſe of a packet, and he thinks he muſt have known it if there had; but he has always known it done in the caſe of merchantmen.—Verdict for defendant by a ſpecial jury.

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(*If a ſhip happens*) But now by ſtat. 22 Geo. 3. c. 25. "it ſhall not be lawful for any of his "Majeſty's ſubjects to ranſom, or to enter into any contract or agreement for ranſoming any "ſhip or veſſel belonging to any of his Majeſty's ſubjects, or any merchandize or goods on board "the ſame, which ſhall be captured by the ſubjects of any ſtate at war with his Majeſty, or by "any

any perſons committing hoſtilities againſt any of his Majeſty's ſubjects. And all contracts and agreements entered into, and all bills, notes, and other ſecurities given for ſuch purpoſes are declared void, and "the offender is ſubject to a penalty of five hundred pounds."

(G) Of Hypothecation.

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(*But although*) However, what is ſaid by Ld. Hardwicke in the caſe of Buxton v. Ince, 1 Ves. 6. and the deciſion of the Maſter of the Rolls in Samſun v. Braginton, 1 Ves. 443. ſupport the doctrine in the text.

(*The maſter*) And therefore 2 P. Wms 367. 2 Str. 695. 1 Atk. 234.

For that court has cognizance of an hypothecation bond given in the courſe of a voyage, though it be executed upon land, and under ſeal. Menetone v. Gibbons, 3 Term Rep. 267.

(H) Of Charter-Parties.

In covenant on a charter-party, whereby it was agreed to employ a ſhip of which the plaintiff was captor, as ſoon as ſentence of condemnation ſhould have paſſed, the ſentence muſt be taken to mean a *legal* ſentence, and the party who ſues for the freight muſt aver, that the ſhip was condemned by a court having competent juriſdiction. Unwin v. Wolſeley, 1 TermRep. 674.

If there be a covenant in a charter-party, that no claim ſhall be admitted or allowance made for ſhort tonnage, unleſs ſuch ſhort tonnage be found and made to appear on the ſhip's arrival, on a ſurvey to be taken by four ſhipwrights to be indifferently choſen by both parties; this is not a condition precedent to the plaintiff's right of recovering for ſhort tonnage, but a matter of defence to be taken advantage of by the defendant; and, conſequently, the not averring performance can be no ground for arreſting the judgment. Hotham v. East India Company, 1 TermRep. 638.

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(*If a charter be*) But Lord Mansfield, ſpeaking of this very inſtrument, ſays, "In conſtruing arguments, I know of no difference between a court of equity and a court of law. A court of equity cannot *make* an agreement for the parties; it can only explain what their true meaning was, and that is alſo the duty of a court of law." Dougl. 277.

Freighters of ſhips under charter-parties with the *Eaſt India* Company, are not anſwerable for *damage*, or *loſs*, occaſioned by the act of God. The expreſſion *ſhip-damage*, in thoſe charter-parties, means, damage from negligence, inſufficiency, or bad ſtowage in the ſhip. Dougl. 272

(I) Of Policies of Inſurance: and herein,

1. Of Marine Inſurances.

ASSURANCE or inſurance ſignifies a contract or agreement whereby one or more perſons, called inſurers or aſſurers, oblige themſelves to anſwer for the loſs of a ſhip, houſe, goods, &c. ſpecified in an inſtrument ſubſcribed by them, in conſideration of a premium of a ſtipulated ſum per *cent.* paid by the proprietors of the things inſured. 2 Saund. 200.

The

Park, 1. The inſtrument by which this contract of indemnity is effected, is called a Policy. It is ſigned only by the inſurer, who, on that account, is denominated an underwriter. Notwithſtanding this, there are certain conditions to be performed as well by the perſon not ſubſcribing, as by the underwriter, elſe the policy will be void.

2 Burr. 1171. Of policies there ſeem to be two ſorts, *valued* and *open* policies; and the only difference between them is, that in the former, goods or property inſured are valued at prime coſt, at the time of effecting the policy; in the latter, the value is not mentioned: that in the caſe of an open policy the real value muſt be proved; in a valued policy it is agreed, and is just as if the parties had admitted it at the trial.

Park, 1. Skin. 54. (*a*) Bates v. Graham, 2 Salk. 444. (*b*) Henkle v. Royal Exchange Aſſurance Company, 1 Vez. 317. Although policies of inſurance are not to be ranked with ſpecialty contracts, not being under ſeal, yet they have always been holden as ſacred agreements. The courts therefore will very reluctantly admit of any alteration in them. They may indeed be altered by the conſent of the parties (*a*) after they are ſigned; but the courts will never vary or depart from the written words, but upon the ſtrongeſt and moſt ſatisfactory evidence that the meaning of the parties has been miſtaken (*b*).

Motteux v. Governor and Company of the London Aſſurance, 1 Atk. 545.

The projectors of theſe companies had been very induſtrious to beſpeak the countenance of the Houſe of Commons, for which they had cauſed two letters to be printed and given to the members. But theſe, and all other ſolicitations having proved ineffectual, they had recourſe to other expedients; and underſtanding that the civil liſt was conſiderably in arrears, (for which no proviſion had been, or could be conveniently made by the parliament, becauſe the

By the common law and uſage of merchants, any perſon might be an inſurer. But the ſtatute of 6 *G.* 1. *c.* 18. (by which the crown was authorized to create two diſtinct corporations for the purpoſe of inſuring, which corporations are ſince known by the names of the *Royal Exchange Aſſurance* Office, and the *London Aſſurance* Office,) has ſomewhat in reſtrained this common law right: for by ſect. 12. of that ſtatute it is enacted, "that from and after the granting or making the ſaid charters or indentures for making the two corporations above mentioned, and paſſing the ſame under the great ſeal, for and during the continuance of the ſaid corporations reſpectively, or either of them, all other corporations or bodies politick, before this time erected or eſtabliſhed, or hereafter to be erected or eſtabliſhed, whether ſuch corporations or bodies politick, or any of them, be ſole or aggregate, and all ſuch ſocieties and partnerſhips as now are, or hereafter ſhall or may be, entered into by any perſon or perſons, for aſſuring ſhips or merchandizes at ſea, or for lending money on bottomry, ſhall, by force and virtue of this act, be reſtrained from granting, ſigning, or underwriting any policy of aſſurance, or making any contracts for aſſurance of or upon any ſhip or ſhips, goods, or merchandizes, at ſea, or going to ſea, and for lending any monies by way of bottomry as aforeſaid: and if any corporation or body politick, or perſons acting in ſuch ſociety or partnerſhip, (other than the two corporations intended to be eſtabliſhed by this act, or none of them,) ſhall preſume to grant, ſign, or underwrite, after the twenty-fourth day of *June* 1720, any ſuch policy or policies, or make any ſuch contract or contracts for aſſurance of or upon any ſhip or ſhips, goods, or merchandizes, at ſea or going to ſea, or take or agree to take any premium or other reward for ſuch policy or policies, every ſuch policy and policies of aſſurance of or upon any ſuch ſhip or ſhips, goods or merchandizes, ſhall be *ipſo facto* void, and all and every ſuch ſum or ſums ſo ſigned and underwritten in ſuch policy or policies ſhall be forfeited, and ſhall and may be recovered, one half to the uſe of his majeſty, the other to that of the informer, by action: and if any corporation or bodies politick, or perſons acting in ſuch ſociety or partnerſhip, other than the two corporations intended to be erected by this act, or one of them, ſhall preſume to lend

or agree to lend, or advance, by themſelves or any others on their behalf, after the ſaid twenty-fourth day of *June* 1720, any money by way of bottomry contrary to this act, the bond or other ſecurity for the ſame ſhall be *ipſo facto* void, and ſuch agreement ſhall be adjudged to be an uſurious contract, and the offenders therein ſhall ſuffer as in caſes of uſury: nevertheleſs, it is intended and hereby declared, that any private or particular perſon or perſons ſhall be at liberty to write or underwrite any policies, or engage himſelf or herſelf in any aſſurances of, for, or upon any ſhip or ſhips, goods or merchandizes, at ſea or going to ſea, or may lend money by way of bottomry, as fully and beneficially, as if this act had never been made, ſo as the ſame be not on the account or riſk of a corporation or body politick, or upon the account or riſk of perſons acting in a ſociety or partnerſhip for that purpoſe as aforeſaid."

grand committee of ſupply had been inadvertently diſmiſſed,) they offered to the miniſtry 600,000*l.* towards the diſcharge of that debt, in caſe they might obtain the

g's charter, with the parliamentary ſanction forthe eſtabliſhment of theſe companies. This r the miniſtry, who were at a loſs for means to pay the civil liſt debt, readily embraced; and, . Craggs having prepared the leading members of the Houſe of Commons, Mr. Aiſlabie, on 4th of May 1730, preſented a meſſage from the King, recommending the eſtabliſhment of ſe companies; in purſuance of which this act was paſſed.

Upon this clauſe of the ſtatute, a queſtion lately aroſe at *Guildhall*. It s an action brought to recover a ſum of money received by the defendant m one *Briſtow* to the plaintiff's uſe. The plaintiff was an underwriter, d the defendant was a broker, and a loſs having happened upon a policy derwritten by the plaintiff, he had been obliged to pay it: but *Briſtow*, ving agreed to take half the plaintiff's riſk, had paid his moiety of the into the hands of the defendant, to recover it from whom this action brought. Lord *Kenyon*—I am of opinion that the plaintiff cannot reer, for this is clearly a partnerſhip within the act of parliament. If a le name appears upon the policy, as in this caſe, the inſurer ſhall never allowed, if a loſs happen, to defeat a *bona fide* inſurance by ſaying to an ocent man, there was a ſecret partnerſhip between another and myſelf, therefore the policy is void. But here, the plaintiff is himſelf the unwriter, who comes to enforce the contract: it is a partnerſhip *pro hâc ; and this party cannot apply to a court of juſtice to enforce a contract nded on a breach of the law.

Sullivan v. Greaves, Sittings after Eaſter, 1789. Park, 8. No motion was ever made to ſet aſide the nonſuit: but two or three days after, Lord Kenyon mentioned to the bar, that he had ſtated the caſe to the other judges

the court of King's Bench, who were unanimouſly of the ſame opinion with him And opinion has been ſince farther confirmed by a deciſion of the court of Common Pleas in the caſe Mitchel v. Cockburne, 2 H. Bl. 379., and of the court of King's Bench in Booth v. Hodgſon, Term Rep. 405.

With reſpect to the ſubjects of the policy, the moſt frequent are ſhips, ds, merchandizes, the freight or hire of ſhips: alſo, houſes, wareſes, and the goods laid up in them from danger by fire. and inſurance n lives. Bottomry and *reſpondentia* may alſo be the ſubject of inſurance t then it muſt be particularly expreſſed in the policy to be *reſpondentia* inſt; for under a general inſurance (*a*) on *goods and merchandizes*, the y inſured cannot recover money lent upon bottomry. Not (*b*) but that ney expended by the captain for the uſe of the ſhip, and for which *reſdentia* intereſt is charged, may be recovered under an inſurance upon *ds, ſpecie, and effects*, provided the uſage of the trade, which in matters inſurance is always of great weight, ſanctions it.

Park, 9.

(*a*) Glover v. Black, 3 Burr. 1394. 1 Bl. Rep. 405. S. C.

(*b*) Gregory v. Chriſtie, B. R. Tr. 24. Geo. 3. Park, 11.

Although

1 Mag. 19. Although insurances upon the wages of mariners are in general for very wise reasons forbidden; yet this regulation does not mean to prevent them from insuring those wages, which they are entitled to receive abroad, or goods which they have purchased with those wages in order to bring home; for in such a case, they are to be considered in the same light with other men.

Carter v. Boehm, 3 Burr. 1905. and 1 Bl. Rep 593. In an action upon a policy of insurance upon *Fort Marlborough*, otherwise *Bencoolen*, in the *East Indies*, for twelve calendar months, from the first of *October* 1759, to the first of *October* 1760, against any *European* enemy, for the benefit of the governor, it was doubted by Lord *Mansfield*, who tried that cause, whether a policy against the loss of *Fort Marlborough* for the benefit of the governor was good, upon the principle which does not allow a sailor to insure his wages. But afterwards, when he came to deliver the opinion of the court upon all the points in that cause, after mentioning this doubt, which had occurred to his mind, he went on thus: "But, considering that this place, though called a fort, was really but a "factory or settlement for trade; and that he, though called a governor, "was really but a merchant; considering too, that the law allows a captain of a ship to insure goods which he has on board, or his share in the "ship, if he be a part owner; and the captain of a privateer, if he be a part "owner to insure his share; considering too, that the objection could not, "upon any ground of justice, be made by the insurer, who knew him to "be the governor, at the time he took the premium; and as with regard "to principles of publick convenience, the case so seldom happens, (I never "knew one before,) any danger from the example is little to be apprehended, I did not think myself warranted, upon that point, to nonsuit the "plaintiff; especially too, as the objection did not come from the bar. "Though this point was mentioned, it was not insisted upon at the last "trial; nor has it been seriously argued, upon this motion, as sufficient alone "to vacate the policy; and if it had, we are all of opinion, that we are "not warranted to say, that it is void upon that account."

It is enacted by stat 28 *G.* 3. *c.* 56. "That it shall not be lawful for "any person or persons to make or effect, or cause to be made or effected, "any policy of assurance on any ship or vessel, or upon any goods, merchandizes, effects, or other property whatsoever, without first inserting or "causing to be inserted in such policy the name or names, or the usual "style and firm of dealing of one or more of the persons interested in such "assurance, or without instead thereof first inserting the name or names, "or the usual style and firm of dealing of the consignor or consignors, consignee or consignees, of the goods or property so to be inserted, or the "name or names, or the usual style and firm of dealing of the person or "persons residing in *Great Britain* who shall receive the order for and effect "such policy, or of the person or persons who shall give the order or direction, the agent or agents immediately employed to negociate or effect "such policy." The statute further declares, that "every policy made "or underwritten contrary to the true intent and meaning of this act, shall "be null and void to all intents and purposes."

Kewley v. Ryan, 2 H. Bl. 343. Henchman v. Offley, *Id.* 345. note. An assurance generally "*upon any ship or ships*" expected from a particular place is valid; and the insured has a right to cover any ship he may think proper, that falls within the terms of it.

Nor

Nor do the owners of goods insured preclude themselves by shifting the goods from one ship to another from recovering an average loss arising from the capture of the second ship, if they acted from necessity, and for the benefit of all concerned. Plantamour v. Staples, 1 Term Rep 611. note.

An action was brought upon a policy of insurance of the captain's goods for six months certain. The loss proved was chiefly for goods lashed on deck, and the captain's clothes, and the ship's provisions. It was proved by an underwriter and broker, that none of those things are within a general policy on goods; for the risk was greater as to the goods lashed on deck, than other goods: and a policy on goods means only such goods as are merchantable, and a part of the cargo. They also swore, that when goods like the present are meant to be insured, they are always insured by name; and the premium is greater. Ross v. Thwaite. Sittings after Hil. 16 G. 3. at Guildhall. Park, 21.

Lord *Mansfield* said, he thought it consistent with reason; and understood the usage to be so: therefore he advised the plaintiff to withdraw a juror, the premium having been paid into court, to which he consented.

Where the owner of the goods insured brought down *his own lighter*, received the goods out of the ship, and before they reached land, an accident happened, whereby the goods were damaged, a special jury of merchants, under the express direction of Lord Chief Justice *Lee*, found that the insurer was discharged, although the insurance was upon goods to *London*, and *all the same should be safely landed there*. Sparrow v. Carruthers. 2 Str. 1236. The case turned upon the goods not being sent by the ship's boat, which is considered as part of the ship and voyage.

By 35 *Geo.* 3. *c.* 63. which repeals all former duties upon policies of insurance, it is enacted, "That for every skin, or piece of vellum, or parchment, or sheet of paper, on which any insurance upon any ship or ships, goods or merchandize, or upon any other property or interest whereon insurances may lawfully be made, shall be engrossed, written, or stamped, the stamp duties following upon the sums insured, that is to say, where the sum to be insured shall amount to 100*l.*, a stamp duty of 2*s.* 6*d.*, and so progressively for every sum of 100*l.* insured; and where the sum to be insured shall not amount to 100*l.*, a like stamp duty of 2*s.* 6*d.*; and where the sum to be insured shall exceed 100*l.*, or any progressive sums of 100*l.* each, by any fractional part of 100*l.*, a like stamp duty of 2*s.* 6*d.* for each fractional part of 100*l.*; and that upon all and every insurances or insurance, where the premium, or consideration in the nature of a premium, actually and *bonâ fide* paid, given, or contracted for, shall not exceed the rate of 10*s.*, there shall be paid the following duties; that is to say, where the sum so to be insured shall amount to 100*l.* a stamp duty of 1*s.* 3*d.* and so progressively for every sum of 100*l.* so insured; and where the sum so to be insured shall not amount to 100*l.*, a like stamp duty of 1*s.* 3*d.*; and where the sum so to be insured shall exceed 100*l.* or any progressive sums of 100*l.* each, by any fractional part of 100*l.*, a like stamp duty of 1*s.* 3*d.* for such fractional part of 100*l.*, which several sums shall be payable and paid by the assured in such insurances respectively." By § 2. the duty imposed by this act is not to extend to insurances on lives, or insurances from losses by fire.

"Provided, that upon every such insurance, where the premium or consideration in the nature of a premium, actually and *bonâ fide* paid, given, or contracted for, shall not exceed the rate of 10*s. per centum* on the sum insured, it shall be lawful where the sum insured shall amount to 200*l.* or upwards, to use stamps of 2*s.* 6*d.* for every 200*l.* of the sum insured, instead of stamps of 1*s.* 3*d.* for every 100*l.* of the like sum insured. § 4.

"Every

§ 11. "Every contract or agreement which ſhall be made or entered into for "any inſurance, in reſpect whereof any duty is by this act made pay- "able, ſhall be engroſſed, printed, or written, and ſhall be deemed and "called *a policy of inſurance*; and the premium, or conſideration in the "nature of a premium, paid, given, or contracted for, upon ſuch inſu- "ance, and the particular riſk or adventure inſured againſt, together with "the names of the ſubſcribers and underwriters, and ſums inſured, ſhall "be reſpectively expreſſed or ſpecified in or upon ſuch policy, and in de- "fault thereof every ſuch inſurance ſhall be null and void to all intents and "purpoſes whatever."

§ 12. "And no policy of inſurance upon any ſhip, or upon any ſhare or in- "tereſt therein, ſhall be made for any certain term longer than twelve "calendar months; and every policy which ſhall be made for any longer "term ſhall be null and void to all intents and purpoſes."

The 10th ſection provides for an allowance to be made under certain circumſtances by the commiſſioners, where the ſums inſured on home-ward voyages ſhall exceed the intereſt of the aſſured.

The 13th ſection provides, that nothing contained in the act ſhall prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of inſurance, duly ſtamped as aforeſaid, after the ſame ſhall have been underwritten, or to require any additional ſtamp duty by reaſon of ſuch alteration, ſo that ſuch alteration be made before notice of the determination of the riſk originally inſured, and the premium or conſideration originally paid or contracted for ſhall exceed the rate of 10*s. per cent.* on the ſum inſured, and ſo that the thing inſured ſhall remain the property of the ſame perſon or perſons, and ſo that ſuch alteration ſhall not prolong the term inſured beyond the period allowed by § 12. of this act. and ſo that no additional or further ſum ſhall be inſured by reaſon or means of ſuch alteration.

§ 15. A penalty of 500*l.* is impoſed both upon the perſons procuring, and the

§ 16. brokers effecting inſurances on policies not duly ſtamped; and the latter

§ 17. can neither demand their brokerage, nor the money expended for premiums; and every underwriter ſubſcribing ſuch illegal policy, is liable to a like penalty of 500*l.*

Anon. Skin 243. A policy of inſurance ſhall be conſtrued to run until the ſhip ſhall have ended, and be diſcharged of her voyage; for arrival at the port, to which ſhe was bound, is not a diſcharge *till ſhe is unloaded*: and it was ſo adjudged by the whole court, upon a demurrer.

Lockyer v. Offley, 1 Term Rep 252. But although this conſtruction may be perfectly right, where the policy is general from *A.* to *B*, yet if it contain the words uſually inſerted "and "*till the ſhip ſhall have moored at anchor twenty-four hours in good ſafety*," the underwriter is not liable for any loſs, ariſing from ſeizure after ſhe has been twenty-four hours in port; though ſuch ſeizure was in conſequence of an act of barratry of the maſter *during her voyage*, for, if it were extended beyond the time limited in the policy, it would be impoſſible to lay down any fixed rule, and all would be uncertainty and confuſion.

Lethulier's caſe, 2 Salk 443. In an action upon a policy of inſurance by the defendant at *London*, inſuring a ſhip from thence to the *Eaſt Indies*, warranted to depart with convoy, the declaration ſhewed, that the ſhip went from *London* to the Downs, and from thence with convoy, and was loſt. After a frivolous plea and demurrer, the caſe ſtood upon the declaration, and it was objected, that there was a departure without convoy. But by the court, the clauſe "warranted to depart with convoy," muſt be conſtrued according to the uſage among merchants, that is, from ſuch place whereconvoys are to be had, *as the Downs*.

Caſe

Caſe upon a policy of inſurance, which was to inſure the *William* galley a voyage from *Bremen* to the port of *London*, warranted to depart with convoy. The caſe was, the galley ſet ſail from *Bremen*, under convoy of *Dutch* man of war to the *Elbe*, where they were joined by two other *Dutch* men of war, and ſeveral *Dutch* and *Engliſh* merchant ſhips, whence ey ſailed to the *Texel*, where they found a ſquadron of *Engliſh* men of r and an admiral. After a ſtay of nine weeks, they ſet ſail from the *exel*; the galley was ſeparated in a ſtorm, taken by a *French* privateer, d retaken by a *Dutch* privateer, and eighty pounds ſalvage. It was rul- by *Holt*, Chief Juſtice, that the voyage ought to be according to *uſage*, d that their going to the *Elbe*, though out of the way, was no deviation; r till after the year 1703, (prior to which time this policy was made,) ere was no convoy for the ſhips directly from *Bremen* to *London*. Ver- t for the plaintiff. Bond v. Gonſales, 2 Salk. 445.

The ſhip *Succeſs* was inſured "*at and from* Leghorn *to the port of* London, *and till there moored twenty-four hours in good ſafety*." She arrived e 8th of *July* at *Freſh Wharf* and moored, but was the ſame day ſerved th an order to go back to the *Hope* to perform a fourteen days quaran- e. The men upon this deſerted her, and on the 12th of the month the ptain applied to be excuſed going back, which petition was adjourned to e twenty-eighth, when the regency ordered her back; and on the thir- th, ſhe went back, performed the quarantine, and then ſent up for or- rs to air the goods; but before ſhe returned, the ſhip was burnt on the enty-third of *Auguſt*. The queſtion was, therefore, whether the in- er was liable? Lord Chief Juſtice *Lee* ruled, that though the ſhip was long at her moorings, yet ſhe could not be ſaid to be there in *good ſafety*, ich muſt mean the opportunity of unloading and diſcharging; whereas e ſhe was arreſted within the twenty-four hours, and the hands having ſerted, and the regency taken time to conſider the petition, there was no fault in the maſter or owners: and it was proved that till the fourteen s were expired, no application could be made to air the goods; where- on the jury found for the plaintiff. Waples v. Eames, 2 Str. 1243.

In an inſurance upon *freight*, if an accident happens to the ſhip before any ds are put on board, which prevents her from ſailing, the inſured upon policy cannot recover the freight which he would have earned, if ſhe d ſailed. The circumſtances of the caſe were theſe:

The plaintiff inſured *on ſhip and freight*, at and from *Jamaica* to *Briſtol*. cargo was ready to put on board; but the ſhip being careening, in order the voyage, a ſudden tempeſt aroſe, and ſhe and many others were loſt. e rigging and parts of her were recovered and ſold, and the defendant d into court, as much as, upon an average, he was liable to for the loſs he ſhip: but the plaintiff inſiſted to be allowed ſix hundred pounds for freight the ſhip *would have earned* in the voyage, if the accident had happened. But as the goods were not *actually* on board, ſo as to make plaintiff's right to freight commence; Lord Chief Juſtice *Lee* held, he ld not be allowed it, and he was nonſuited. Tonge v. Watts, 2 Str. 1251.

But if the policy be a valued policy, and part of the cargo on board n ſuch accident happens, the reſt *being ready to be ſhipped*, the inſured recover to the whole amount. This was ſo decided in an action ght by the aſſured on a policy on freight valued at 1500*l*. In fact only *l*. worth of freight was on board when the ſhip was driven from her rings and loſt: but goods to the amount of the reſt of the freight *were y* to be ſhipped, and were lying on the quay for that purpoſe at the time. Montgomery v. Eginton, 3 Term Rep 362.

Lord *Kenyon*, before whom the cauſe was tried, told the jury, that the queſtion for their conſideration was, whether this was a mere colourable inſurance and a gaming policy, or whether it was a *bonâ fide* tranſaction; if the latter, the inſured was entitled to recover for the whole value in the policy. The jury found the whole ſum. The defendant's counſel obtained a rule for a new trial, which he afterwards abandoned, the court being ſtrongly of opinion againſt him.

Thompſon v Taylor, 6 Term Rep. 478.

So alſo, in an *open* policy on freight, *at and from* London *and* Teneriffe *to any of the* Weſt India *iſles*, (*Jamaica* excepted,) the underwriters were held liable to pay the inſurance, though the ſhip ſailed from *London* in ballaſt, and was captured before her arrival at *Teneriffe*, where the cargo was to be put on board. But as the ſhip was under a charter-party *to depart out of the river* Thames, *and proceed to* Teneriffe, *and there to load and receive on board from the freighters* 500 *pipes of wine, to deliver in the* Weſt Indies, *for the freight of which* 500 *pipes, the freighters covenanted to pay* 35*l.* *per pipe*; the court held, that the inſtant the ſhip departed from the *Thames*, the contract for freight had its inception, and the plaintiff was entitled to recover.

Gordon v. Morley, Campbell v. Bordieu. 2 Stra. 1265.

On an inſurance from *London* to *Gibraltar*, warranted to depart with convoy; it appeared there was a convoy appointed for that trade at *Spithead*, and the ſhip *Ranger*, having tried for convoy in the *Downs*, proceeded for *Spithead*, and was taken in her way thither. The inſurers reſiſted the demand of indemnity, alleging, that as there was a *French* war, the ſhip ſhould not have ventured through the *Channel*, but have waited for occaſional convoy. Lord Chief Juſtice *Lee*, however, was of opinion, that the ſhip was to be conſidered as under the defendant's inſurance to a place of general rendezvous, according to the interpretation of the words, *warranted to depart with convoy*, *Salk.* 443. 445.; and if the parties meant to vary the inſurance from what is *commonly* underſtood, they ſhould have ſtated it. Two ſpecial juries of merchants found their verdicts agreeably to this direction.

Motteux and others v. the Gov. and Comp. of Lond. Aſſur. 1 Atk. 545.

A bill was filed in the court of Chancery, which ſtated, that the ſhip *Eyles*, late in the *Eaſt India* Company's ſervice, was, in the year 1734, at *Bengal*, at which time the owner employed *I. H.* to inſure the ſhip at the *London* Aſſurance office for five hundred pounds. The adventure thereon was to commence *from her arrival at Fort Saint George*, and thence to continue till the ſaid ſhip ſhould arrive at *London*, and that it ſhould be lawful for the ſaid ſhip in the ſaid voyage, to ſtay at any ports or places without prejudice, and the ſhip was, and ſhould be rated *at intereſt or no intereſt*, without farther account; in conſideration whereof, *I. H.* paid fifteen pounds premium. The *Eyles* came to *Fort St. George* in *February* 1733, in her way to *England*; but being leaky, and in a very bad condition, upon the unanimous advice of the governor, council, commanders of ſhips, *&c.*, ſhe ſailed to *Bengal* to be refitted, and after being ſheathed, in her return upon her homeward-bound voyage, ſhe ſtruck upon the *Engilee* ſands and was loſt. Evidence was read on the part of the plaintiffs to prove, that *Bengal* was the moſt proper place to refit, and that ſhe went thither for that reaſon; that this was a voyage of neceſſity, and not a trading voyage, for ſhe took no thing on board, but water, proviſion, and ballaſt. Lord Chancellour *Hardwicke*.—As to the queſtion, whether there has been a breach, or, in other terms, a loſs within the meaning of this policy, the general principles laid down by the plaintiff's counſel are right, that ſtreſs of weather, and the danger of proceeding on a voyage, when a ſhip is in a decayed condition, are

be conſidered. In ſuch a caſe, if ſhe went to the neareſt place, I ſhould conſider it equally the ſame as if ſhe had been repaired at the very place rom which the voyage was to commence, according to the terms of the olicy, and no deviation. It is a very material circumſtance, that the go-ernor ordered the lading to be taken out, to ſhew the neceſſity of the ſhip's eing repaired, but there is not a ſyllable of proof why ſhe might not have een equally well repaired at *Fort Saint George*. There is one part of this aſe which diſtinguiſhes it from all others whatever, and that is, as to the ertain time the voyage was to commence. The fact is, the ſhip was loſt *July* 1733, three weeks before the time of making this policy, ſo that early the ſhip was not at *Fort Saint George* at the time the agreement was ade; and therefore it is a material queſtion, whether it comes within the reement. His Lordſhip directed an iſſue to try, whether the loſs in *July* 733 was a loſs during the voyage, and according to the adventure agreed on; which iſſue was afterwards found for the plaintiffs upon a trial in the ommon Pleas.

In an action upon a policy of inſurance, before Lord Chief Juſtice *Hard-icke*, it has been held, that the words "at and from *Bengal* to *England*," eant *the firſt arrival* at *Bengal*; and it was agreed, that when ſuch words e uſed in policies, *firſt arrival* is always implied and underſtood. 1 Atk. 548.

It has likewiſe been held, that when a ſhip is inſured *at and from a place*, d it arrives at that place, as long as the ſhip is preparing for the voyage on which it is inſured, the inſurer is liable: but if all thoughts of the voy-e be laid aſide, and the ſhip lie there five, ſix or ſeven years, with the ner's privity, it ſhall never be ſaid the inſurer is liable; for it would be ſubject him to the whim and caprice of the owner. Chitty v. Selwin, 2 Atk. 359.

This was an action on a policy of inſurance on a ſhip, at and from *Ja-ica* to *London*. The ſhip had alſo been inſured from *London* to *Jamaica* erally, and was loſt in coaſting the iſland, after ſhe had touched for ſome s at one port there, but before ſhe had delivered all her outward-bound go at the other ports of the iſland. This was an action on the homeward icy; and in order to ſhew when the homeward-bound riſk commenced, was neceſſary to ſhew at what time the outward-bound riſk determined; d the jury, which was ſpecial, after an examination of merchants as to the ſtom, by their verdict, decided, that the outward riſk ended, when the p had moored in any port of the iſland, and did not continue till ſhe came the laſt port of delivery. Camden v. Cowley. 1 Bl. Rep. 417.

In the *Trinity* term following, a motion was made for a new trial, but was refuſed; becauſe it had been thoroughly tried, and no new light could thrown upon it although Lord *Mansfield* ſaid, the inclination of his opi-n at the trial was the contrary way. Mr. Juſtice *Wilmot* thought, the ſtruction put upon the policy by the jury was the right one.

In a ſimilar caſe, Lord *Mansfield* laid down the ſame doctrine to the jury nely, that the outward riſk *upon the ſhip* ended twenty-four hours after its ival in the firſt port of the iſland, to which it was deſtined: but that the ward policy *upon goods* continued till they were landed. Barraſs v. the London Aſſurance, Sittings after Hilary 1782, at Guildhall.

The doctrine ſtated in the two laſt caſes has been confirmed in a late de-on. It was an action on a policy of aſſurance of *the ſhip Palliſer*, and *goods* on board thereof, on a voyage at and *from Georgia to Jamaica*. e ſhip arrived at *Montego Bay*, and moored at anchor, and there alſo the Leigh v. Mather, Sittings at Guildhall, after Mich. 1795.

plaintiff's agent ſold and delivered the greateſt part of the cargo to Meſſrs. *Adams* and *Hatton*, merchants there. The captain then entered into a charter-party with *Adams* and *Hatton* to proceed from thence to *Saint Anne's*, and there to take in a cargo for *London*. After unloading the greateſt part of the cargo at *Montego Bay*, and remaining there a month, it was verbally agreed, that the remainder of the cargo, which was lumber, ſhould be carried as ballaſt to *Saint Anne's*, and accordingly the veſſel, after taking in ſome fuſtick, proceeded towards *Saint Anne's*, but was wrecked in her paſſage. For the plaintiff it was inſiſted, that in ſuch an inſurance, the ſhip might go from port to port; and that, in all events, the goods were protected by the policy till they were all diſcharged and ſafely landed. Lord *Kenyon* was clearly of opinion, and that opinion was confirmed by a ſpecial jury, to whom he particularly referred on this occaſion, that the riſk on the ſhip ceaſed, after ſhe had been moored at anchor twenty-four hours in the firſt port of the iſland for the purpoſe of unloading; and the facts diſcloſed in this caſe having manifeſted that *Montego Bay* was alſo the original deſtination of the cargo, and that its not being wholly delivered there, was only prevented by a new agreement, the goods could not be recovered under this policy. A ſhip inſured to *Jamaica* generally cannot be permitted to go round the whole iſland, from port to port, for the purpoſe of unloading her cargo, eſpecially where, as in this caſe, the owner of the ſhip and goods is the ſame perſon. The plaintiff was nonſuited.

In conſtruing policies, the *ſtrictum jus*, or *apex juris* is not to be the rule, but a liberal conſtruction is to be adopted, and the uſage of trade called in to explain any doubts.

Tierney v. Etherington, before Lee, C. J. 5th March 1743. 1 Burr. 348.

Thus, in an aſſurance of goods from *Malaga* to *Gibraltar*, and from thence to *England* or *Holland*, the parties having agreed that the goods might be unloaded at *Gibralter*, and reſhipped in one or more *Britiſh* ſhip or ſhips, and it appearing in evidence that there was no *Britiſh* ſhip at *Gibraltar*, but the goods had been unloaded and put into a *ſtore ſhip*, (which was always conſidered as a warehouſe) the inſurers were held to be liable for the loſs of theſe goods in the ſtore ſhip.

Pell v. Governor and Company of the Royal Exchange Aſſurance, 1 Burr. 341. Brough v. Whitmore, 4 Term Rep. 206.

A ſhip was inſured from *London* to any place beyond the *Cape of Good Hope*. The ſhip arrived in the river *Canton* in *China*, where, in order to be heeled and refitted, the ſails, &c. were taken out, and lodged in a *bank ſaul*, on an iſland in the river, (which was proved to be *uſual* and beneficial to all concerned). The underwriter was held liable for the loſs of the ſails by fire, while in this *bank ſaul*. For the inſurer, at the time of underwriting, has under his conſideration the nature of the voyage, and the uſual manner of doing it. What is uſually done by ſuch a ſhip, with ſuch a cargo, in ſuch a voyage, is underſtood to be referred to by every policy. If a ſhip be driven a mile on ſhore by a hurricane, or be burnt in a dry dock, while repairing, the inſurer is liable. S. P.

Noble v. Kennoway, Dougl. 510.

The goods on board the ſhips, the *Hope* and the *Anne*, were inſured at and from *Dartmouth* to *Waterford*, and from thence to the port or ports of diſcharge, on the coaſt of *Labrador*, with leave to touch at *Newfoundland*, *till the goods ſhould be ſafely diſcharged and landed*. From the time of their arrival, the crew were chiefly employed in fiſhing, and took out their cargo only at leiſure times, (which was fully proved to be the uſage,) and the ſhips were taken by a privateer, before they were unloaded. The court held, that the inſurers were liable; for that according to the uſage there was no delay.

With

With reſpect to *Eaſt India* voyages, the uſage of trade has been more notorious than in any other, the queſtion having more frequently occurred.

The charter-parties of the *India* Company give leave to prolong the ſhip's ſtay in *India* for a year, and it is common, by a new agreement, to detain her a year longer. The words of the policy too are very general, without limitation of time or place.

Theſe charter-parties are ſo notorious, and the courſe of the trade is ſo well known, that the underwriter is always liable for any intermediate voyage, upon which the ſhip may be ſent, while in *India*, though not expreſsly mentioned in the policy.

Thus, where the inſurance was "at and from *Bengal* to any ports or "places whatſoever, in the *Eaſt Indies*, *China*, *Perſia*, or elſewhere be- "yond the *Cape of Good Hope*, forwards and backwards, and during her "ſtay at each place, until her arrival in *London*, &c." and the captain, when in *Bengal*, entered into a new agreement for prolonging the ſhip's ſtay, and went ſeveral intermediate or country voyages, in the laſt of which ſhe was loſt; the inſurers were held liable. Salvador v. Hopkins, 3 Burr. 1707.

In an aſſurance "from *London* to *Madras* and *China*, with liberty to "touch, ſtay, and trade at any ports or places whatſoever," the facts were; that when the ſhip arrived at *Madras*, ſhe was too late to go to *China* that year, upon which ſhe was ſent by the council to *Bengal* to fetch rice, which voyage ſhe performed once, but in the ſecond attempt ſhe was loſt. The inſurers are anſwerable on account of the uſage. Gregory v. Chriſtie, B. R. Tr. 24 Geo. 3. Park. 49.

In an inſurance on a ſhip "at and from *London* to *Bengal*, beginning "the riſk upon the ſhip at *London*, and ſo to continue till the arrival of the "ſaid ſhip at *Madras* and *Bengal*, *with liberty to touch and ſtay at any port* "*or place in this voyage*;" the underwriters were held to be anſwerable for a loſs, which happened in an intermediate voyage from *Madras* to *Viſagipatnam* for rice, by order of the council. Farquharſon v. Hunter, B. R. Hil. 25 G. 3. Park, 50.

However, the parties may, by their own agreement, prevent ſuch latitude of conſtruction.

Nor need this be done by expreſs words of excluſion; but if *from the terms uſed*, it can be collected that the parties meant ſo, that conſtruction ſhall prevail.

Thus, where the general words were reſtrained by the expreſſions, "*in* "*the outward, or homeward bound voyage*;" and "*in this voyage*;" the court held that the policy only meant places in the uſual courſe of the voyage "to and from the places named." Lavabre v. Wilſon, Dougl. 284.

When a man inſures one ſpecies of property, he cannot recover damage, occaſioned by the loſs of a ſpecies of property different from that named in the policy. Thus, under a policy *upon the ſhip*, or *upon the goods*, the inſured cannot recover *extraordinary wages* paid to the ſeamen, or *proviſions* expended, during a detention to repair, or a detention by an embargo. Fletcher v. Poole, Sittings after Eaſter, 1769, before Lord Manſfield at Guildhall, Park 53. Robertſon v. Ewer, 1 Term. Rep. 127.

Nor is the underwriter *on goods* liable for *the freight* paid by the owner of the goods to the proprietors of the ſhip, where the goods were partially loſt. Baillie v. Mondgiliane, B. R. Hil. 25 G. 3.

Neither is an underwriter upon *ſhip and goods* liable for the charge of demurrage. Eden v. Poole, Sitt. after Hil. 1785.

Nor

Hoſkins v. Pickerſgill, B. R. Eaſt. 23 Geo. 3.

Nor in an inſurance upon a *Greenland* ſhip, is the underwriter in a policy *on the ſhip, tackle, and furniture*, &c. liable for the *lines and tackle* employed in the fiſhery in thoſe ſeas.

Brough v. Whitmore, 4 Term Rep. 206.

But proviſions ſent out in a ſhip for the uſe of the crew, are protected by a policy on *the ſhip and furniture.*

In the conſtruction of policies, the loſs muſt be *a diſtinct and immediate conſequence* of the peril inſured, and not a remote one, in order to entitle the inſured to recover.

Jones v. Schmoll, Guildhall, Tr. Vac. 1785. 1 Term Rep. 130. note. See as to inſurance upon negroes, ſtat. 34 G. 3. c. 80. § 10. continued by 35 G. 3. c. 90.

Thus, in an action upon a policy to recover the value of ſome negroes, who periſhed by *mutiny*, which was one of the riſks inſured againſt; it was held, that the underwriters were liable for all thoſe who were killed in the mutiny, or who died of their wounds: that all thoſe who died of the bruiſes which they received in the mutiny, though accompanied with other cauſes, were to be paid for by the underwriters. But they were not liable for thoſe who had ſwallowed ſalt water, and died in conſequence thereof, or who leaped into the ſea, and hung upon the ſides of the ſhip, without being otherwiſe bruiſed, or who died of chagrin; all theſe having been loſt by too remote a conſequence.

In the conſtruction of a policy upon time, the ſame liberality prevails as in other caſes; and an attention to the meaning of the contracting parties has always been paid. Hence, in an inſurance at and from *Liverpool* to *Antigua, with liberty to cruiſe ſix weeks*; it was held, that this meant a connected portion of time, and not a deſultory cruiſing for ſix weeks *at any time.*

Syers v. Bridge, Dougl. 527.

2 Show. 323. Roccus, Not.

With reſpect to perils of the ſea, it is to be obſerved, that every accident, happening by the violence of wind or waves, by thunder and lightning, by driving againſt rocks, or by the ſtranding of the ſhip, may be conſidered as a peril of the ſea; and for ſuch loſſes the underwriter is anſwerable.

Greene v. Elmſlie, Peck. 212.

But a ſhip driven on an enemy's coaſt by the wind, and there captured, ſhall be ſaid to be loſt by capture, and not by perils of the ſea.

Gregſon v. Gilbert, B. R. Eaſt. 23 Geo. 3. Park, 62.

An action was brought to recover the value of certain ſlaves inſured by the policy. The facts were, that the captain miſſed the iſland for which he was bound, and the water running ſhort, ſome of the ſlaves were thrown overboard, to preſerve the reſt; and the declaration ſtated the loſs to have happened by perils of the ſea. But it was held, that *the miſtake* of the captain could not be called *a peril of the ſea.*

A ſhip, which is never heard of, after her departure, ſhall be preſumed to have periſhed at ſea.

Green v. Brown, 2 Str. 1199.

This was held in an action on a policy upon the ſhip from *North Carolina* to *London*, and the loſs was ſtated to be by ſinking at ſea; the evidence to ſupport this averment was, that after ſailing from port ſhe had never been heard of.

Newby v. Read, Sitt. after Mich. 3 Geo. 3. Park. 63.

The ſame was held in a caſe, where a ſhip had been captured and ranſomed at ſea, but was never afterwards heard of, and never arrived at her port of deſtination.

Park, 64.

In *England* no time is fixed, within which payment of a loſs may be demanded from the underwriter, in caſe the ſhip is not heard of. A practice

tice, however, prevails among merchants, that a ſhip ſhall be deemed loſt, if not heard of within ſix months after her departure from any part of *Europe*, or within twelve, if for a place at a greater diſtance.

As to loſſes by capture, the rule is, that as between the inſurer and the inſured, the ſhip is to be conſidered as loſt by the capture, though ſhe be never condemned at all, nor carried into any port or fleet of the enemy: and the inſurer muſt pay the value. If, after a condemnation, the owner recover or retake her, the inſurer can be in no other condition, than if ſhe had been retaken or recovered before condemnation. The inſurer runs the riſk of the inſured, and undertakes to indemnify; he muſt, therefore, bear the *loſs* actually ſuſtained, and can be liable to no more. So that if, after condemnation, the owner recovers the ſhip in her complete condition, but has paid ſalvage, or been at any expence in getting her back, the inſurer muſt pay the loſs ſo actually ſuſtained. No capture by the enemy can be ſo total a loſs. as to leave no poſſibility of a recovery. If the owner himſelf ſhould retake at any time, he will be entitled; and by a late act of parliament, if an *Engliſh* ſhip retake the veſſel captured, either before or after condemnatiou, the owner is entitled to reſtitution upon ſtated ſalvage. This chance does not, however, ſuſpend the demand for a total loſs upon the inſurer: but juſtice is done, by putting him in the place of the inſured, in caſe of a recapture.

2 Burr. 694. 1ſt point in Goſs v. Withers.

2 Burr. 696.

29 G. 2. c. 34 §. 24. 34 Geo. 3. c. 66. § 42.

It has likewiſe been held, that where a capture has been made, whether it be legal or not, the inſurers are liable for the charges of a compromiſe made, *bonâ fide*, to prevent the ſhip from being condemned as prize.

Berens v. Rucker, 1 Bl. Rep. 313.

By the marine law of *England*, as practiſed in the court of Admiralty, it was formerly held, that the property was not changed ſo as to bar the original owner in favour of a vendee or recaptor, till there had been a ſentence of condemnation.

Park. 71.

But now by ſtatute this right of the original owner, in caſe of a recapture, is preſerved to him for ever, upon payment of ſtated ſalvage to the recaptors.

13 Geo. 2. c. 4. 29 Geo. 2. c. 34. 33 Geo. 3. c. 66.

Before the ſtat. of 19 *G.* 2. *c.* 37. ſeveral caſes were determined upon the queſtion of recapture in the *Engliſh* courts, but the ſame queſtion can never again ariſe between an inſurer and inſured.

If the ſhip be recovered, before a demand for indemnity is made, the inſurer is only liable for the amount of the loſs actually ſuſtained at the time of the demand. Or, if the ſhip be reſtored at any time ſubſequent to the payment by the underwriter he ſhall then ſtand in the place of the inſured, and receive all the benefits reſulting from ſuch reſtitution.

Park, 777.

The underwriter, by the expreſs terms of his contract, is anſwerable for all loſs or damage ariſing to the inſured "*by the arreſts, reſtraints, and* "*detainments of all kings, princes, and people, of what nation, condition, or* "*quality ſoever.*"

In a late caſe, the declaration claimed a loſs of corn, occaſioned *by the unlawful arreſt, reſtraint, and detention of people to the plaintiffs unknown.* The facts upon this part of the caſe were, that the ſhip being forced into *Elly* Harbour in *Ireland*, and a great ſcarcity of corn prevailing there at that time, the people came on board in a tumultuous manner, took the government of the veſſel from the captain and crew, weighed her anchor, by which ſhe drove upon a reef of rocks, and would not leave her till they had compelled the captain to ſell all the corn conſiderably below the invoice price

Neſbitt v. Luſhington, 4 Term Rep. 783.

price. The word *people*, it was contended, at the bar, meant individuals of a nation as oppoſed to magiſtrates or rulers. But the court held, that it meant "*the ruling power of the country.*"

2 Burr. 696. In caſe of an arreſt or embargo by a prince, though not an enemy, the inſured is entitled to recover againſt the inſurer.

Saloucci v. Johnſon, B. R. Hil 25 G. 3. Park, 79. If the ſhip be detained by a foreign power, which, in time of war, may have ſeized a neutral ſhip, in order to ſearch her for enemy's property, the charges conſequent thereupon muſt be borne by the underwriter.

But though an underwriter is liable for all damage ariſing to the owner of the ſhip or goods from the reſtraint or detention of princes, yet that rule ſhall not be extended to caſes where the inſured ſhall navigate againſt the laws of thoſe countries, in the ports of which he may chance to be detained, or to caſes where there ſhall be a ſeizure for nonpayment of cuſtoms.

2 Vern. 176. This was ſo ruled by Lord Commiſſioner *Hutchins* in Chancery, in the year 1690: and the reaſon of it it obvious, becauſe there is a groſs fraud on the part of the owner of the property inſured; and no man ſhall take advantage of his own miſconduct. If indeed any of thoſe acts were committed by the maſter of the ſhip, without the knowledge of the inſured, the underwriter would be liable, if not for loſſes by detention, at leaſt for a loſs by the barratry of the maſter, to which ſuch conduct would moſt certainly amount.

Rotch v. Edie, 6 Term Rep. 413. It is now ſettled, that under a policy on a ſhip and ſtores, "at and "from a port," in a foreign country, the inſurers are liable for the payments of damage occaſioned by the detention or ſeizure of the ſhip by the government of the country in the loading port.

Another of the riſks inſured againſt is the barratry of the maſter or mariners.

1 Stra. 581. 2 Stra. 1173. Cowp. 143. 1 Term Rep. 323. It appears from the caſes upon this ſubject, that any act of the maſter, or of the mariners, which is of a criminal nature, or which is groſsly negligent, tending to their own benefit, to the prejudice of the owners of the ſhip, without their conſent or privity, is barratry.

Cowp. 155. It is not neceſſary, in order to entitle the inſured to recover for barratry, that the loſs ſhould happen *in the act of barratry*; that is, it is immaterial, whether it take place *during* the *fraudulent* voyage, or *after* the ſhip has returned to the regular courſe; for the moment the ſhip is carried from its right track with an evil intent, barratry is committed.

Lockyer v. Offley 1 Term Rep. 252. But the loſs, in conſequence of the act of barratry, muſt happen *during the voyage inſured*, and within the time limited by the policy, otherwiſe the underwriters are diſcharged. Thus, if the captain be guilty of barratry by ſmuggling, and the ſhip afterwards arrive at the port of deſtination, and *be there moored at anchor twenty-four hours in good ſafety*; the underwriters are not liable, if, after this, ſhe ſhould be ſeized for that act of ſmuggling.

From the above deſcriptions of barratry, it will appear, that if the act of the captain be done with a view to the benefit of his owners, and not to advance his own private intereſt, no barratry is committed. To conſtitute barratry, it muſt be without the knowledge or conſent of the owners; becauſe nothing can be ſo clear as this, that no man can complain of an act done, to which he himſelf is a party. It is material to conſider, in what ſenſe the word owner is to be underſtood, in this definition. It has been argued, that if *A.* be the owner of a ſhip, and let it out to *B.* as freighter, who inſures it for the voyage; and if the deviation be with the knowledge of *A.*, though unknown to *B.*, the inſurer is diſcharged. But the court over-ruled that argument, and ſaid, that, in order to diſcharge the inſurer from

Cowper, 154.

from the loſs by barratry, it muſt appear, that the act done was by the conſent, or with the privity of the owner, *pro hac vice*, that is, the freighter, the perſon inſured.

If a declaration ſtate a ſhip to have been loſt by the *fraud and negligence* of the maſter, that is a ſufficient averment of a loſs by *barratry*. Knight v. Cambridge 2Ld.Raym. 1349. 1 Str. 581. S. C.

But where a ſhip ſailed a different courſe from that firſt intended, which alteration was publickly notified before the ſhip ſailed, and where the maſter was to have no benefit by the charge, it was held not to be barratry. Stamma v. Brown, 2 Str. 1173.

So, if a ſhip take a prize, and inſtead of proceeding on her voyage, the captain is forced by the mariners to return to port with the prize, againſt the orders of his owners, the captain is juſtified by neceſſity; and it is not barratry, becauſe not done to defraud the owners. Elton v. Brogden, 2 Str. 1264.

A ſhip was inſured from *London* to *Seville*; ſhe was let to freight for the voyage; ſhe ſailed from *London* to the *Downs*, from whence ſhe ſailed to *Guernſey*, *which was out of the courſe of the voyage*. The captain went there to take in brandy *on his own account*, with the knowledge of the original owner of the ſhip, *but not of the freighter for that voyage*. This was held to be barratry. Valleio v. Wheeler, Cowp. 143.

A breach of an embargo is, it ſeems, an act of barratry in the maſter. Roberts v. Ewer, 1 Term Rep. 127.

In an action on a policy on goods on board the *Live Oak*, whereof *Joſeph Rati* was maſter, at and from *Jamaica* to *New Orleans*, it appeared, that the ſhip was put up as a general ſhip in *Jamaica* in 1783; that ſhe ſailed on the voyage inſured in *May* 1783, and arrived in *June* following at the mouth of the river *Miſſiſſippi*, which leads up to *New Orleans* in *Spaniſh America*; at the diſtance of about 35 leagues. When the captain had gotten thus far, he dropped anchor, and on his return, without carrying the ſhip to her port of deſtination, ſtood away for the *Havannah*, after which he was never heard of. It appeared, that he had a private adventure of negroes of his own on board, which there was reaſonable evidence for ſuppoſing he intended to have diſpoſed of at *New Orleans*; but finding it difficult to do ſo, on account of a prohibition to import them into the *Spaniſh* government, he went to the *Havannah*. The jury found for the plaintiff on the count in the declaration, charging the barratry of the maſter; and the whole court of King's Bench, upon a motion for a new trial, were of opinion, that the facts ſtated amounted clearly to the crime of barratry. v. Hunter, 4 Term Rep. 33.

So, it has been holden, that if the captain of a ſhip, contrary to the inſtructions of his owner, cruize for, and take a prize, and the veſſel be afterwards loſt, in conſequence of it, he is guilty of barratry, even though he libel his prize in the court of Admiralty in the name of himſelf and his owner; and though the owner had procured a letter of marque, ſolely with a view to encourage ſeamen to enter, and without any intention of uſing it for the purpoſe of cruiſing; for whatever is done by the captain to defeat or delay the performance of the voyage is barratry in him, it being to the prejudice of his owners, and though the captain might conceive that what he did was for the benefit of his owners, yet, if he acted contrary to his duty to them, it is barratry. Moſs v. Byrom, 6 Term Rep. 379.

An act of the captain, *with the knowledge of the owners of the ſhip*, though without the privity of the owner of the goods, who happened to be the perſon inſured, is not barratry. Nutt v. Bourdieu, 1 Term Rep. 323.

If

If the maſter of the ſhip be alſo the owner, he cannot be guilty of barratry.

It is clear, that if the owner be alſo the maſter of the ſhip, any act, which in another maſter would be conſtrued barratry, cannot be ſo in him; becauſe ſuch doctrine would militate againſt one of the rules above laid down; namely, that no man ſhall be allowed to derive a benefit from his own crime, which he would do, were he to recover againſt the inſurers for a loſs occaſioned by his own act. But where it was proved, that the perſon who was deſcribed in the policy as maſter, and who was treated with as ſuch, carried the ſhip out of courſe for fraudulent purpoſes, it was holden to be *primâ facie* evidence of barratry, and that it lay upon the inſurer, in order to diſcharge himſelf, to ſhew that the perſon ſo acting as maſter, was alſo the owner or freighter of the veſſel.

Roſs v. Hunter, 4 Term Rep. 33.

This rule, reſpecting the ſame perſon being both owner and maſter, has been extended in the court of Chancery to a caſe, where ſuch an owner and maſter, after mortgaging his ſhip, had committed barratry; and when the mortgagee brought an action at law againſt the inſurer to recover damages for the loſs which he had ſuſtained by this act of barratry, the court, ſtill conſidering the mortgagor as the owner, granted an injunction

Lewin v. Suaſſo, in Can. 16 Geo. 2. Poſtlethw. Dict. vol. i. p. 147.

Even if the parties inſert in the policy, that the inſurance ſhall be upon the ſhip *in any lawful trade*, if the captain commit barratry by ſmuggling, the underwriters are anſwerable For otherwiſe the word *barratry* ſhould be ſtruck out of the policy; and moſt clearly, the ſtipulation in the policy reſpecting the employment of the ſhip in a lawful trade, muſt mean the *trade* on which ſhe is ſent by the owners.

Havelock v. Hanail, 3 Term Rep. 277.

If any captain, or mariner, belonging to any ſhip ſhall wilfully burn or deſtroy her, to the prejudice of any merchant loading goods thereon, *or of any perſon underwriting any policy thereon*, or to the prejudice of the owner of the ſhip, he ſhall ſuffer death as a felon, without benefit of clergy.

If the offence be committed within the body of a county, the offender ſhall be tried in a court of common law; if upon the high ſeas, it ſhall be tried according to the directions of the 28 *H.* 8. *c.* 15.

Partial, or, as it is ſometimes called, average loſs, *ex vi termini*, implies a damage, which the ſhip may have ſuſtained in the courſe of her voyage, from any of the perils mentioned in the policy: when applied to the cargo, it alſo means the damage which goods may have received, without any fault of the maſter, by ſtorm, capture, ſtranding, or ſhipwreck, although the whole, or the greater part thereof, may arrive in port. Theſe partial loſſes fall upon the owners of the property ſo damaged, who muſt be indemnified by the underwriter. For if the goods arrive, but leſſened in value through damage received at ſea, the nature of an indemnity ſpeaks demonſtrably, that it can only be effected by putting the merchant in the ſame condition in which he would have been, if the goods had arrived free from damage.

2 Burr. 1172.

The proportion of damage the merchant may have ſuffered is aſcertained in this way. Where an entire thing, as one hogſhead of ſugar, happens to be ſpoiled, if you can fix, whether it be a third, a fourth, or a fifth worſe, then the damage is aſcertained to a mathematical certainty. This is found out, not by any price at the port of diſcharge, but by the price at the port of *delivery*, where the voyage is completed, and the whole damage known. Whether the price at the latter be high or low, it is the ſame thing; for in either caſe it equally ſhews, whether the damaged goods

2 Burr. 1170.

Lewis v. Rucker, 2 Burr.

are

are a third, a fourth, or a fifth worſe than if they had come ſound: conſequently, whether the injury ſuſtained be a third, fourth, or fifth of the value of the thing. And as the inſurer pays the whole prime coſt, if the thing be wholly loſt; ſo, if it be only a third, fourth, or fifth worſe, he pays a third, fourth, or fifth, not of the value for which it ſold, but of the value ſtated in the policy. And when no valuation is ſtated in the policy, the invoice of the coſt, with the addition of all charges, and the premium of inſurance, ſhall be the foundation, upon which the loſs ſhall be computed.

1167. Dick v. Allen, at Guild. after Mich 1785, *coram* Buller, J. 1 Magens, 37.

This rule of aſcertaining the damage will hold wherever there is a ſpecifick deſcription of caſks or goods: but in *Le Cras* v. *Hughes*, the property, which conſiſted of various goods taken from an enemy, was valued at the ſum inſured, and part was loſt by perils at ſea; conſequently, the ſame rule could not be adopted, on account of the nature of the thing inſured. The only mode was to go into an account of the whole value of the goods, and take a proportion of that ſum, as the amount of the goods loſt.

Le Cras v. Hughes, B. R. Eaſt. 22 Geo. 3. Park, 111.

Since the 19th of *G.* 2. the conſtant uſage has been to let the valuation fixed in the policy remain, in caſe of a total loſs, unleſs the defendant can ſhew that the plaintiff had a colourable intereſt only, or that he has greatly overvalued the goods: but a partial loſs opens the policy. This cuſtom, ſaid Lord *Mansfield*, was introduced by Lord Chief Juſtice *Lee*, in a caſe of *Eraſmus* v. *Banks*, and in another caſe of *Smith* v. *Flexney*, which happened about the ſame period, the ſame rule of deciſion was adopted.

M. 21 G. 2.

The underwriters of *London* have, by expreſs words inſerted in their policy, declared, that they will not be anſwerable for any partial loſs, happening to corn, fiſh, ſalt, fruit, flour, and ſeed, unleſs it ariſe by way of a general average, or in conſequence of the ſhip being ſtranded. This clauſe was introduced to prevent the vexation of trifling demands, which muſt have ariſen in every voyage, on account of the very periſhable nature of the above commodities. This form was formerly uſed by the two inſurance companies, as well as by the private inſurers, till the year 1754, when a ſhip having been ſtranded, and got off again, the inſured recovered a ſmall partial loſs againſt the *London* Aſſurance Company, ſince which period, the companies have left out the words, "*or the ſhip be ſtranded*;" and are now only liable in caſes of a general average: but the old form is ſtill retained by private inſurers.

Cantillon v. the London Aſſurance Company, cited in 3 Burr. 1555.

Upon this clauſe there have been ſeveral determinations, in all of which it has been uniformly held, that the underwriters can in no caſe be anſwerable for a partial loſs to ſuch commodities: and that no loſs ſhall be deemed a total one, but the abſolute deſtruction of the thing inſured; for that while it ſpecifically remains, though perhaps wholly unfit for uſe, no loſs has happened within the meaning of this memorandum.

Corn is a general term, and includes many particulars; peas and beans have been holden to come within the meaning of the word. Maſon v. Skurray, Sittings after Hil. 1780, at Guildhall. But in a late trial at Guildhall, in the court of Common Pleas, Mr. J. Wilſon was of opinion, that the term ſalt uſed in the memorandum did not include ſaltpetre. Jouram v. Bourdieu, Sittings after Eaſter Term, 27 Geo. 3.

This was held with reſpect to a cargo of wheat, which was partially damaged in a ſtorm.

Wilſon v. Smith, 3 Burr 1550.

The ſame with reſpect to a cargo of fiſh, which was ſtinking, and of no value when examined.

Cockings v. Fraſer, B.R. Park. 114.

A cargo

Maſon v. Skurray, Sitt. after Hil. 1780. at Guildhall.

A cargo of peas was ſo much damaged, that the produce was three-fourths leſs than the freight; but as it in fact arrived at the port of deſtination, the underwriter was holden not to be liable.

Park, 117.

When the quantity of damage ſuſtained in the courſe of the voyage is known, and the amount, which each underwriter upon the policy is liable to pay, is ſettled, it is uſual for the underwriter to indorſe on the policy, "*adjuſted this loſs, at ſo much per cent.*" or ſome words to the ſame effect. This is called an adjuſtment.

Hog v. Goulding, Sitt. after Tr. 1745, at Guildhall, *cor.* Lee, C. J. Beawe's Lex Mercat. 310.

It has been determined, that after an adjuſtment has been ſigned by the underwriter, if he refuſe to pay, the owner has no occaſion to go into the proof of his loſs, or any of the circumſtances reſpecting it.

Rodgers v. Maylor, Sitt. after Tr. 1790. Park, 118.

However, this rule has of late been ſomewhat relaxed. An action was brought on a policy of aſſurance on ſhip and goods from *London* to *Shelburne*, in *Nova Scotia*. The policy had been adjuſted by the defendant at 50 *per cent.*, and it was contended, that he was now bound by that adjuſtment. On the other hand, it was argued, that the adjuſtment was not binding; and that if it were, it ought to have been declared upon ſpecially. Lord *Kenyon* ſaid, that he did not think it neceſſary to declare on the adjuſtment ſpecially, that it was *primâ facie* evidence againſt the defendant; but if there had been any miſconception of the law or fact, upon which it had been made, the underwriter was not abſolutely concluded by it.—This turned out to be the caſe, and there was a verdict for the defendant.

De Garron v. Galbraiths, Sitt. after Tr. 1795. Park, 118.

Again, the plaintiff produced no other evidence at the trial but the adjuſtment; and the witneſs, who proved it, ſwore, that doubts, ſoon after they had ſigned it, aroſe in the minds of the underwriters, and they refuſed to pay; upon which Lord *Kenyon* ſaid, that under thoſe circumſtances, the plaintiff muſt go into other evidence, which not being prepared to do, he was nonſuited. In the following term a motion was made to ſet aſide the nonſuit, upon the ground that an adjuſtment was *primâ facie* evidence of the whole caſe, and threw the *onus probandi* upon the underwriter; and that it amounted to more than proof of the defendant's ſubſcription to the policy.—Lord *Kenyon*: I admit the adjuſtment to be evidence in the caſe to a certain extent; but I thought at the trial, and ſtill think, that when the ſame witneſs, who proved the ſignature of the defendant to the adjuſtment, ſaid, that doubts, ſoon after the adjuſtment took place, aroſe in the minds of the underwriters, as to the honeſty of the tranſaction, and they called for further proof, the plaintiff ſhould have produced other evidence: and that to ſhut the door againſt inquiry after an adjuſtment, would be to put a ſtop to candour and fair dealing amongſt the underwriters. The rule was refuſed.

Thelluſſon v. Fletcher Dougl. 301.

An action was brought upon an inſurance upon goods on board a *foreign ſhip*, "the policy to be deemed ſufficient proof of intereſt in caſe of loſs." The defendant ſuffered judgment to go againſt him by default; and on a motion to ſet aſide the writ of inquiry, the court of King's Bench ſaid, that although ſuch a policy would be void in this country, by virtue of the ſtatute of the 19th *G.* 2. *c.* 37., yet the ſtatute did not extend to policies on foreign ſhips: and in this caſe the underwriter, having ſuffered judgment to go by default, has confeſſed the plaintiff's title to recover; and the amount of that loſs was fixed, by his own ſtipulation in the policy, which he cannot now controvert.

If

If an inſurer pay money for a total loſs, and in fact it be ſo at the time of adjuſtment; if it afterwards turn out to be only a partial loſs, he ſhall not recover back the money ſo paid to the inſured. But ſubſtantial juſtice is done, by putting him in the place of the inſured, and giving him all the advantages that may ariſe from the ſalvage.

A box of bullion was wholly loſt, the loſs adjuſted and paid, and an agreement was entered into at the time of adjuſtment, that the inſured would refund to the inſurer whatever he ſhould recover in ſuch proportion as the ſum inſured bore to the whole intereſt. The bullion was afterwards fiſhed up, and the inſured paid into court the inſurer's proportion after deducting ſalvage. The court held this to be right. Da Coſta v. Firth, 4 Burr. 1966.

Salvage is an allowance made for ſaving a ſhip, or goods, or both, from the dangers of the ſeas, fire, pirates, or enemies: and it is alſo ſometimes uſed to ſignify the thing itſelf, which is ſaved; but it is in the former ſenſe only, in which it is here uſed. Beawe's Lex Mer. 146.

Underwriters by their policy, expreſsly undertake to bear all expences of ſalvage. Park, 140.

The valuation of a ſhip and cargo in order to aſcertain the rate of ſalvage, may be determined by the policies of inſurance made on them reſpectively; if there be no reaſon to ſuſpect they are undervalued. If there be no policy, the real value muſt be proved by invoices, &c.

In order to entitle the inſured to recover expences of ſalvage, it is not neceſſary to ſtate them in the declaration, as a ſpecial breach of the policy.

Thus, in a declaration on a policy on goods, it was ſtated, that the ſhip ſprung a leak, and ſunk in the river, whereby the goods where ſpoiled. Lord *Hardwicke* held, that under this declaration, the plaintiffs might give in evidence the expences of ſalvage. Carey v. King. Ca. temp. Hardw. 304

But if the inſurer pay to the inſured ſuch expences, and from particular circumſtances the loſs be repaired by unexpected means, the inſurer ſhall ſtand in the place of the inſured, and receive the ſum thus paid to atone for the loſs. Randal v. Cockran, 1 Vez. 98.

Before a perſon inſured can demand from the underwriter a recompence for a total loſs, he muſt abandon to him whatever claims he may have to the property inſured. Park, 143.

As ſoon as the inſured receive accounts of ſuch a loſs as entitles them to abandon, they muſt, in the firſt inſtance, make their election whether they will abandon or not: and if they abandon, they muſt give the underwriters notice in a reaſonable time, otherwiſe they waive their right to abandon, and can never afterwards recover for a total loſs. Mitchell v. Edie, 1 Term Rep 608.

But if the inſured, hearing that his ſhip is much diſabled, and has put into port to repair, expreſs his deſire to the underwriters to abandon, and be diſſuaded from it by them, and they order the repairs to be made; they are liable to the owner for all the ſubſequent damage occaſioned by that refuſal, though it ſhould amount to the whole ſum inſured. For the reaſon why the notice of abandonment is deemed neceſſary, is to prevent ſurpriſe or fraud upon the underwriter; but in the caſe put, they have by their own act ſuperſeded the neceſſity of notice. Da Coſta v. Newnham, 2 Term Rep. 407.

When an abandonment is made, it muſt be total, and not partial. Park, 142.

The inſured may in all caſes chooſe not to abandon: but he cannot at his pleaſure abandon, and thereby turn a partial into a total loſs. 2 Burr. 697

The inſured may abandon to the underwriter, and call upon him for a total loſs, if the damage exceed half the value; if the voyage be abſolutely loſt or not worth purſuing; if further expence be neceſſary; or if the inſu- Park, 146.

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rer will not engage at all events to bear that expence, though it ſhould exceed the value, or fail of ſucceſs.

1 Term Rep 191. But he cannot abandon, unleſs at ſome period or other of the voyage there has been a total loſs; and if neither the thing inſured, nor the voyage is loſt, and the damage does not amount to a moiety of the value, he ſhall not be allowed to abandon.

Pringle v. Hartley, 3 Atk. 195. A ſhip was taken by a *Spaniſh* privateer, retaken by an *Engliſh* privateer and carried into *Boſton* in *New England*, where, as no perſon appeared to give ſecurity for the ſalvage, ſhe was ſold; the recaptors had their moiety, and the overplus remaining in the hands of the officers of the court of Admiralty, the owners were entitled to abandon and to recover for a total loſs.

Goſs v. Withers, 2 Burr. 683 A ſhip was taken by the *French*, remained with them eight days, and was then retaken: the maſter, mates, and ſailors, except a landman and an apprentice, had been taken out and carried to *France*. Before the capture the ſhip had been ſeparated from her convoy, and was ſo far diſabled by ſtorm, as to be incapable of proceeding in her voyage without going into port to refit. Part of the cargo was thrown overboard in the ſtorm, and the reſt ſpoiled while the ſhip lay at *Milford haven*. In actions upon two policies, one on the ſhip, and the other on the cargo, it was held, that this was a total loſs, ſo as to entitle the owner to abandon.

Milles v. Fletcher, Dougl. 219. A ſhip bound from *Mountſerrat* to *London*, was captured, and the captain, crew, rigging, and part of the cargo, which was ſugar, were taken away. She was retaken and carried into *New York*, where the captain alſo arrived. Upon taking poſſeſſion he found, that part of the cargo that was left had been waſhed overboard; that 57 hogſheads of what remained were damaged, and that the ſhip was in ſuch a ſtate that ſhe could not be repaired, without unloading her entirely. The owners had no ſtorehouſes at *New York*; nor were any ſailors to be had. The ſalvage came to forty hogſheads of ſugar; and if the ſhip had been repaired, it would have exceeded the freight by 100*l*. There was an embargo laid on all ſhips till *December*, and this ſhip was to have arrived in *London* in *July* preceding. The captain, upon the advice of his friends, ſold the cargo, and was paid for it: he agreed alſo to ſell the ſhip; but the perſon who contracted for her ran away, upon which the captain left her in a creek, and came to *England*. The owners of the ſhip had a right to abandon to the inſurers on the ſhip and freight.

The right to abandon muſt depend upon the nature of the caſe at the time of the action brought, or at the time of the offer to abandon: and therefore if at the time advice is received of the loſs, it appears that the peril is over and the thing in ſafety, the inſured has no right to abandon.

Hamilton v. Mendes, 2 Burr 1198. 1 Bl. Rep. 276. S. C. Thus, in a caſe where there was a capture and recapture, and it was ſtated that at the time of the offer to abandon, the ſhip was ſafe in port, and had ſuſtained no damage, the court held, that the inſured had no right to abandon.

Da Coſta v. Firth, 4 Burr. 1966. But if the underwriter pay for a total loſs, and it afterwards turn out to be but partial, the inſured ſhall not be obliged to refund: but the inſurer ſhall ſtand in his place for the benefit of ſalvage.

Cazalet v. Barbe, 1 Term Rep 187. A ſhip was inſured from *Wyburg* to *Lynn*, at which place ſhe arrived: the jury found that the ſhip was not worth repairing; but the damage ſuſtained in the voyage inſured did not exceed 48*l*. *per cent*. By the court—The jury have precluded us from ſaying this is a total loſs; and where neither the thing inſured nor the voyage is loſt, the inſured cannot abandon.

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An insurance was made on ship, cargo, and freight, at and from *Tortola* to *London*, warranted free of particular average. On the first of *August* the whole fleet got under way, but not being able to get clear of the islands, they anchored that night, and the next day got clear of them. About ten o'clock of the 2d of *August*, several squalls of wind arose, which occasioned the ship to strain, and make water so fast, that the crew were obliged to work both pumps: on the 3d, the captain made a signal of distress, and returned to *Tortola*. A survey was held, by which the ship was declared unable to proceed to sea with her cargo; and that she could not be repaired in any of the *English West India* islands. Many of the sugars in the bilge and lower tier were washed out, and several casks broke and in bad order. This was holden to be a total loss, the voyage being entirely defeated. Manning v. Newnham, Tr 22 G 3. Park, 168.

Policies are annulled by the least shadow of fraud or undue concealment of facts; and both parties are equally bound to disclose circumstances, within their knowledge: for if the insurer, at the time he underwrote, knew that the ship was safe arrived, the contract will be void.

A policy was held to be void, where goods were insured as the property of an ally, when in fact they were the goods of an enemy. Skin. 327.

A ship was known to have sailed from *Jamaica* on the 24th of *November*; and the agent told the insurer she sailed the latter end of *December*; the policy was declared void. Roberts v. Founereau, Sittings at Guildhall, after Tr. 1742.

In an insurance upon goods, the insured warranted the ship and goods to be neutral; it was expressly found by the jury, that they were not neutral. The court, therefore, though the loss happened by storms, and not by capture, declared that the insured could not recover. Woolmer v. Muilman, 3 Burr. 1419. 1 Bl. Rep. 427. S. C.

Goods were insured on board a ship, warranted *Portuguese*. The goods were lost by a different peril, but in fact the ship was not *Portuguese*. The policy was adjudged void *ab initio*. Fernandes v. Da Costa, Sittings after Hil. 4 G. 3. Da Costa v. Scandret, 2 P. Wms. 170.

One having an account that a ship, described like his, was taken, insured her, without giving any notice to the insurers of what he had heard. The policy was decreed in equity to be delivered up.

The agent for the plaintiff, two days before he effected the policy, received a letter from *Cowes*, in which were these words: "On the 12th "of this month I was in company with the *Davy* (the ship in question,) "at twelve at night lost sight of her all at once; the captain spoke to me "the day before that she was leaky, and the next day we had a hard "gale." The ship, however, rode out the gale, and was captured by the *Spaniards*. The policy was held to be void, because the letter was not communicated to the insurer. Seaman v. Founereau. 2 Str. 1183.

A ship was insured, "*at and from* Genoa." The ship loaded at *Leghorn*, and was originally bound for *Dublin*; but losing her convoy, she put into *Genoa* in *August*, and lay there till the *January* following. All these facts were known to the insured, but not communicated to the insurer. The policy was held to be void. Hodgson v. Richardson 1 Bl. Rep. 463.

A ship being bound from the coast of *Africa* to the *British West Indies*, sailed from *St. Thomas*'s on the coast of *Africa* on the 2d of *October*, a circumstance with which the plaintiff was acquainted by a letter received in *February*. The policy was not made till the 21st of *March*. The letter was not shewn, nor was any thing said of her sailing from *St. Thomas*'s, but Ratcliffe v. Shoolbred, Sittings at Guildhall, after Tr. 1780, Park, 181,

but in the inſtructions "the ſhip was ſaid to have been on the coaſt the 2d of *October*." The policy was held to be void.

Fillis v. Brutton, Sittings at Guildhall, after Hil. 1782, Park, 182.

The broker's inſtructions ſtated *ſhip ready to ſail on the 24th of* December; the broker repreſented to the underwriter that the ſhip was in port, when in fact ſhe had ſailed the 23d of *December*. The policy was void.

Carter v. Boehm, 3 Burr. 1905. 1 Bl. Rep. 593. S. C.

But there are many matters as to which the inſured may be innocently ſilent; 1ſt, As to what the inſurer knows, however he came by that knowledge; 2d, As to what he ought to know; 3d, As to what leſſens the riſk. An underwriter is bound to know particular perils, as to the ſtate of war or peace. If a privateer is inſured, the underwriter needs not be told her deſtination.—An inſurance was made on *Fort Marlborough* in the *Eaſt Indies* for twelve months againſt the attacks of an *European* enemy, for the benefit of the governor. The defence ſet up was an undue concealment of circumſtances, particularly the weakneſs of the fort, and the probability of its being attacked by the *French*. The court held that the policy was good.

Planchè v. Fletcher, Dougl. 238.

A ſhip was inſured "from *London* to *Nantz*, with liberty to call "at "*Oſtend*." The ſhip's clearances and papers were all made out for *Oſtend*; but ſhe was never intended to go thither. After the policy was made, war was declared againſt *Franec*. Two defences were ſet up; 1ſt, That there was a fraud in clearing out the ſhip for *Oſtend*, when ſhe never was deſigned for place. 2d, That as hoſtilities were declared after the policy was ſigned, and before the ſhip ſailed, the defendant ought to have had notice. The court held that neither of the objections were valid; for as to the firſt it was the common uſage; and of the ſecond the inſurer was bound to take notice.

Mayne v. Walter, B. R. Eaſt. 22 Geo. 3. Park, 125.

An underwriter refuſed to pay a loſs by capture, the ſhip being *Portugueſe* and condemned for having an *Engliſh* ſupercargo on board, becauſe the inſured had not diſcloſed that circumſtance. The court held, that the condemnation was unjuſt, and was not ſuch a circumſtance as the inſured was bound to diſcloſe.

Park, 196.

A repreſentation is a ſtate of the caſe, not forming a part of the written inſtrument or policy; and it is ſufficient if it be ſubſtantially performed. If there be a miſrepreſentation, it will avoid the policy, as a fraud, but not as a part of the agreement. Even written inſtructions, if they are not inſerted in the policy, are only to be conſidered as repreſentations; and in order to make them valid and binding as a warranty, it is neceſſary that they make a part of the written inſtrument. But if a repreſentation be falſe in any material point, it will avoid the policy; becauſe the underwriter has computed the riſk upon circumſtances which did not exiſt.

Pawſon v. Watſon, Cowp. 785.

The following inſtructions were ſhewn to the firſt underwriter, but not inſerted in the policy, "Three thouſand five hundred pounds upon the "ſhip *Julius Ceſar*, for *Halifax*, to touch at *Plymouth*, and any port in "*America*: *ſhe mounts twelve guns, and twenty men.*" The inſtructions were not ſhewn to the preſent defendant, but ſhe was repreſented *generally as a ſhip of force*. At the time of her capture, ſhe had on board 6 four-pounders, 4 three-pounders, 3 one-pounders, 6 ſwivels, and 27 men and boys in all, of which 16 only were men. The witneſs ſaid, he conſidered her as being ſtronger with this force, than if ſhe had 12 carriage guns, and 20 men; and that there were neither men nor guns on board at the time

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of the insurance. The court held, that these instructions were only a representation; and that they had been substantially performed.

A ship was insured at and from *Port l'Orient* to the *Isles of France* and *Bourbon*, and to all or any ports or places where, and whatsoever, in the *East Indies*, *China*, *Persia*, or elsewhere, beyond the *Cape of Good Hope*, from place to place, and during the ship's stay and trade, backwards and forwards, at all ports and places, and until her safe arrival back at her last port of discharge in *France*. A slip of paper, at the time the policy was underwritten, was *wafered* to it, and shewn to the underwriters, on which was written the following representation: "The ship has had a complete "repair, and is now a fine and good vessel, three decks. Intends to sail "in *September* or *October* next. Is to go to *Madeira*, the *Isles of France*, "*Pondicherry*, *China*, the *Isles of France*, and *l'Orient*." The ship, in fact, did not sail till the 6th of *December*, and did not reach *Pondicherry* till the month of *July* following. She continued there till *August*, when instead of proceeding to *China*, she sailed for *Bengal*, where having passed the winter and undergone considerable repairs, she returned to *Pondicherry*, and after taking in a homeward-bound cargo at that place, proceeded in her voyage back to *l'Orient*, but was taken by the *Mentor* privateer. The usual time, in which the direct voyage is performed between *Pondicherry* and *Bengal* is six or seven days; but this ship was six weeks in going to, and two months in returning from *Bengal*, and lay off *Madras*, *Masulipatam*, *Visigapatam*, and *Tanon*, and took in goods at all those places. Lord *Mansfield* told the jury, that if no fraud was intended, and that the variance between the intended voyage, as described in the slip of paper, and the actual voyage as performed did not tend to increase the risk, *this slip of paper being only a representation*, the plaintiff was entitled to their verdict. Bize v. Fletcher, Dougl. 272.

If the misrepresentation be in a *material* point, it will avoid the policy, even though it happen by mistake.

Thus, in a policy on a ship from *New York* to *Philadelphia*, the broker represented to the insurer that the *ship was seen safe in the* Delaware *on the 11th of* December by a ship which arrived at *New York*; whereas in fact the ship was lost on the 9th of *December*. The policy was held to be void, although there was no suspicion of fraud. Macdowell v. Fraser, Dougl. 247.

The same rule holds if the broker conceal any thing *material*, though the only ground for not mentioning it should be that the fact concealed appeared immaterial to him. Shirley v. Wilkinson, Dougl. 293.

But the thing concealed must be some *fact*, not a *mere speculation or expectation* of the insured. Thus, where a broker insuring several vessels, speaking of them all, said, "which vessels are *expected* to leave the coast of *Africa* in *November* or *December*;" the policy was held good, although in fact the ship in question had sailed in the month of *May* preceding. Barber v. Fletcher, Dougl. 292.

Wherever there has been an allegation of falsehood, a concealment of circumstances, or a misrepresentation, it is immaterial whether it be the act of the person himself who is interested, *or of his agent*; for in either case the contract is founded in deception, and the policy is consequently void. Park, 208.

This rule prevails, even though the act cannot be at all traced to the owner of the property insured.

A man having arrived at *Greenock*, knowing of the loss of the ship insured, and meeting an intimate friend and acquaintance of the insured, and a partner with him in some other transactions, communicated the intelligence of the loss of the ship to him, *who desired it might be concealed*. The same day the person receiving the account held a conversation with the plaintiff's Stewart v. Dunlop, Cas. of House of Lords, Apr 8, 1785.

plaintiff's clerk, who, notwithſtanding that, ſwore, that he had no information from him reſpecting the ſhip, nor did he get *any hint* from him, further than the ſaid perſon aſking the deponent, if he knew whether there was any inſurance made upon her, and if there was any account of her. The ſame day the plaintiff deſired this clerk to write to get an inſurance effected, which he did, without telling his maſter of this converſation. The court of Seſſion in *Scotland* held the policy to be void; and the Houſe of Lords confirmed the decree.

Fitzherbert v. Mather, 1 Term Rep. 12.

The plaintiff's agent ſhipped goods for the plaintiff, and wrote to the plaintiff's agent in town to get an inſurance done. The letter was dated the 16th of *September*, and it contained this ſentence, "I this day ſhipped "on board the *Joſeph, which ſailed immediately*, a cargo of oats, &c." This letter was not however ſent till one o'clock on the 17th. The caſe ſtates, that about ſix o'clock in the evening of the 16th, *Thomas* (the agent) heard a report that the ſhip was on ſhore; and at ſix o'clock in the morning of the 17th *he knew* the ſhip was loſt. The policy was held void on account of the fraud in *Thomas*.

Wittingham v. Thornborough Pr. Ch. 2 2 Vern. 206. 3. C.

The courts of juſtice in this country have not yet adopted any general rule with reſpect to the return of premium in caſes of fraud In two or three inſtances in the court of Chancery, where the underwriters have been relieved from the payment of the ſums inſured, on account of fraud, the decree has directed the premium to be returned.

Thus, in a caſe in the year 1690, the defendant and others had come to the inſurance office, and bought a policy for inſuring the life of one *Horwell* (upon whoſe life they had no concern or intereſt depending) for a year; and the policy ran whether intereſted or not intereſted, at a premium of 5*l. per cent.* They took this way of drawing in ſubſcribers: they agreed with one *Marwood* a known merchant upon the Exchange, and a leading man in ſuch caſes, to ſubſcribe firſt; but in caſe *Horwell* died within the year, *Marwood* was to loſe nothing, but on the contrary was to ſhare what ſhould be gained from the other ſubſcribers. Upon the credit of *Marwood*'s ſubſcribing, ſeveral others (who had inquired of *Marwood* about *Horwell*, who was his neighbour) ſubſcribed likewiſe. *Horwell* lived about four months, and then died; and this bill was brought to be relieved againſt the policy; and this matter being all confeſſed by the anſwer, the court decreed the policy to be delivered up, *and the premium to be repaid.*

Da Coſta v. Scandrett, 2 P. Wms. 170.

So alſo, in the caſe of *Da Coſta* v. *Scandrett*, Lord *Macclesfield*, although he held the policy to be void, on the ground of fraud, decreed the premium to be returned to the inſured.

It is true, that during the argument in the caſe next to be quoted, the counſel cited a caſe of *Rucker* v. *Hollingbury*, in which the Maſter of the Rolls had been of a different opinion from that delivered in the two preceding caſes. But Lord *Manſfield* ſaid, that there muſt be ſome miſtake in reciting the caſe before the Maſter of the Rolls; for the practice of the court of Chancery was certainly agreeable to the two former caſes.

Wilſon v. Duckett, 1 Burr. 1361.

The caſe, in which this obſervation was made, was an action on a policy of inſurance on a ſhip, with a count of a general *indebitatus aſſumpſit* for money had and received to the plaintiff's uſe; and damages were laid at 98*l.* The trial was had, under a decree of the court of Chancery, where the now defendant, the inſurer being there complainant, *had offered to pay back the premium, which was* 10*l.* No money was, in the preſent caſe, paid into court; though the uſual courſe in theſe caſes is for the defendant, the

inſurer,

inſurer, to bring the premium into court. The jury found a verdict for the plaintiff, for the ten pounds premium, on the count for money had and received to his uſe; although they were of opinion againſt the policy, upon the foot of fraud; and found againſt it, as being fraudulent. In fact, the firſt underwriter was only a decoy-duck, to induce other perſons to underwrite the policy: and it had been previouſly agreed between the inſured and him, that he ſhould not be bound by ſigning the policy; which this court conſidered as a fraud, and therefore that the jury had given a right verdict in finding the policy fraudulent. With the concurrence of Lord *Mansfield*, (before whom this cauſe was tried,) and of the counſel on both ſides, it was agreed to bring this queſtion before the court, whether, upon a policy of inſurance being found fraudulent, the premium ſhould be returned to the plaintiff the inſured), or retained by the defendant (the inſurer)? The caſes above mentioned were quoted by the counſel for the plaintiff; but they being all in Chancery, Lord *Mansfield* ſaid he wanted to know whether there was any common law determination to the ſame effect. As it did not appear that there was, his Lordſhip ſaid, It was plain what muſt be done in this caſe; for he looked upon *the offer made* by the complainant's bill in equity, to be the ſame thing as if the money had *actually been brought into court* in the preſent caſe.

But although the common law has been ſo ſilent upon the ſubject, as not to lay down any general rule; and although, in all the caſes ſtated, the premium was reſtored; yet, if the fraud is notorious, palpable, and groſs in its nature, the court may order, and has ordered, the underwriter to retain the premium.

Thus, where an action was brought by the inſured to recover 150*l.*, being the amount of the defendant's ſubſcription; the ground of refuſal was, that the inſurance was fraudulent; and that the plaintiff knew of the loſs of the ſhip, at the time of effecting the policy. The counſel for the plaintiff were under the neceſſity of admitting that their client had made ſome fraudulent inſurances upon this very ſhip, ſubſequent to the one now in diſpute; but contended, that news of the loſs of the ſhip had not arrived, till after this particular one was effected. The evidence, however, was ſo ſtrong as eaſily to convince the jury, that the plaintiff had received information of the loſs before the order for making the inſurance was given to the broker; and they found a verdict for the defendant. Tyler v. Horne, Sittings at Guildhall, after Hil. T. 1784.

Lord *Mansfield* ſaid, The fraud was ſo groſs, that the premium ſhould not be recovered from the underwriter.

It is proper, however, to obſerve, that it has been laid down as clear law, that if the underwriter has been guilty of fraud, an action lies againſt him, at the ſuit of the inſured, to recover the premium. Thus it was ſaid by Lord *Mansfield*, in the caſe of *Carter* v. *Boehm*: "The policy would "be void againſt the underwriter, if he concealed any thing; as, if he in- "ſured a ſhip on her voyage, which he privately knew to be arrived; and "*an action would lie to recover the premium.*" 3 Burr. 1909.

By ſtatute 1 *Ann. ſt.* 2. *c.* 3. § 4. it is enacted, That if any captain, maſter, mariner, or other officer, belonging to any ſhip, ſhall willingly caſt away, burn, or otherwiſe deſtroy the ſhip unto which he belongeth, or procure the ſame to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants that ſhall load goods thereon, (or, by a ſubſequent ſtatute, to the prejudice of any perſon or perſons that ſhall underwrite any policy or policies of inſurance thereon,) ſhall ſuffer death as a felon. 4 Geo. 1. c. 12. § 3.

Every

Mills. v. Roebuck, in the Exch. Park, 221.

Every ſhip inſured muſt, at the time of the inſurance, be able to perform the voyage, unleſs ſome external accident ſhould happen; and if ſhe have a latent defect wholly unknown to the parties, that will vacate the contract, and the inſurers are diſcharged. This ariſes from a tacit and implied warranty, that the ſhip ſhall be in a condition to perform the voyage.

But, though the inſured ought to know whether ſhe was ſea-worthy or not, at the time ſhe ſet out upon her voyage; yet, if it can be ſhewn that the decay to which the loſs is attributable did not commence till a period ſubſequent to the inſurance, the underwriter will be liable, if ſhe ſhould be loſt a few days after her departure.

Eden v. Parkinſon, Dougl. 708.

It was ſaid by Lord *Mansfield*, that "by an implied warranty every ſhip "inſured muſt be tight, ſtaunch, and ſtrong; but it is ſufficient if ſhe be ſo "at the time of her ſailing. She may ceaſe to be ſo in twenty-four hours "after her departure, and yet the underwriter will continue liable."

Murray v. Vandam, Sittings at Guildhall, after Mich. 1794, *coram* Kenyon, C. J.

However, if a ſhip ſail upon a voyage, and in a day or two become leaky, and founder, or be obliged to return to port, without any ſtorm, or viſible or adequate cauſe to produce ſuch an effect, the preſumption is, that ſhe was not ſeaworthy when ſhe ſailed; and the jury, upon the plaintiff's own caſe, may draw ſuch a concluſion.

Shoolbred v. Nutt, Sittings at Guildhall, after Hil. 1783.

As it is a condition or implied warranty in every policy of inſurance, that the ſhip is ſeaworthy, there need be no repreſentation of that; for if ſhe ſail without being ſo, the policy is void. And any inſufficiency in her former voyage, will not vacate the policy

Park, 233.

Whenever an inſurance is made on a voyage expreſsly prohibited by the common law, ſtatute, or maritime law of this country, the policy is void.

Johnſon v. Sutton, Dougl. 241

The goods on board a ſhip were inſured "at and from *London* to *New* "*York*, warranted to depart with convoy from the channel for the voyage." She had proviſions on board, which ſhe had a licence to carry to *New York* under a proviſo in the prohibitory act of 16 *G.* 3. *c.* 5. But *one-half of the cargo, including the goods which were the ſubject of this inſurance, was not licenſed.* The commander in chief had iſſued a proclamation to allow the entry of unlicenſed goods; but he had no authority under the act of parliament to iſſue ſuch proclamation, or to permit the exportation of unlicenſed goods. The ſtatute prohibits all intercourſe with *New York*, and confiſcates all ſhips trading to that place, unleſs they have a licence. The court held the policy was void: it is immaterial whether the underwriter did or did not know that the voyage was illegal; for the court cannot ſubſtantiate a contract in direct contradiction to law.

Delmeda v. Motteux, B. R. Mich. 25 Geo. 3.

If a ſhip, though neutral, be inſured on a voyage prohibited by an embargo, ſuch an inſurance is void.

Park, 234.

Planché v. Fletcher, Dougl. 238. Lever v. Fletcher. Lond. Sittings, Hil. Vac. 1780.

An inſurance upon a ſmuggling-voyage prohibited by the revenue laws of this country would be void. *Aliter*, if merely againſt the revenue laws of a foreign ſtate; for no country pays attention to the revenue laws of another.

Park, 237.

Brandon v. Nesbitt,

No inſurance can be legally made on an enemy's property.

6 Term Rep. 23. Briſtow v. Towers, *Id.* 35

All

All insurances upon commodities, the importation or exportation of which is prohibited by law, are void. And this rule prevails, whether the insurer did or did not know, that the subject of the insurance was a prohibited commodity. Park, 244.

By statute 4 & 5 *W. & M. c.* 15. § 14, 15, 16. a penalty of 500*l.* is inflicted on the insurer, who shall by way of insurance procure the importation of prohibited goods; and a like penalty on the insured.

By 8 & 9 *W.* 3. *c.* 36. § 1. the importation of any foreign alamodes or lustrings, by way of insurance or otherwise; without paying the duties, is expressly prohibited.

By 28 *G.* 3. *c.* 38. § 45. persons making insurances on wool, *&c.* are liable for the first offence to a fine of 50*l.* and six months solitary imprisonment. The same penalty is imposed on the insured, and the insurance is void.

In a policy, "valued free from average" and "interest or no interest," it is manifest, that the performance of the voyage or adventure, in a reasonable time and manner, and not the bare existence of the ship or cargo, is the object of the insurance.

It was declared from the Bench, in the reign of Queen *Anne*, that such insurances were *formerly* bad; for it is said in that case, that in former times, if one had no interest, though the policy ran, *interest or no interest*, the insurance was void; because insurances were made for the benefit of trade, and not that persons unconcerned therein, or unInterested in the subject-matter, should profit by them. Affievedo v. Cambridge, 1 Mod. 77.

The idea thus started is very much confirmed by what fell from the court in the case of *Depaiba* v. *Ludlow:* for the court there observed, that insurances upon interest or no interest were introduced *since* the revolution. Depaiba v. Ludlow, Comyns's Rep. 360.

But though this mode of insuring thus gained footing in *England*, yet when introduced, the courts of justice looked upon these contracts with a jealous eye; and by their determinations shewed the strong prejudices which they entertained against them, The courts of equity in particular manifested that their inclination would lead them as much as possible to suppress such a species of contract: nay, that they still considered them as void.

The defendant had lent money on a bottomry bond, but had no interest in the ship or cargo; the money lent was 300*l.*, and he insured 450*l.* on the ship: the plaintiff's bill was to have the policy delivered up; because the defendant was not concerned in point of interest, as to the ship or cargo. *Per curiam* Take it that the law is settled, that if a man has no interest, and insures, the insurance is void, though it be expressed in the policy, *interested or not interested.* The reason the law goes upon is, that insurances were made for the benefit of trade, and not that persons unconcerned therein, and who were not interested in the ship, should profit thereby; and *where one would have the benefit of the insurance, he must renounce all interest in the ship.* And the reason why the law allows that a man, having some interest in the ship or cargo, may insure more, or five times as much, is, that a merchant cannot tell how much or how little his factor may have in readiness to lade on board his ship. *Per cur.*—Decree the policy to be delivered up to be cancelled. Goddart v. Garrett, 2 Vern. 269.

So, on a policy of insurance on goods, by agreement valued at 600*l.*, the insured not to be obliged to prove any interest; the Lord Chancellour ordered the defendant to discover what goods he put on board; for although the defendant offered to renounce all interest to the insurers, yet it must be referred to the Master to examine the value of the goods saved, and Le Pypre v. Farr, 2 Vern. 7.

to

to deduct it out of the value or ſum of 600*l*, at which the goods were valued by agreement.

Goſs v. Withers, 2 Burr. 683.

The difference between policies upon intereſt, and ſuch as are not, was, that in policies upon intereſt, the intereſt recovered for the loſs actually ſuſtained, whether it were total or partial: but upon a wager policy, could never recover but for a total loſs.

It is enacted by ſtat. 19 *Geo* 2. *c.* 37. that inſurances made on ſhips or goods, *intereſt or no intereſt*, or, *without further proof of intereſt than the policy*, or *by way of gaming or wagering*, or *without benefit of ſalvage to the inſurer*, ſhall be void. By § 2. there is an exception for inſurances on private ſhips of war, fitted out ſolely to cruiſe againſt his Majeſty's enemies; and alſo by § 3. on any merchandizes or effects, from any ports or places in *Europe* or *America*, belonging to the crowns of *Spain* or *Portugal*.

Thelluſſon v. Fletcher. Dougl. 301.

This ſtatute hath been frequently holden not to extend to inſurances of foreign property, and on foreign ſhips.

Lewis v. Rucker, 2 Burr. 1167.

It hath been alſo frequently holden upon this act, that a valued policy is not a wager policy, for the inſured muſt prove ſome intereſt, although he need not prove the value of this intereſt. If indeed it could be made appear, that a valued policy were uſed merely as a cover to a wager, in order to evade the ſtatute, it would be void.

Grant v. Parkinſon, Mich. 22 Geo. 3. B. R. Park, 267. Da Coſta v. Firth, 4 Burr. 1966.

Le Cras v. Hughes, B. R. Eaſt. 22 Geo. 3. Park, 269.

Upon a joint capture by the army and navy, the officers and crew of the ſhips have, before condemnation, an inſurable intereſt by virtue of the prize act, which uſually paſſes at the commencement of a war.

Kent v. Bird, Cowp. 583.

All inſurances, made by perſons having no intereſt in the event about which they inſure, or without reference to any property on board, are merely wagers, and are void. Thus, where the defendant, in conſideration of 20*l*. paid by the plaintiff, undertook that the ſhip ſhould ſave her paſſage to *China* that ſeaſon, or that he would pay 1000*l*. within one month after her arrival in the river *Thames*; the contract was holden to be void, although the plaintiff had ſome goods on board.

Lowrey v. Bourdieu, Dougl 451.

Wherever the court can ſee upon the face of the policy, that it is merely a contract for gaming, where indemnity is not the object in view, they are bound to declare ſuch policy void. As, where by the policy it appeared, that the plaintiffs had lent 26,000*l*. on bond to a captain of an *Eaſt Indiaman*, to which amount the ſhip and cargo were inſured, and that in caſe of loſs no other proof of intereſt was to be required than the exhibition of the bond; the court held, that the contract was void.

As to re-aſſurances, it is declared by ſtat. 19 *G.* 2. *c.* 37. § 4. that it ſhall not be lawful to make re-aſſurance, unleſs the inſurer be inſolvent, become a bankrupt, or die; in any of which caſes, ſuch inſurer, his executors, adminiſtrators, or aſſigns, may make re-aſſurance to the amount before by him inſured, expreſſing in the policy, that it is a re-aſſurance.

Andreè v. Fletcher, 2 Term Rep. 161.

A re-aſſurance was made by the defendant on a *French* veſſel, firſt inſured by a *French* underwriter at *Marſeilles*, who was living, and, at the time of ſubſcribing the ſecond policy, was ſolvent. The court were unanimouſly of opinion, that this re-aſſurance was void; and that every re-aſſurance in this country, either by *Britiſh* ſubjects or foreigners, on *Britiſh* or foreign ſhips, is void by the ſtatute, unleſs *the firſt aſſurer be inſolvent, become a bankrupt, or die.*

It

In the year 1763, it was ruled by Lord *Mansfield*, Chief Juſtice, and agreed to be the courſe of practice, that upon a double inſurance, though the inſured is not entitled to two ſatisfactions; yet, upon the firſt action he may recover the whole ſum inſured, and may leave the defendant therein, to recover a rateable ſatisfaction from the other inſurers. Newby v. Reed, Sittings in London, Eaſt. Vacat. 1763. 1 Blackſt. Rep. 416.

Thus alſo, it was determined in a ſubſequent caſe at *Guildhall*. It was an action on a policy of inſurance on a ſhip from *Newfoundland* to *Dominica*, and from thence to the port of diſcharge to the *Weſt Indies*. It was a valued policy on the ſhip and freight; and on the goods as intereſt ſhould appear. The ſhip ſailed from *Saint John*'s the 17th of *December* 1775, and the plaintiff declared as for a total loſs. The defendant underwrote for 200*l*., and paid into court 124*l*. This ſum was paid on a ſuppoſition, that the underwriters on a former policy ſhould bear a ſhare of the loſs. The plaintiff had originally inſured at *Liverpool* on a voyage from *Newfoundland* to *Barbadoes* and the *Leeward iſlands*, with an exception of *American* captures: but the plaintiff afterwards, for the purpoſe of ſecuring himſelf againſt captures, and having altered the courſe of his voyage, made the preſent inſurance. The plaintiff now inſiſted he was entitled to receive the full amount of his inſurance againſt the defendant, and not to any part from the *Liverpool* underwriters, becauſe the voyage now inſured was different from that inſured at *Liverpool*. There was, however, a verdict for the plaintiff for his full demand, *with liberty for the defendant to bring an action againſt the* Liverpool *underwriters, if he thought fit.* Rogers v. Davis, Sittings in Mich. Vac. 17 Geo. 3. before Lord Mansfield,

Accordingly in the *Eaſter* term following, an action was brought for money had and received to the uſe of the plaintiff, who was the defendant in the laſt cauſe, in order to recover a contribution for the loſs which the plaintiff had been obliged to pay. It was agreed by both parties to admit, that on the *London* policy (which was the ſubject of the former action) 2200*l* were inſured; that on the two *Liverpool* policies 1700*l* were inſured: that the merchant was intereſted to the amount of 500*l*. on the ſhip; 300*l*. on the freight; and 1400*l*. on the cargo. That the plaintiff had paid 200*l*. loſs, and 47*l*. for the coſts. The queſtion was, Whether the defendant was liable to contribute any thing, and what? The whole intereſt was 2200*l*. and the whole inſurance was 3900*l*. It was inſiſted by the counſel for the defendant, that the inſurance in *London* was an illegal re-aſſurance; and therefore the plaintiff might have made a good defence in an action brought againſt him: and if ſo, he could not now recover over againſt the defendant. Davis v. Gildart, Sittings in Eaſt. Vac. 17 Geo. 3. at Guildhal

Lord *Mansfield*.—The queſtion ſeems to be, whether the inſured has not two ſecurities for the loſs that has happened? If ſo, can there be a doubt that he may bring his action againſt either? It is like the caſe of two ſecurities; where, if all the money be recovered againſt one of them, he may recover a proportion from the other. Then this would bring it to the queſtion, whether the ſecond inſurance is void as a *re-aſſurance?* But a re-aſſurance is a contract made by the inſurer to ſecure himſelf; *and this is only a double inſurance* —There was another ground taken in the cauſe, which is not material to be mentioned here: but upon this direction, the plaintiff had a verdict.

Although a man, by making a double inſurance, ſhall not be allowed to recover a double ſatisfaction for the ſame loſs; yet various perſons may inſure various intereſts on the ſame thing, and each to the whole value (as the maſter Godin v. Lond. Aſſur. Company,

1 Burr. 489. 1 Bl. Rep. 103. S. C.

master for wages, the owner for freight, one person for goods, another for bottomry); and such a contract does not fall within the idea of a double insurance.

Park, 294.

A deviation is understood to mean a voluntary departure, without necessity or any reasonable cause, from the regular or usual course of the specifick voyage insured. Whenever this happens, the voyage is determined; and the insurers are discharged from any responsibility.

The reason of this is, because the ship goes upon a different voyage from that against which the insurer undertook to indemnify.

Nor is it material whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference whether the insured was or was not consenting to the deviation.

Fozv. Black Exeter Ass. 1767, *coram* Yates, J. Park, 295.

A ship was insured from *Dartmouth* to *Liverpool*; she put into *Loo*, a *place she must of necessity pass by*; and although no accident befel her in going into or coming out of *Loo* (for she was lost after she got out to sea); it was held to be a deviation.

Townson v. Guyon, before Lord Mansfield, *Ibid.*

A ship being insured from *Dunkirk* to *Leghorn*, comes to *Dover* for a *Mediterranean* pass, and it was held to be a deviation.

Ibid. by Lee, C. J.

If the master of a vessel put into a port not usual, or stay an unusual time, it is a deviation.

Elliot v. Wilson, 7 Br. P. C. 459.

The insured ordered their broker to insure on a particular vessel from *Carron to Hull, with liberty to call as usual.* These instructions were entered in the broker's books, and the insurer subscribed a policy on the goods, "at and from the loading thereof, on board the said ship at *Carron* wharf, "and to continue and endure until the said ship (*being allowed a liberty to* "*call at* Leith), shall arrive at *Hull.*" It being usual for these vessels to call at *Borrowstoneſs*, *Leith*, and *Morison's* Haven, this vessel stopt at the latter; and received no damage in going into or coming out of it. The courts in *Scotland* held it was no deviation; but their judgment was reversed in the House of Lords.

Beatson v. Howard, 6 Term Rep. 531.

If several places are named in the policy, the ship must go to those places in the order in which they are named, unless some usage, or some special facts be proved, to vary the general rule.

Clason v. Simmond, Sittings at Guildhall, Hil. 1741.

If the deviation be but for a single night, or for an hour, it is fatal.

Cock v. Townson, C. B. before Lord Camden.

A ship was bound from *Cork* to *Jamaica* under convoy. Being of force, she, with two other vessels, took advantage of the night, and cruised in hopes of meeting with a prize; it was held a deviation.

Jolly v. Walker, Sittings at Guildhall after East. 1781.

But, if a merchant ship carry letters of marque, she may *chase* an enemy though she may not *cruise*, without being deemed guilty of a deviation.

Moss v. Byrom, 6 Term Rep. 379.

If the insured, without the knowledge of the underwriters, take out a letter of marque, (but without a certificate, which by the prize act of the 33 *Geo.* 3. *c.* 66. § 15. is absolutely necessary to its validity,) for the purpose of inducing the seamen to enter, and without any intention of cruising, this does not so essentially vary the risk, as to avoid the policy.

In

In an action on a policy of insurance on freight of the ship *Bethiah* at and from *Bourdeaux* to *Virginia*, warranted *American* ship and property; the declaration alleged, that the ship was an *American* ship, and the property of *American* subjects. The plaintiff proved the ship to be *American*, and it was to have been contended, that the warranty extended to the goods on board as well as to the ship; but upon the evidence it appeared, that the goods, whether *American* or not, were to be carried in the ship from *Bourdeaux* to *Saint Domingo*, and that she was only to call at *Norfolk* in *Virginia*, for orders; so that it was unnecessary to decide or discuss the question upon the construction of the warranty, Lord *Kenyon* being of opinion, that the underwriters upon this policy had a right to expect, that the goods upon which the freight was payable were consigned to *Virginia*; and that if the freight was payable for the carriage of them from *Bourdeaux* to *Saint Domingo*, the underwriters were not liable for the loss, though the ship was to call at *Norfolk* for orders, the freight payable being in such case different from the freight insured. The plaintiff was accordingly nonsuited, and no application was made to set the nonsuit aside. Mrudock v. Potts, Sittings at Guildhall, after Tr. 1795.

Wherever the deviation is occasioned by absolute necessity; as, where the crew forced the captain to deviate, the underwriter continues liable. Elton v. Brogden, 2 Str. 1264.

If a ship is decayed, and goes to the nearest port to refit, it is no deviation. Mottenx v. London Assurance Company, 1 Atk. 545.

Wherever a ship, in order to escape a storm, goes out of the direct course; or when, in the due course of the voyage, she is driven out of it by stress of weather; this is no deviation. Harrington v. Halkeld, Sittings at Guildhall, after Mich. 1788.

If a storm drive a ship out of the course of her voyage, and she do the best she can to get to her port of destination, she is not obliged to return to the point from which she was driven. Delaney v. Stoddart, 1 Term Rep. 22.

A deviation may also be justified, if done to avoid an enemy, or to seek for convoy; because it is in truth no deviation to go out of the course of a voyage, in order to avoid danger, or to obtain a protection against it.

In an action upon a policy, which was to insure the *William Galley* in a voyage from *Bremen* to the port of *London*, warranted to depart with convoy, the case was this: the *Galley* set sail from *Bremen*, under convoy of a *Dutch* man of war to the *Elbe*, where they were joined by two other *Dutch* men of war, and several *Dutch* and *English* merchant ships, whence they sailed to the *Texel*, where they found a squadron of *English* men of war and an admiral. After a stay of nine weeks, they set out from the *Texel*, and the *Galley* was separated in a storm, and taken by a *French* privateer, taken again by a *Dutch* privateer, and paid 80*l.* salvage. It was ruled by Lord Chief Justice *Holt*, that the voyage ought to be according to usage, and that their going to the *Elbe*, though in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for ships directly from *Bremen* to *London*. And the plaintiff had a verdict. Bond v. Gonsales, 2 Salk. 445.

On an insurance from *London* to *Gibraltar*, warranted to depart with convoy, it appeared, there was a convoy appointed for that trade at *Spithead*, and the ship *Ranger* having tried for convoy in the *Downs*, proceeded to *Spithead*, and was taken in her way thither. The insurers insisted Gordon v. Morley, Campbell v. Bordieu, 2 Str. 1165

ſiſted, that this being the time of a *French* war, the ſhip ſhould not have ventured through the channel, but have waited in the *Downs* for an occaſional convoy: and many merchants and office-keepers were examined to that purpoſe. But Lord Chief Juſtice *Lee* held, that the ſhip was to be conſidered as under the defendant's inſurance to a place of general rendezvous, according to the interpretation of the words *warranted to depart with convoy*. And if the parties meant to vary the inſurance from what is commonly underſtood, they ſhould have particularized her departure with convoy from the *Downs*. The juries were compoſed of merchants; and in both caſes they found for the plaintiffs upon the ſtrength of this direction.

Cowp. Rep 601. In the caſe of *Bond* againſt *Nutt*, the point of deviation for the purpoſe of procuring convoy alſo came under the conſideration of the court. Upon that occaſion, Lord *Mansfield* and the whole court held, that if a ſhip go to the uſual place of rendezvous, for the ſake of joining convoy there ready, though ſuch place be out of the direct courſe of the voyage, it is no deviation.

Enderby and Another v. Fletcher, Sittings in London, Trin. Vac. 1780. And in a more modern caſe, the only queſtion was, whether there was a deviation or not. Lord *Mansfield* there directed the jury to find for the plaintiffs, if they believed that the captain fairly and *bonâ fide* acted according to the beſt of his judgment: that he had no other view or motive but to come the ſafeſt way home, and to meet with convoy; for that it was no deviation to go out of the way to avoid danger.

In our law books it is ſometimes ſaid, that a deviation may be juſtified by the uſage and cuſtom of the trade. But that is not quite correct; for if by the uſage of any particular trade, it is cuſtomary to ſtop at certain places, lying out of the direct courſe from *A.* to *B.*, it is not a deviation to ſtop there; becauſe it is a part of the voyage. There is no deception upon the inſurer; becauſe he is bound to take notice of the uſages of trade; they are notorious to all the world; and when the uſage has declared it lawful in a ſpecifick voyage to go to any place, though out of the immediate track, it is as much a part of the contract of inſurance between the parties, as if it had been particularly mentioned. But in order to juſtify the captain of a ſhip in quitting the ſtraight and direct line from the port of loading to that of delivery, there muſt be a preciſe, clear, and eſtabliſhed uſage upon the ſubject, not depending merely upon one or two looſe and vague inſtances.

Saliſbury v. Townſon, Park, 309. Where a ſhip was inſured from *Liverpool* to *Jamaica*, and had put into the *Iſle of Man*; it appeared that there were *ſome inſtances* of the *Liverpool* ſhips putting in there, but it was not the ſettled, common, eſtabliſhed, and direct uſage of the voyage and trade: it was therefore held a deviation, and the underwriters were diſcharged from any loſs that happened ſubſequent to the deviation.

Cowp. 601. Wherever a ſhip does that which is for the general benefit of all parties concerned, the act is as much within the intention and ſpirit of the policy, and, conſequently, as much protected by it, as if expreſſed in terms. And therefore in all caſes, in order to determine whether a diverſion from the direct courſe of the voyage is ſuch a deviation as in law vacates the policy, it will be proper to attend to the motives, end, and conſequences of the act, as the true criterion of judgment.

Lavabre v. Walter, Dougl. 271. If any of the circumſtances above ſtated do really and *bonâ fide* occur, ſo as to render a deviation abſolutely neceſſary, the ſhip muſt purſue ſuch *voyage of neceſſity* in the direct courſe, and in the ſhorteſt time poſſible, otherwiſe

otherwiſe the underwriters will be diſcharged. Becauſe a voyage ſuperadded by neceſſity, ought to be ſubject to the ſame qualifications, and entitled only to the ſame ſort of latitude as the original voyage, it having become, by operation of law, a part, as it were, of that original voyage.

But though an actual deviation from the voyage inſured is thus fatal to the contract of inſurance; yet a deviation merely intended, but never carried into effect, is conſidered as no deviation, and the inſurer continues liable. This has been frequently ſo decided. Thus, in the caſe of an inſurance from *Carolina* to *Liſbon*, and at and from thence to *Briſtol*; it appeared, that the captain had taken in ſalt, which he was to deliver at *Falmouth*, before he went to *Briſtol*; but the ſhip was taken in the direct road to both, and before ſhe came to the point, where ſhe would have turned off to *Falmouth*. It was held, that the inſurer was liable; for it is but *an intention to deviate*, and that was held not ſufficient to diſcharge the underwriter. Foſter v. Wilmer, 2 Stra 1249. Ld. Ch. Juſt Lee.

In the caſe of *Carter* v. *the Royal Exchange Aſſurance Company*, where the inſurance was from *Honduras* to *London*, and a conſignment to *Amſterdam*; a loſs happened before ſhe came to the dividing point between the two voyages, for which the inſurers were held liable to pay. 2 Stra. 1249.

The doctrine laid down in theſe caſes has ſince been frequently recognized in ſubſequent deciſions, and particularly by Lord *Manſfield* in the caſe of *Thelluſſon* v. *Ferguſſon*. The inſurance was from *Guadaloupe* to *Havre*, and one of the grounds of defence was, that the ſhip never ſailed from *Guadaloupe* to *Havre*, but on a voyage from *Guadaloupe* to *Breſt*. Lord *Manſfield*, in anſwer, ſaid, "the voyage to *Breſt* was, at moſt, "but an *intended deviation*, not carried into effect." Dougl. 346.

If, however, it can be made appear by evidence, that it never was intended, nor came within the contemplation of the parties, to ſail upon the voyage inſured; if all the ſhip's papers and documents be made out for a different place from that deſcribed in the policy, the inſurer is diſcharged from all degree of reſponſibility, even though the loſs ſhould happen before the dividing point of the two voyages. This diſtinction was very properly taken by the court of King's Bench, in a very modern caſe: and by that diſtinction they admitted the general doctrine, with reſpect to the intention to deviate, in its fulleſt extent.

The ſhip *Molly*, being inſured "at and from *Maryland* to *Cadiz*," was taken in *Cheſapeak Bay*, in the way to *Europe*. Upon this the inſured brought this action againſt the defendant, one of the underwriters on the policy. The trial came on at *Guildhall* before Lord *Manſfield*, when a verdict was found for the defendant. A new trial being moved for, the material facts of the caſe appeared to be as follows:—The ſhip was cleared from *Maryland* to *Falmouth*, and a bond given that all the *enumerated* goods ſhould be landed in *Britain*, and all the other goods in the *Britiſh* dominions. An affidavit of the owner ſtated that the veſſel was bound for *Falmouth*. The bills of lading were, "To *Falmouth* and a market:" and there was no evidence whatever that ſhe was deſtined for *Cadiz*. The place where ſhe was taken, was in the courſe from *Maryland* both to *Cadiz* and *Falmouth*, before the dividing point. Many circumſtances led to a ſuſpicion that ſhe was, in truth, neither deſigned for *Falmouth* nor *Cadiz*, but for the port of *Boſton*, to ſupply the *American* army; but there was not ſufficient direct evidence of that fact. At the trial, Lord *Manſfield* told the jury, that if they thought the voyage intended was to *Cadiz*, they muſt find for the plaintiff. If, on the contrary, they ſhould think there was no deſign Wooldridge v. Boydell, Dougl. 16.

of

of going to *Cadiz*, they muſt find for the defendant. It alſo appeared in evidence, that the premium to inſure a voyage from *Maryland* to *Falmouth* and from thence to *Cadiz*, would have greatly exceeded what was paid in this caſe. Upon the motion for a new trial being argued, the counſel for the plaintiff cited the two caſes above ſtated from *Strange*'s Reports.

Lord *Manſfield*.—The policy on the face of it, is from *Maryland* to *Cadiz*, and therefore purports to be a direct voyage to *Cadiz*. All contracts of inſurance muſt be founded in truth, and the policies framed accordingly. When the inſured intends a deviation from the direct voyage, it is always provided for, and the indemnification adapted to it. There never was a man ſo fooliſh as to intend a deviation from the voyage deſcribed, when the inſurance is made, becauſe that would be paying without an indemnification. Deviations from the voyage inſured ariſe from after-thoughts, after-intereſt, after-temptation; and the party, who actually deviates from the voyage deſcribed, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the caſes of that ſort, the *terminus a quo*, and *ad quem*, were certain and the ſame. Here, was the voyage ever intended for *Cadiz*? There is not ſufficient evidence of the deſign to go to *Boſton*, for the court to go upon. But ſome of the papers ſay to *Falmouth* and a market: ſome to *Falmouth* only. None mention *Cadiz*, nor was there any perſon in the ſhip, who ever heard of any intention to go to that port, A *market* is not ſynonymous to *Cadiz*; that expreſſion might have meant *Naples*, *Leghorn*, or *England*. No man upon the inſtructions would have thought of getting the policy filled up to *Cadiz*. In ſhort, that was never the voyage intended, and, conſequently, is not what the underwriters meant to inſure.

Way v. Modigliani, 2 Term Rep. 30.

In a later caſe the ſame doctrine was holden, *viz*. that if a ſhip be inſured from a day certain from *A*. to *B*., and, before the day, ſail on a different voyage from that inſured, the aſſured cannot recover; even though the ſhip afterwards fall into the courſe of the voyage inſured, and be loſt after the day on which the policy was to have attached.

Kewley v. Ryan, 2 H. Bl. Rep. 343.

An inſurance was at and from *Grenada* to *Liverpool*, the ſhip ſailed from *Grenada* bound for *Liverpool*, but with a deſign formed before the commencement of the voyage, as appeared by the clearances, and was admitted on all ſides, to touch at *Corke*, in her way to *Liverpool*, but was totally loſt, before ſhe arrived at the dividing point. The court of *C. P.* held, that where the *termini* of the intended voyage were really the ſame as thoſe deſcribed in the policy, it was to be conſidered as the ſame voyage, and a deſign to deviate, not effected, would not vitiate the policy. That in *Wooldridge* v. *Boydell*, it appeared, there was no intention in the ſhip to go to *Cadiz*, which was mentioned as her port of delivery, at all; and in *Way* v. *Modigliani*, there was an actual deviation, by the ſhip going to fiſh on the banks of *Newfoundland*: theſe caſes therefore were wholly different from the preſent, for here, the ſhip was really bound to *Liverpool*, though there were alſo clearances for *Corke*.

From the propoſition juſt eſtabliſhed, namely, that a mere intention to deviate will not vacate the policy, it follows as an immediate conſequence, that whatever damage is ſuſtained before actual deviation, will fall upon the underwriters.

Green v. Young, 2 Ld. Raym. 840, 2 Salk. 444. S. C.

Thus it was held by Lord Chief Juſtice *Holt*, who ſaid, that if a policy of inſurance be made to begin from the departure of the ſhip from *England* until *&c.*, and after the departure a damage happen, *&c.*, and then the ſhip

ſhip *deviate*; though the policy is diſcharged from the time of the deviation, yet, for the damages ſuſtained before the deviation, the inſurers ſhall make ſatisfaction to the inſured

Subject to the rules already advanced, deviation or not is a queſtion of fact, to be decided according to the circumſtances of the caſe. Dougl. 758.

In caſes of deviation, the premium is not to be returned; becauſe the riſk being commenced, the underwriter is entitled to retain it.

A warranty, in a policy of inſurance, is a condition or a contingency, that a certain thing ſhall be done, or happen; and unleſs that is performed, there is no valid contract. It is immaterial for what end the warranty is inſerted in the contract; but being inſerted, if becomes a binding condition upon the inſured, and he muſt ſhew a *literal* compliance with it. 1 Term Rep. 345.

Neither is it any matter whether the loſs happen in conſequence of the breach of warranty or not; for the very meaning of inſerting a warranty is to preclude all inquiry about its materiality. *Ibid.*

It is alſo immaterial to what cauſe the non-compliance is to be attributed; for although it might be owing to wiſe and prudential reaſons, the policy is avoided. Cowp. 607.

In this ſtrict and literal compliance with the terms of a warranty conſiſts the difference between a warranty and repreſentation. *Id.* 708.

In order to make *written* inſtructions binding as a warranty, they muſt appear on the face of, and make a part of, the policy. Cowp. 708.

Even though a written paper be *wrapt up in the policy*, and ſhewn to the underwriters at the time of ſubſcribing; or even *though it be wafered to the policy*, it is not a warranty but a repreſentation. Dougl. 12. notes.

Thus, when evidence was offered to prove that a paper incloſed was always deemed a part of the policy, Lord *Mansfield* refuſed to hear it.

A warranty written *in the margin* of the policy is conſidered to be equally binding, and liable to the ſame ſtrict conſtruction, as if written in the body of the policy. Bean v. Stupart, Dougl. 10.

Words written tranſverſely on the policy were held to be a warranty. Kenyon v. Berthon, Dougl. 12.

Where it was ſaid *in the margin* that the ſhip ſailed from *Liverpool* with 50 *hands and upwards*, the court held this was a warranty; and as ſhe in fact ſailed from *Liverpool* with only 46, though ſhe had upwards of 50 hands from *Beaumaris*, which is within ſix hours ſail from *Liverpool*, the underwriters were diſcharged. De Hahn v. Hartley, 1 Term Rep. 343.

If a man warrant to ſail on a particular day, and be guilty of a breach of that warranty, the underwriter is no longer anſwerable: and this rule holds, though the ſhip be delayed for the beſt and wiſeſt reaſons, or even though ſhe be detained by force. Thus, where a ſhip was inſured at and from *Jamaica*, warranted to ſail on or before the 26th of *July*; and it appeared that the ſhip was ready, and would have ſailed on the 25th, *if ſhe had not been reſtrained by the order and command of Sir* Baſil Keith, *governor of* Jamaica, *and detained beyond the day*; the inſurer was diſcharged. Hore v. Whitmore, Cowp. 784.

If the warranty be to ſail *after* a ſpecifick day, and the ſhip ſail before, the policy is equally avoided as in the former caſe. Vezian v. Grant, *coram* Buller, J. after Eaſt. 1779.

Upon a warranty to ſail on or before a particular day, if the ſhip ſailed before the day from her port of loading, *with all her cargo and clearances on board*, to the uſual place of rendezvous at another part of the iſland, merely for the ſake of joining convoy, it is a compliance with the warranty, though ſhe be afterwards detained there by an embargo, beyond the day.

But

But if her cargo was not complete, it would not be a commencement of the voyage.

Bond v. Nutt, Cowp. 601.

A ſhip being inſured at and from *Jamaica* to *London*, warranted to ſail on or before the 1ſt of *Auguſt*, was *completely laden* for her voyage to *England*, at *St. Ann*'s in *Jamaica*, and ſailed from thence on the 26th of *July*, for *Bluefields*, in order to join the convoy there; but was detained by an embargo till the 6th of *Auguſt*. The court held that the ſailing from *St. Ann*'s was the commencement of the voyage. For when a ſhip leaves her port of loading, having a full and complete cargo on board, and having no other view but the ſafeſt mode of ſailing to her port of delivery, her voyage muſt be ſaid to commence from her departure from that port.

Thelluſſon v. Ferguſon, Dougl. 346.

The ſame doctrine was advanced, even though it was a condition inſerted in one of the ſhip's clearances, that *ſhe ſhould paſs by the place* (at which ſhe was detained by the governor beyond the day named in the warranty) to take the orders of government.

Earle v. Harris, at Guildhall, Hil. Vac. 1780.

Thus alſo, where an embargo was actually publiſhed, before the ſhip ſailed, and the captain, immediately after croſſing the bar, returned to make a proteſt, and knowingly ſent his ſhip into the embargo; yet as he ſwore, that he believed the embargo would be immediately taken off, the underwriter was held liable.

If the inſured warrant that the veſſel ſhall depart with convoy, and it do not; the policy is defeated, and the underwriter is not reſponſible.

A convoy means a naval force, under the command of that perſon whom government may happen to appoint

Hibbert v. Pigou. B. R. Eaſt. 23 Geo. 3. Park, 139.

Therefore, where a ſhip put herſelf under the direction of a man of war till ſhe ſhould join the convoy, which had left the uſual place of rendezvous before ſhe arrived there; it was held not to be a departure with convoy, although ſhe, in fact, joined, and was loſt in a ſtorm.

Qu. Whether ſailing orders from the commander in chief to the particular ſhips are neceſſary to conſtitute a convoy?

But a convoy appointed by the admiral, commanding in chief upon a ſtation abroad, is a convoy appointed by government.

Lethulier's caſe, 2 Salk. 443 Gordon v. Morley, 2 Str 1265. S. P.

A ſailing with convoy from the uſual place of rendezvous, as *Spithead* for the port of *London*, is a *departure* with convoy, within the meaning of ſuch a warranty.

2 Salk. 443. Jeffreys v. Legendra, 3 Lev. 320 Lilly v. Ewer, Dougl. 71.

Although the words uſed generally are "to depart with convoy," or "to ſail with convoy," yet they extend to ſail with convoy throughout the voyage.

But an unforeſeen ſeparation from convoy is an accident to which the underwriter is liable.

Victoria v. Cleeve, 2 Str. 1250.

It hath been ſo determined where a ſhip was ſeparated from her convoy by ſtorm, and by ſtorm prevented from rejoining it, and was loſt. And even where the ſhip has by tempeſtuous weather been prevented from joining the convoy, at leaſt, ſo as to receive the orders of the commander of the ſhips of war, if ſhe do every thing in her power to effect it, it ſhall be deemed a ſailing with convoy.

But it is otherwiſe, if the not joining be owing to the negligence and delay of the captain. As, where repeated ſignals for ſailing had been made

Taylor v. Woodmeſs,

made the night before, and continued next day from 7 to 11; notwithſtanding which the ſhip inſured did not ſail till two hours after. Sittings at Guildhall, Hil. Vac. 4 Geo. 3. Park, 349.

But if the courſe upon a particular voyage has been to have a relay of convoy, protecting the trade from one port to another; or, if government appoint a convoy to eſcort the trade of a place to a given latitude, and no farther; and there be no convoy on that ſtation; a veſſel, taking advantage of ſuch a convoy, has complied with the warranty to ſail with convoy for the voyage. De Gray v. Claggett, Lond. Sittings, after Mich 1795. D'Eguino v. Bewicke, 2H. Bl. 551.

If a man warrant the property to be neutral, and it is not, the policy is void *ab initio*. Woolmer v. Muilman, 4 Burr. 1419. 1 El. Rep. 427.

In an inſurance upon goods, the inſured warranted the ſhip and goods to be neutral; it was expreſsly found by the jury that they were not neutral. The court therefore, though the loſs happened by ſtorms, and not by capture, declared that the contract was void. Eden v. Parkinſon, Dougl. 705.

If the ſhip and property are neutral at the time when the riſk commences, this is a ſufficient compliance with a warranty of neutrality. The inſurer takes upon himſelf the riſk of war and peace; for if the property be neutral at the time of ſailing, and a war break out the next day, the inſurer is liable. Tyſon v. Gurney, 3 Term Rep. 477.

The ſentence of a foreign court of Admiralty is not concluſive, to ſhew that a ſhip was not neutral, unleſs it appear that the condemnation went on that ground. Bernaldi v. Motteux, Dougl. 574.

But if it appear evident that the ſentence proceeded upon the ground of the property not being neutral, that is concluſive evidence againſt the inſured, that he has not complied with his warranty, and the underwriter is diſcharged. Barzillay v. Lewis, B. R. Tr. 22 Geo. 3. Park, 359.

And even where no ſpecial ground of condemnation is ſtated, but the ſhip is condemned as good and lawful prize, the court here muſt conſider it as concluſive evidence that the property was not neutral. Saloucci v. Woodmeſs, B. R. Hil. 24 Geo 3. Park, 361.

But if the ground of deciſion appear to be a foreign ordinance, manifeſtly unjuſt, and contrary to the laws of nations, and the inſured has only infringed ſuch a partial law, that ſhall not be deemed a breach of his warranty, ſo as to diſcharge the inſurer. Mayne v. Walter, B R Paſt. 22 Geo. 3. Park, 363.

If the ſhip be condemned as prize, and the grounds of the ſentence appear manifeſtly to contradict ſuch a concluſion, the court here will not diſcharge the inſurers, by declaring that the inſurer has forfeited his neutrality Saloucci v. Johnſon, B. R. Hil, 23 Geo. 3. Park, 364.

A clauſe was inſerted that 8*l. per cent.* of the premium ſhould be returned, if the ſhip ſailed from any of the *Weſt India* iſlands with convoy for the voyage, *and arrives*. The court held, that the arrival of the ſhip, whether with or without convoy, entitled the party to a return of the premium ſtipulated. Simond v. Boydell, Dougl. 255.

If the riſk is not run, whether the cauſe of its not being run is attributable to the *fault*, *will*, or *pleaſure* of the inſured, the premium is to be returned. Cowp. 668. 3 Burr. 1237.

When a policy is void as a wager policy, *and the ſhip has arrived ſafe*, the court will not allow the inſured to recover back the premium; though it might perhaps be otherwiſe where the ſhip *has not arrived*. Lowry v. Bourdieu, Dougl. 251. Andree v. Fletcher, 3 Term Rep. 266.

Where

Where the riſk has *once* commenced, there ſhall be no apportionment or return of premium afterwards.

But if there are two diſtinct points of time, or, in effect, two voyages either in the contemplation of the parties, or by the uſage of trade, and only one of the two voyages was made, the premium ſhall be returned on the other, though both are contained in one policy.

Stevenſon v. Snow, 3 Burr. 1237. 1 Bl. Rep. 318. S. C.

Thus, in an inſurance "at and from *London* to *Halifax*, warranted to "depart with convoy from *Portſmouth*," when the ſhip arrived at *Portſmouth*, the convoy was gone; the premium for the voyage from *Portſmouth* to *Halifax* was returned.

Tyrie v. Fletcher, Cowp. 666.

A ſhip was inſured for twelve months, at 9*l. per cent.*, warranted free from *American* captures. The ſhip was taken within two months by the *Americans*. There ſhall be no return of premium, becauſe the contract was entire; the premium was a groſs ſum ſtipulated and paid for twelve months.

Loraine v. Thomlinſon, Dougl. 564.

So alſo, it was held, where a ſhip, inſured for twelve months, was loſt at the end of two; though the whole premium of 18*l.* was acknowledged to be received *at the rate of* 15*s. per month*; for that is only a mode of computing the groſs ſum.

Where the premium is entire in a policy on the voyage, where there is no contingency at any period, out or home, upon the happening or not happening of which, the riſk is to end, nor any uſage eſtabliſhed upon ſuch voyage; though there be ſeveral diſtinct ports, at which the ſhip is to ſtop, yet the voyage is one, and no part of the premium ſhall be recoverable.

Berman v. Woodbridge, Dougl. 751.

It was ſo held in a caſe, where a ſhip was inſured "at and from *Honfleur* "to the coaſt of *Angola*, during her ſtay, and trade there, at and from "thence to her port or ports of diſcharge in *St Domingo*, and at and from "*St. Domingo* back to *Honfleur*;" and the policy was at an end by her deviation, before ſhe arrived at *St. Domingo*; and, conſequently, for the latter part of the voyage inſured, the inſurer ran no riſk.

Long v. Allen, B. R. Eaſt. 25 Geo. 3. Park, 390.

It was alſo held where a ſhip was inſured "*at* and *from Jamaica*, war- "ranted to ſail on or before the firſt of *Auguſt*, to return eight *per cent.* if ſhe ſailed with convoy;" and ſhe did not ſail till *September*; that there ſhould be no return upon the warranty of the time of ſailing; for the court cannot make a diſtinction between the riſk *at* and the riſk *from*: though it will be otherwiſe, if the jury find an expreſs uſage upon the ſubject of re-

Park, 391.

turn of premium. Indeed, it ſeems that there never has been an apportionment unleſs there be ſomething like an uſage found to direct the judgment of the court.

Kill v. Halliſter, 1 Wilſ. 129.

In an action upon a policy of inſurance it appeared, that a clauſe was inſerted, that in caſe of any loſs or diſpute about the policy, it ſhould be referred to arbitration; and the plaintiff averred in his declaration, that there had been no reference. Upon the trial at *Guildhall*, the point was reſerved for the conſideration of the court, whether this action would lie before a reference had been made; and it was held by the whole court, that if there had been a reference depending, or made and determined, it might have been a bar; but the agreement of the parties cannot ouſt this court; and as no reference has been, nor any is depending, the action is well brought, and the plaintiff muſt have judgment.

Gardiner v. Croſdale, 2 Burr. 904. 1 Bl. Rep. 198.

If the plaintiff in his declaration allege, that a total loſs has happened, and lay the damages as for a total loſs, it ſhall be no bar to his recovery, though he can only prove a partial loſs; for in an action for damages mere-

ly,

ly, a man may always recover *leſs*, but never *more* than the ſum he has laid in the declaration. A contrary doctrine was once attempted to be maintained; but was unanimouſly over-ruled.

An action was brought on a policy of inſurance, in which the declaration ſtated, that the plaintiff was poſſeſſed of one-third of the ſhip on which the inſurance was made. It was proved that the plaintiff had purchaſed the whole ſhip at one period; and as there was no evidence to ſhew that he had ſince parted with any ſhare of it, the counſel for the defendant inſiſted, that the plaintiff had not proved his declaration, which alleged him to have but one-third. Lord *Manſfield* over-ruled the objection, ſaying, that this was *primâ facie* ſufficient evidence; for *omne majus continet in ſe minus*. Page v. Rogers, Sittings at Guildhall, Hil. Vac. 1785.

By 19 *G.* 2. *c.* 37. § 6. it is declared, "That in all actions or ſuits "brought or commenced by the aſſured, upon any policy of aſſurance, the "plaintiff in ſuch action or ſuit, or his attorney or agent, ſhall, within "fifteen days after he or they ſhould be required ſo to do in writing by the "defendant, or his attorney or agent, declare what ſum or ſums he had "aſſured, or cauſed to be aſſured in the whole, and what ſums he had "borrowed at *reſpondentia* or bottomry, for the voyage in queſtion in ſuch "ſuit or action."

And by § 7. it is enacted, "That it ſhall and may be lawful for any "perſon or perſons, body or bodies corporate, ſued in any action or ac"tions of debt, covenant, or any other action or actions, on any policy "or policies of inſurance, *to bring into court any ſum or ſums of money*; and "that if any ſuch plaintiff or plaintiffs refuſe to accept ſuch ſum or ſums of "money ſo brought into court as aforeſaid, with coſts to be taxed, in full "diſcharge of ſuch action or actions, and afterwards proceed to trial in "ſuch action or actions; and the jury do not aſſeſs damages to ſuch plain"tiff or plaintiffs, exceeding the ſum or ſums of money ſo brought into "court, ſuch plaintiff or plaintiffs, in every ſuch caſe and caſes, ſhall pay "to ſuch defendant or defendants, in every ſuch action or actions, coſts "to be taxed; any law, cuſtom, or uſage to the contrary notwith"ſtanding."

A man having purchaſed goods beyond ſea, in order to prove his property in the cargo, in an action upon a policy of inſurance, produced a *bill of parcels* of one *Gardiner* at *Peterſburgh*, with his receipt to it, and proved his hand. The defendant objected, that this was no evidence againſt the inſurers; but the Chief Juſtice allowed it. Ruſſell v. Boheme, 2 Strange, 1127.

If a merchant abroad, who is intereſted in goods and the freight of a cargo, mortgage them to his creditor here for the payment of money at a certain day, and by a letter incloſing the bills of lading, direct an inſurance, he has an inſurable intereſt, although the mortgage was become abſolute before the letter directing the inſurance was received, and an action lies againſt the agent for not inſuring agreeably to the inſtructions contained in ſuch letter. Smith v. Laſcelles, 2 Term Rep. 187.

In an action on a policy of inſurance, for inſuring goods on board the ſhip *A.*, the plaintiff declares, that the ſhip ſprung a leak, and ſunk in the river, whereby the goods were ſpoiled. The evidence was, that many of the goods were ſpoiled, but ſome were ſaved; and the queſtion was, Whether the plaintiff might give in evidence the expence of ſalvage, that not being particularly laid as a breach of the policy in the declaration? Carey v. King. Ca. temp. Hardwicke, B. R. 304.

Lord *Hardwicke*, C. J.—I think he may give it in evidence; for the inſurance is againſt all accidents. The accident laid in this declaration is, that the ſhip ſunk in the river; it goes on and ſays, that by reaſon thereof the goods were ſpoiled, that is the only ſpecial damage laid: yet it is but

the common caſe of a declaration that lays ſpecial damage, where the plaintiff may give evidence of any damage that is within his cauſe of action as laid. And though it was objected, that ſuch a breach of the policy ſhould be laid, as the inſurer may have notice to defend it; it is ſo in this caſe, for the plaintiff hath laid the accident, which is ſufficient notice, becauſe it muſt neceſſarily follow, that ſome damage did happen.

Lees v. Smith, B. R. Tr. 37 G. 3.

A company of ſhip-owners engaged to inſure each others ſhips *ſeverally* (and *not jointly*) to pay a certain ſum in caſe of loſs in proportion to their reſpective ſhares; but in caſe of the inſolvency of any one of the members, all the others were to be reſponſible. This contract is void by *ſtat.* 6 G. 1. *c.* 18. § 12.

Law v. Hollingſworth, 7 Term Rep. 160.

A ſhip homeward bound to the port of *London* received a pilot at *Orfordneſs* as directed by 5 *G.* 2. *c.* 20. and dropped him before ſhe reached her moorings in the River *Thames*; after which, and before ſhe was ſafely moored, ſhe was by accident ſunk. The underwriter on the ſhip and cargo was holden to be diſcharged, becauſe there was *no* pilot on board when the accident happened; though it did not appear that the loſs was imputable to want of ſkill in thoſe who navigated the veſſel. The queſtion, therefore, whether it was neceſſary to the aſſured's right to recover, that there ſhould be on board ſuch a pilot as is required by the ſtatute of 5 G. 2. that is, a pilot licenſed by the *Trinity-Houſe*, was left undecided.

Middlewood v. Blakes, 7 Term Rep. 162.

A ſhip inſured from *A.* to *B.* ſailed with an intent to touch at *C.*, an intermediate point: to a certain point the voyage was the ſame: from that point there were three tracks to *B.*, one by way of *C.*, the two others by different courſes: there were advantages and diſadvantages attending each; and the captain muſt elect according to circumſtances; the ſhip took the track by *C.* under directions from the inſured to put in there, but was taken before ſhe came to the point where ſhe muſt have turned out of the track to *B.* by the way of *C.*. for the purpoſe of putting into the harbour of *C.* The underwriter is diſcharged; for he was entitled to the advantage of the captain's judgment which of the three tracks it was beſt to purſue when he came to the firſt dividing point.

Burnett v. Kenſington, 7 Term Rep. 210.

If an inſurance be effected on fruit, and the policy contain the uſual memorandum, "corn, fruit, *&c* warranted free from "average, unleſs "general, or the ſhip be ſtranded," and the ſhip be in fact ſtranded in the courſe of the voyage, the underwriters are liable for an average loſs ariſing from the perils of the ſea, though no part of the loſs happened from the act of ſtranding.

Farmer v. Leg, 7 Term Rep. 186.

An action was brought on a policy of inſurance on a ſhip, engaged in the ſlave-trade "at and from *London* to the coaſt of *Africa*, during her "ſtay there, and thence to her port of diſcharge in the *Weſt-Indies*." The loſs happened in conſequence of an inſurrection of the ſlaves. The principal queſtion was, Whether the ſhip had been navigated in the manner preſcribed by the 31 *G.* 3. *c.* 54., the 7th ſection of which enacts, "That it ſhall not be lawful for any perſon to become a maſter, or take "or have the command or charge of any ſuch ſhip or veſſel at the time he "ſhall clear out from any port of *Great Britain* for purchaſing or carrying "ſlaves from the coaſt of *Africa*, unleſs ſuch maſter or perſon taking or "having the charge or command of any ſuch ſhip or veſſel ſhall have made "oath, and delivered in to the collector or other chief officer of the cuſ-"toms, at the port where ſuch ſhip or veſſel ſhall clear out, a *certificate "atteſted by the reſpective owner or owners* that he has already ſerved in "ſuch capacity during one voyage, or ſhall have ſerved as chief mate or "ſurgeon

" ſurgeon during the whole of two voyages, or either as chief mate or " other mate during three voyages, in purchaſing and carrying ſlaves from " *Africa*, under pain that ſuch maſter or other perſon taking or having the " charge or command of any ſuch ſhip or veſſel, and alſo the owner or " owners who ſhall hire or employ ſuch perſon, ſhall for every ſuch offence " reſpectively forfeit and pay the ſum of 500*l.*" The queſtion was, Whether the certificate therein required, ought to be atteſted by the owner of the ſhip upon the voyage inſured, or by the owner or owners of the ſhips during the reſpective voyages out of which the qualification aroſe? In the preſent inſtance, the captain had made oath that he had been two voyages in a ſhip engaged in the ſlave-trade, and the preſent plaintiff (the owner in the voyage inſured) had certified that that was true, to the beſt of his knowledge and belief. Lord *Kenyon*, before whom the cauſe was tried, being of opinion that ſuch certificate did not anſwer the requiſition of the ſtatute, nonſuited the plaintiff; and on a motion to ſet aſide the nonſuit, the other judges of the court of King's Bench concurred with his lordſhip in that opinion.

Where a mate of a ſhip or a ſailor is to receive ſomething at the end of the voyage in lieu of wages, for inſtance, ſlaves, he cannot inſure it; and of courſe cannot recover the value of it in an action againſt his agent for negligence in not procuring ſuch an inſurance. Webſter v. De Taſtet, 7 Term Rep. 157.

2. Of Inſurances upon Lives.

It is enacted by 14 *G.* 3. *c.* 48. § 1. " That no inſurance ſhall be made " by any perſon or perſons, bodies publick or corporate, *on the life or lives* " of any perſon or perſons, or on any other event or events whatſoever, " wherein the perſon or perſons, for whoſe uſe, benefit, or on whoſe ac- " count, ſuch policies ſhall be made, *ſhall have no intereſt, or by way of* " *gaming or wagering*; and every inſurance made, contrary to the true " intent and meaning thereof, ſhall be null and void to all intents and " purpoſes." And in order more effectually to guard againſt any impoſi- § 2. tion or fraud, and to be the better able to aſcertain, what the intereſt of the perſon, entitled to the benefit of the inſurance, really was, it was further enacted, by the ſame ſtatute, " that it ſhall not be lawful to make any " policy or policies on the life or lives of any perſon or perſons, or other " event or events, without inſerting in ſuch policies, the perſon's name " intereſted therein, or for whoſe uſe, benefit, or on whoſe account, ſuch " policy was ſo made or underwritten. And that in all caſes where the § 3. " inſured has an intereſt in ſuch life or lives, event or events, no greater " ſum ſhall be recovered, or received from the inſurer or inſurers, than " the amount or value of the intereſt of the inſured in ſuch life or lives, " or other event or events."

It has been holden, that a perſon holding a note given for money won at play, has not an inſurable intereſt in the life of the maker of the note. An action was brought on a policy on the life of *James Ruſſell* from the 1ſt of *June* 1784 to the 1ſt of *June* 1785. *Ruſſell* was warranted in good health, and by a memorandum at the foot of the policy it was declared, that it was intended to cover the ſum of 5000*l.* due from *Ruſſell* to the plaintiff, for which he had given his note payable in one year from the 14th of *May* 1784. Two objections were made on the part of the defendant: 1ſt, That part of the conſideration for the note was money won at play; 2d, That *Ruſſell*, at the time he gave the note, was an infant.—*Buller*, J. Dwyer v. Edie, London, Sittings after Hil. 1788.

nonſuited the plaintiff upon the ground of part of the conſideration being for a gaming tranſaction, and that therefore there was a want of intereſt in the plaintiff. But as to the other objection on account of infancy, he ſaid, the intereſt muſt be contingent, for *Ruſſell* might or might not avoid his note; and he doubted much whether till ſo avoided, the note muſt not be taken againſt a third perſon to be the note of an adult, for the maker of the note only could take the objection.

Anderſon v. Edie, Sittings at Guildhall, in Tr. 1795.

In an action on a policy of inſurance on the life of Lord *Newhaven* from 1ſt *December* 1792 to 1ſt *December* 1793, the only queſtion made by the defendant was as to the plaintiff's intereſt, which it was contended was not ſufficient to take the caſe out of the above ſtatute. It appeared in evidence, that Lord *Newhaven* was indebted to the plaintiff and a Mr. *Mitchell* in a large ſum of money, part of which debt had been aſſigned by them to another perſon: the remainder, being more than the ſum inſured, was, upon a ſettlement of account between the plaintiff and *Mitchell*, agreed by them to remain to the account of *Mitchell* only.—Lord *Kenyon* was of opinion, that this debt was a ſufficient intereſt: that a creditor had certainly an intereſt in the life of his debtor; the means by which he is to be ſatisfied may materially depend upon it; and at all events the death muſt in every caſe leſſen the ſecurity. Verdict for the plaintiff.

Roebuck v. Hammerton, Cowp. 737.

A policy made, in order to decide upon the ſex of a particular perſon, was held to fall within the prohibition of the ſtatute.

Molliſon v. Staples, Sittings at Guildhall, Mich Vac. 1788.

Again, a policy having been made, on the event of there being an open trade between *Great Britain* and the province of *Maryland*, on or before the 6th *July* 1778, Lord *Mansfield* ſaid, that it was clear the plaintiff could not recover. 1ſt, Is this an intereſt within the act? It was made to prevent gambling policies. Every man in the kingdom has an intereſt in the events of war and peace: but, I doubt, whether that be an intereſt within the act. But, 2dly, The policy is void, by not having the name inſerted according to the ſecond ſection of the ſtatute.

Park, 433.

In a life inſurance, the inſurer undertakes to anſwer for all thoſe accidents, to which the life of man is expoſed, except ſuicide, or the hands of juſtice.

The death muſt happen within the time limited in the policy; otherwiſe the inſurers are diſcharged. And therefore, if a man receive a mortal wound during the exiſtence of the policy, but does not in fact die till after, the inſurers are not liable.

Patterſon v. Black, Sittings at Guildhall, after Hil. 1780.

But, if a man, whoſe life is inſured, goes to ſea, and the ſhip in which he ſailed is never heard of afterwards, the queſtion, whether he did or did not die within the term inſured, is a fact for the jury to aſcertain from the circumſtances.

Sir Robert Howard's caſe, 2 Salk. 625. 1 Ld. Raym. 480. S. C.

A policy was made for one year from the day of the date thereof: the policy was dated 3d *September* 1697. The perſon died on the 3d *September* 1698, about one o'clock in the morning; and the inſurer was held liable.

Where there is a warranty that the perſon is in good health, it is ſufficient that he be in a reaſonable good ſtate of health; for it never can mean, that he is free from the ſeeds of diſorder.

Willis v. Poole, Sittings at Guildhall, after Eaſt. 1780.

If the perſon, whoſe life was inſured, laboured under a particular infirmity, if it be proved by medical men, that, in their judgment, it did not at all contribute to his death, the warranty of health has been fully complied with, and the inſurer is liable.

If

If the perſon, whoſe life was inſured, ſhould commit ſuicide, or be put to death by the hands of juſtice, the next day after the riſk commenced, there would be no return of premium. Cowp. 669. Dougl. 738.

3. Of Inſurance againſt Fire.

The *London* Aſſurance Company inſert a clauſe in their propoſals, by which they declare, that they do not hold themſelves reſponſible for any damage by fire, occaſioned by an invaſion, foreign enemy, or any military or uſurped power whatſoever. Under this proviſo, it was holden, that they were not exempted from loſs by fire, occaſioned by a mob at *Norwich*, which aroſe on account of the high price of proviſions. Drinkwater v. London Aſſurance, 2 Wilſ. 363.

But the Sun-fire Office, in addition to theſe words, inſert, "*civil commotions*," which words, it was determined, protected them from any reſponſibility for the loſſes occaſioned by the rioters, who roſe in *London* in 1780, to compel the repeal of a ſtatute, which had paſſed in favour of the Roman Catholicks. Langdale v. Maſon, Sittings at Guildhall, after Mich. 1780, *coram* Mansfield, C. J.

In a policy of aſſurance againſt loſs by fire from half a year to half a year, the aſſured agreed to pay the premium half-yearly "as long as the "aſſurers ſhould agree to accept the ſame, *within fifteen days after the ex-* "*piration of the former half year*;" and it was alſo ſtipulated, that no inſurance ſhould take place till the premium was actually paid. A loſs happened within fifteen days after the end of one half-year, but before the premium for the next was paid. It was holden, that the inſurers were not liable, though the inſured tendered the premium before the end of the fifteen days, but after the loſs. Tarleton v. Staniforth, 5 Term Rep. 695.

Theſe policies of inſurance are not, in their nature, aſſignable, for they are only contracts to make good the loſs, which the contracting party himſelf ſhall ſuſtain; nor can the intereſt in them be transferred from one perſon to another without the conſent of the office (*a*). There is a caſe in which, by the propoſals, theſe policies are allowed to be transferred, and that is, when any perſon dies, the policy and intereſt therein ſhall continue to the heir, executor, or adminiſtrator, reſpectively, to whom the property inſured ſhall belong; provided, before any new payment be made, ſuch heir, executor, or adminiſtrator, do procure his or her right to be indorſed on the policy at the ſaid office, or the premium be paid in the name of the ſaid heir, executor, or adminiſtrator. But in all other caſes there can be no aſſignment; and the party claiming an indemnity muſt have an intereſt in the thing inſured at the time of the loſs. Lynch v. Dalzell, 3 Br. P. C. 497. Sadler's Company v. Badcock, 2 Atk. 554.

(*a*) *Secus*, of marine inſurances. Delaney v. Stoddart, 1 Term Rep. 26.

(K) Of Bottomry and Reſpondentia.

THE contract of bottomry is in the nature of a mortgage of a ſhip, when the owner of it borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ſhip, as a ſecurity for the repayment: and it is underſtood, that if the ſhip be loſt, the lender alſo loſes his whole money; but if it return in ſafety, then he ſhall receive back his principal, and alſo the premium or intereſt ſtipulated to be paid, however it may exceed the uſual or legal rate or intereſt. When the ſhip and tackle 2 Blackſt. Com. 457. Latch. 252.

tackle are brought home, they are liable, as well as the perſon of the bor-
2 Blackſt. Com. 458. rower, for the money lent. But when the loan is not made upon the veſ-ſel, but upon the goods and merchandizes laden thereon, which, from their nature, muſt be ſold or exchanged in the courſe of the voyage, then the borrower only is *perſonally* bound to anſwer the contract; who therefore in this caſe is ſaid to take up money at *reſpondentia*. In this conſiſts the difference between *bottomry* and *reſpondentia*: that the one is a loan upon the ſhip, the other upon the goods: In the former, the ſhip and tackle are liable, as well as the perſon of the borrower; in the latter, for the moſt part, recourſe muſt be had to the *perſon* only of the borrower.

2 Valin. Com. p. 4. Another obſervation is, that in a loan upon bottomry, the lender runs no riſk though the goods ſhould be loſt; and upon *reſpondentia*, the lender muſt be paid his principal and intereſt, though the ſhip periſh, provided the goods are ſafe. But in all other reſpects, the contract of bottomry and that of *reſpondentia* are upon the ſame footing; the rules and deciſions applicable to one, are applicable to both; and therefore, in the courſe of our inquiries, they ſhall be treated as one and the ſame thing, it being ſufficient to have once marked the diſtinction between them.

2 Blackſt. Com. 458. Theſe terms are alſo applied to another ſpecies of contract, which does not exactly fall within the deſcription of either, namely. to a contract for the repayment of money, not upon the ſhip and goods only, but upon the mere hazard of the voyage itſelf: as, if a man lend 1000*l.* to a merchant

1 Sidirfin, 27. to be employed in a beneficial trade, with a condition to be repaid with extraordinary intereſt, in caſe a ſpecific voyage named in the condition ſhall be ſafely performed: which agreement is ſometimes called *fœnus nau-*

Molloy, lib. 2. c. 11. § 8. *ticum* or *uſura maritima*. But as this ſpecies of bottomry opened a door to gaming and uſurious contracts, eſpecially in long voyages, the legiſlature, at the time it ſuppreſſed inſurances upon wagering policies, introduced a

19 Geo. 1. c. 37. § 5. clauſe, by which it was enacted, "That all ſums of money lent on bottom-
" ry, or at *reſpondentia* upon any ſhip or ſhips belonging to his Majeſty's
" ſubjects, *bound to or from the* Eaſt Indies, ſhould be lent only on the
" ſhip, or on the merchandize or effects, laden or to be laden on board of
" ſuch ſhip, and ſhould be ſo expreſſed in the condition of the ſaid bond;
" and the benefit of ſalvage ſhould be allowed to the lender, his agents or
" aſſigns, who alone ſhould have a right to make aſſurances on the money
" ſo lent; and in caſe it ſhould appear that the value of his ſhare in the
" ſhip, or in the merchandizes or effects laden on board of ſuch ſhip, did
" not amount to the full ſum or ſums he had borrowed as aforeſaid, ſuch
" borrower ſhould be reſponſible to the lender for ſo much of the money
" borrowed, as he had not laid out on the ſhip or merchandizes laden
" thereon, with lawful intereſt for the ſame, in the proportion the money
" not laid out ſhould bear to the whole money lent, notwithſtanding the
" ſhip and merchandizes ſhould be totally loſt.

This ſtatute has entirely put an end to that ſpecies of contract which was laſt mentioned, namely, a loan upon the mere voyage itſelf, as far, at leaſt, as relates to *India* voyages; but as none other are mentioned, and as *expreſſio unius eſt excluſio alterius*, theſe loans may be made in all other

7 Geo. 1. c. 21. § 2. caſes, as at the common law, except in the following inſtance, which is another ſtatute prohibition. It is declared, that all contracts made or entered into by any of his Majeſty's ſubjects, or any perſons in truſt for them, for or upon the loan of any monies by way of bottomry on any ſhip or ſhips in the ſervice of foreigners, and bound or deſigned to trade in the *Eaſt Indies* or parts aforeſaid, ſhall be null and void.

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This act it ſhould ſeem does not mean to prevent the King's ſubjects from lending money on bottomry on foreign ſhips trading from their own country to their ſettlements in the *Eaſt Indies*. The purpoſe of the ſtatute was only to prevent the people of this country from trading to the *Britiſh* ſettlements in *India* under foreign commiſſions, and to encourage the lawful trade thereto. It lately became a queſtion in the Common Pleas, Whether an *American* ſhip ſince the declaration of *American* independency was a foreign ſhip within the ſtatute 7 *G.* 1. *c.* 21. § 2.? It came before the court on a motion to diſcharge the defendant out of cuſtody upon entering a common appearance. The defendant was holden to bail upon a *reſpondentia* bond, which was executed by the defendant, who was an *American*, to ſecure the payment of a cargo ſhipped by the plaintiff on board an *American* ſhip in the *Eaſt Indies*, homeward-bound from *Calcutta* to *Rhode Iſland* in *America*. The ſhip had ſailed from *England*, and landed a cargo of *European* goods in *Bengal*, previouſly to her taking in the cargo on which the bond was given. The court were much inclined to think that the bond was void, the caſe being within the miſchief intended to be remedied by the act: but as the queſtion was of conſiderable conſequence, they thought it not proper to be diſcuſſed on this ſummary application; but they ordered the defendant to be diſcharged on the ground that where it appeared from the affidavit to hold to bail, that there was a probability of the contract being void, on which the action was founded, it would be wrong to detain the defendant in priſon; more particularly as the plaintiff would by that means have an opportunity of tampering with the defendant in priſon, and of eſcaping from the penalties of the act, and of preventing the caſe from being brought before the court. Sumner v. Gree, Mich. 30 Geo. 3. C. B.

Again, in debt upon an obligation, conditioned to pay ſo much money, if ſuch a ſhip returned within ſix months from *Oſtend* in *Flanders* to *London*, which was more by the third part than the legal intereſt of money; and if ſhe did not return, then the obligation to be void: the defendant pleaded, that there was a corrupt agreement betwixt himſelf and the plaintiff, and that at the time of making the obligation, it was agreed betwixt them, that he ſhould have no more for intereſt than the law permits, in caſe the ſhip ſhould ever return; and averred that the obligation was entered into by covin, to evade the ſtatute of uſury, and the penalty thereof: upon this averment the plaintiff took iſſue, and the defendant demurred.—Lord Chief Baron *Hale*.—Clearly this bond is not within the ſtatute, for this is the common way of inſurance; and if this were void by the ſtatute of uſury, trade would be deſtroyed. It is not like to the caſe, where the condition of the bond is to give ſo much money, if ſuch or ſuch a perſon be then alive; for there is a certainty of that at the time. But it is uncertain and a caſualty whether ſuch a ſhip will ever return or not. Joyv. Kent, Hard. Rep. 418.

It ſeems to have been a doubt, late in the laſt century, whether a loſs by the attacks of pirates was a riſk which the lender on bottomry had his contract undertaken to bear; for it was argued in the King's Bench, in the reign of *James* the ſecond. But the court were of opinion, that piracy was one of the dangers of the ſeas; and the defendant had judgment. Barton v. Wolliford, Comb. 56.

The lender is anſwerable likewiſe for loſſes by capture; or, to ſpeak more accurately, if a loſs by capture happen, he cannot recover againſt the borrower: but in bottomry and reſpondentia bonds, capture does not mean a mere temporary taking, but it muſt be ſuch a capture as to occaſion a total loſs. And therefore if a ſhip be taken and detained for a ſhort time, and yet arrive at the port of deſtination within the time limited, (if

time

time be mentioned in the condition,) the bond is not forfeited, and the obligee may recover.

Joice v. Williamſon, B. R. Mich. Term 23 Geo. 3. Park. 421.

This doctrine was laid down by the whole court of King's Bench, in a caſe upon a bond of this nature; the proceedings on which were fully ſtated, when the unanimous opinion of the court was delivered by Lord *Mansfield*. This comes before the court upon a motion on the part of the defendant, for a new trial. It was an action of debt upon a bottomry bond; the condition of which was, that upon the ſhip's ſafe arrival at *New York*, a certain ſum of money ſhould be paid to the plaintiff; but that in caſe the ſhip ſhould miſcarry, be loſt, caſt away, or taken by the enemy, the plaintiff ſhould have nothing. The defendant pleaded three pleas: 1ſt, *Non eſt factum*; 2dly, That the ſhip did not arrive at *New York*, the port of deſtination; 3dly, That the ſhip was captured. Upon the two firſt pleas iſſue was joined; and to the laſt, there was a replication of recapture. The facts, which appeared in evidence on the trial are theſe: *the ſhip was taken before her arrival at New York*, by two *American* privateers, which detained her for one month, and plundered her of her ſtores; at which time *ſhe was retaken* by an *Engliſh* privateer, and carried into *Halifax*. The Admiralty court adjudged her to be a good prize to the *Engliſh* privateer, and decreed that ſhe ſhould be reſtored to the original owners, on paying one-eighth for ſalvage: that ſhe proceeded with the remainder of her cargo to *New York*, and earned her freight: that the value of the ſhip was not ſufficient to ſatisfy the bond. Theſe are the facts. Now it is clear, that, by the law of *England*, *there is neither average nor ſalvage upon a bottomry-bond*. It was indeed contended at the bar, on the part of the defendant, that this caſe was within the ſaving of the bond; for it is provided, that in caſe of loſs by *capture*, &c. the bond ſhould be void: and that here there was a capture, and a detention for one month. But upon conſideration, we think that a capture, within this condition, does not mean a *temporary capture*, but it *muſt be a total loſs*: now here it was not ſuch a capture as to occaſion a total loſs. The voyage was not loſt, for the defendant purſued it and earned his freight. Freight depends upon the ſafety of the ſhip; and as the freight was earned, the ſhip muſt have arrived ſafe at the port of deſtination. In whatever way we determine this caſe, there muſt be a hardſhip: but we are all of opinion, that the verdict is right, and that the rule for a new trial muſt be diſcharged.

Walpole v. Ewer, Sittings after Tr. 1789.

An action was brought on a policy of inſurance, on a *reſpondentia* bond, on ſhip and goods at and from *B.* to *C.* The ſhip was *Daniſh*, and an average loſs was ſuſtained upon the goods to the amount of *6l. 15s. per cent.*, and the plaintiff as holder of a *reſpondentia* bond had been called upon to contribute; and now brought his action againſt the *Engliſh* underwriters for the amount of that contribution. Lord *Kenyon*.—By the law of *England*, a lender upon *reſpondentia* is not liable to average loſſes, but is entitled to receive the whole ſum advanced, provided that the ſhip and cargo arrive at the port of deſtination. The plaintiff contends that, as by the law of *Denmark*, ſuch lenders upon *reſpondentia* are liable to average, and bound to contribute according to the amount of their intereſt, the inſurer muſt anſwer to them. The *Daniſh* conſul has proved that he received a judgment of the court of *Copenhagen*, the decretal part of which proves the law of *Denmark* to be as the plaintiff has ſtated it. The opinions of ſeveral men of eminence in that country have been offered on each ſide, but I reject them, becauſe the ſolemn deciſion of a court of competent juriſdiction is of much

much greater weight than the opinions of advocates however eminent, or even than the extrajudicial opinions of the moſt able judges. It ſeems, as if in this caſe the underwriters were bound by the law of the country to which the contract relates. Verdict for the plaintiff.

This is not the only caſe in which the inſurers have been holden liable to indemnify, the inſured having been obliged by the law of a foreign country to pay a larger ſum than by the laws of *England* could have been demanded: though to be ſure, in the caſe about to be quoted, there ſeems to have been an uſage proved, and upon that the learned Judge much relied. It was an action on a policy of inſurance on a cargo of fiſh from *Newfoundland* to any part of *Spain*, *Portugal*, or *Italy*. The ſhip met with bad weather, and put into *Alicant* and *Leghorn* to repair. The captain being owner, preſented a petition to the commercial court of *Piſa*, to adjuſt the general average, as he had put in for the general benefit of all concerned. The court, according to its uſual courſe (which ſeems a very extraordinary one), adjuſted the loſs by charging the cargo at its full value, but the ſhip at one-half, and the freight at one-third, and they alſo charged as a part of the general average, the ſeamen's wages and proviſions whilſt in port. The defendant, as underwriter, had paid into court as much as would cover the average according to the memorandum in the policy, and the law and uſage of *England*. The queſtion was, Whether, the plaintiff having been compelled to pay beyond that ſum according to the calculation of the ſentence of the court of *Piſa*, it was concluſive upon the defendant, and the plaintiff was entitled to recover his average by the ſame ſtandard? The plaintiff called ſeveral brokers, who ſaid, that, in repeated inſtances, they had adjuſted averages under ſimilar ſentences of the court of *Piſa*, and the underwriters, though with reluctance, had always paid them. *Buller*, J.—On the general law, the plaintiff would fail; but, in all matters of trade, uſage is a ſacred thing. I do not like theſe foreign ſettlements of average, which make underwriters liable for more than the ſtandard of *Engliſh* money. But if you are ſatisfied it has been the uſage upon the evidence given, it ought not to be ſhaken. The plaintiff had a verdict. Newman v. Cazalet, Sit. at Guildh. after Hil.

It has been ſaid, that if the accident happen by the default of the borrower, or of the captain, the lender is not liable, and has a right to demand the payment of the bond. If, therefore, the ſhip be loſt by a wilful deviation from the tract of the voyage, the event has not happened, upon which the borrower was to be diſcharged from his obligation. This has been decided in ſeveral caſes.

An action of debt was brought upon an obligation for performance of covenants in an indenture, wherein it was recited, that ſuch a ſhip was in the ſervice of the *Eaſt India* Company, and that it was to obey ſuch orders as they or their factors ſhould give; and that ſhe was deſigned for a voyage from *London* to *Bantam*, and from thence to *China* or *Formoſa*. The plaintiff lent 500*l.* upon the hull of the ſhip, and the defendant covenanted to pay, if the ſhip went from *London* to *Bantam*, and returned from thence directly to *London*, 550*l.*: if from *London* to *Bantam*, and from thence to *China* or *Formoſa*, and returned to *London* within 24 months 650*l* If ſhe returned not within 24 months, then to pay 5*l.* per month above 650*l.*, till 36 months; and if ſhe returned not within 36 months, then to pay 710*l.*, unleſs it could be proved by *Widdy*, that the ſhip returned not, but was loſt within 36 months. The ſhip, in fact, went from *London* to *Bantam*, and from *thence to Surat*, and other parts, and ſo returned to *Bantam*; and in her voyage from *Bantam* to *London* was loſt within 36 months: upon which the preſent action was brought. Weſtern v. Wildy, Skin. 152.

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The court inclined to be of opinion, that this ſhip having deviated from the voyage deſcribed, in going to *Surat*, the plaintiff was not to bear the loſs, and was conſequently entitled to recover. They, however, took time to deliberate; and after conſideration, gave judgment for the plaintiff.

Williams v. Steadman, Holt's Reports, 126. Skin. 345. S. C.

In another caſe of debt upon a bottomry-bond, the defendant pleaded, that the ſhip went from *London* to *Barbadoes ſine deviatione*, and afterwards ſhe returned from *Barbadoes* towards *London*, and in her return was loſt in *voyagio prædicto*; the plaintiff replied, that the ſhip in her return went from *Barbadoes* to *Jamaica*; and that after a ſtay there, ſhe returned from *Jamaica* towards *London*, and was loſt, and ſo ſhews a deviation. The defendant rejoined, that ſhe was preſſed into the King's ſervice, and ſo was compelled to go to *Jamaica*, which is the deviation pleaded by the plaintiff; without this, that ſhe deviated after ſhe was preſſed. The plaintiff demurred, and judgment was given for the plaintiff. The plea of the defendant is not good; for he pleads that the ſhip went from *London* to *Barbadoes* without deviation, and that in the return ſhe was loſt in the voyage aforeſaid; but does not ſhew *without deviation*. Now the condition is ſo in expreſs words, and he ought to ſhew expreſsly that he has performed the words of the condition.

The ſame rule of deciſion has been adopted in the courts of equity.

1 Equity Caſes Abr. 372. 2 Chan. Caſes, 130.

The plaintiff entered into a penal bond to pay 40*s.* per month for 50*l.*, the ſhip was to go *from* Holland *to the* Spaniſh *iſlands*, *and to return to* England: but if ſhe periſhed, the defendant was to loſe his 50*l.* The ſhip went accordingly to the *Spaniſh* iſlands, took in *Moors* at *Africa*, then went to *Barbadoes*, and periſhed at ſea. The plaintiff, being ſued at law upon the bond, came into equity ſuggeſting the *the deviation was through neceſſity*. But his bill was diſmiſſed, except as to the penalty.

It frequently happened that the borrowers on bottomry, or at *reſpondentia*, became bankrupts after the loan of the money, and before the event happened, which entitled the lender to repayment: by which means the debt could not be proved under the commiſſion, and the lenders were left to ſuch redreſs as they could obtain from the bankrupt, who had previouſly given up every thing to his other creditors. This being likely to prove a diſcouragement to trade, parliament was obliged to interpoſe; and it accordingly enacted, "That the obligee in any bottomry, or *reſpondentia* bond, made, and entered into upon a good and valuable conſideration, *bona fide*, ſhould be admitted to claim, and *after the contingency ſhould have happened, to prove his or her debt or demands in reſpect of ſuch bond, in like manner as if the contingency had happened before the time of the iſſuing of the commiſſion of bankruptcy againſt any ſuch obligor*, and ſhould be entitled unto, and ſhould have and receive, a proportionable part, ſhare, and dividend of ſuch bankrupt's eſtate, in proportion to the other creditors of ſuch bankrupt, in like manner as if ſuch contingency had happened before ſuch commiſſion iſſued: and that all and every perſon or perſons, againſt whom any commiſſion of bankruptcy ſhould be awarded, ſhould be diſcharged of and from the debt or debts owing by him, her, or them, on every ſuch bond as aforeſaid, and ſhould have the benefit of the ſeveral ſtatutes now in force againſt bankrupts, in like manner, to all intents and purpoſes, as if ſuch contingency had happened, and the money due in reſpect thereof had become payable, before the time of the iſſuing of ſuch commiſſion."

19 Geo. 2. c. 32. § 2.

By the ſtatute-book it appears, that the maſters and mariners of ſhips, having taken upon bottomry greater ſums of money than the value of their adventure,

adventure, had been accuſtomed wilfully to caſt away, burn, or otherwiſe deſtroy the ſhips under their charge, to the great loſs of the merchants and owners: it was therefore enacted, "That if any captain, maſter, mariner "or other officer belonging to any ſhip, ſhould wilfully caſt away, burn, "or otherwiſe deſtroy the ſhip unto which he belonged, or procure the "ſame to be done, he ſhould ſuffer death as a felon." The duration of this act having been limited to three years, it became extinct: but the neceſſity of ſuch a proviſion was ſo great, that a ſimilar law was made a few years afterwards, and is ſtill in force.

16 Cha. 2. c. 6. § 12.

22 & 23 Cha. 2. c. 11. § 12.

(L) Of Bills of Exchange.

1. Of the Nature and different Kinds of Bills of Exchange and Negotiable Notes.

1. *Of Foreign Bills.*

But bills of exchange and promiſſory notes, though, according to the general principles of the law, they are to be conſidered only as evidence of a ſimple contract, are yet ſo far regarded as ſpecialties, that unleſs the contrary be ſhewn by the defendant, they are always preſumed to have been made on a good conſideration; nor is it incumbent on the plaintiff, either to ſhew conſideration in his declaration, or to prove it at the trial. Foreign bills were always entitled to this privilege; but it was not without a conſiderable ſtruggle that it was extended to inland bills; and notes are indebted for it to the ſtatute of Queen *Anne*.

1 Bl. Rep. 445. Peckham v. Wood, B. R. E. 18 Geo. 3. *Vide* 2 Ld. Raym. 758. 1 Bl. Rep. 487.

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(*Bills of exchange*) Here it may be proper to mention, that uſance between London and any part of France, is thirty days after date.—Between London and the following places; Hamburgh, Amſterdam, Rotterdam, Middleburg, Antwerp, Brabant, Zealand, and Flanders, is one calendar month after the date of the bill.—Between London and Spain and Portugal, two calendar months.—Between London and Genoa, Leghorn, Milan, Venice, and Rome, three calendar months.—The uſance of Amſterdam, on Italy, Spain, and Portugal, is two months.—On France, Flanders, Brabant, and on any place in Holland, or Zealand, is one month.—On Frankfort, Nuremberg, Vienna, and other places in Germany on Hamburg and Breſlau, fourteen days after ſight, two uſances twenty-eight days, and half uſance ſeven.—Half uſance when the uſance is one month, ſhall contain fifteen days, notwithſtanding the inequality in the length of the months.

Where the time, after the expiration of which a bill is made payable, is limited by months, it muſt be computed by calendar, not lunar months: thus, on a bill dated the firſt of *January*, and payable at one month after date, the month expires on the firſt of *February*.

Starke v. Cheeſman, Carth. 510. 1 Salk. 128. Eaſt v. Eſſington, 1 Salk. 130. 2 Ld. Raym. 810. Wegerſloff v. Kenn, 1 Str. 224.

Where a bill is payable at ſo many days after ſight, or from the date, the day of preſentment or of the date is excluded. Thus, where a bill, payable ten days after ſight, is preſented on the firſt day of a month, the ten days expire on the eleventh; where it is dated the firſt, and payable twenty days after date, theſe expire on the twenty-firſt. Where there is no date, and the payment is directed to be made ſo many days *after* date, the date is taken to be the day on which it iſſued.

Bellaſis v. Heſter, Ld. Raym. 281. Coleman v. Sayer, Str. 829.

A cuſtom has obtained among merchants, that a perſon to whom a bill is addreſſed, ſhall be allowed a little time for payment, beyond the term mentioned in the bill, called days of grace. But the number of theſe days varies, according to the cuſtom of different places.

Great

Great Britain, *Ireland*, *Bergamo*, and *Vienna*, three days.

Frankfort, out of the time of the fair, four days.

Leipſick, *Naumburg*, and *Augſburg*, five days.

Venice, *Amſterdam*, *Rotterdam*, *Middleburg*, *Antwerp*, *Cologn*, *Breſlau*, *Nuremberg*, and *Portugal*, ſix days.

Dantzick, *Koningſberg*, and *France*, ten days.

Hamburg and *Stockholm*, twelve days.

Naples eight, *Spain* fourteen, *Rome* fifteen, and *Genoa* thirty days.

Leghorn, *Milan*, and ſome other places in *Italy*, no fixed number.

Sundays and holidays are included in the reſpite days at *London*, *Naples*, *Amſterdam*, *Rotterdam*, *Antwerp*, *Middleburg*, *Dantzick*, *Koningsberg*, and *France*; but not at *Venice*, *Cologn*, *Breſlau*, and *Nuremberg*. At *Hamburgh*, the day on which the bill falls due makes one of the days of grace, but it is not ſo elſewhere.

In *England*, if the laſt of the three days happen to be *Sunday*, the bill is to be paid on *Saturday*.

But bills payable at ſight, are to be paid without any days of grace.

Per Lord Mansfield, in Heylin v. Adamſon, 2 Burr. 676.

A promiſſory note, in its original form of a promiſe from one man to pay a ſum of money to another, bears no reſemblance to a bill of Exchange. When it is indorſed, the reſemblance begins, for then it is an order by the indorſer to the maker of the note, who, by his promiſe, is his debtor, to pay the money to the indorſee. This is the exact definition of a bill of exchange.

The indorſer of the note correſponds to the drawer of the bill; the maker to the drawee or acceptor; and the indorſee to the payee, or party to whom the bill is made payable.

When this point of reſemblance is once fixed, the law is fully ſettled to be exactly the ſame in bills of exchange and promiſſory notes: and as ſome confuſion has ariſen in the books from an inattention to the real analogy between them, it may be proper to obſerve, that whenever the law is reported to have been ſettled with reſpect to the acceptor of a bill, it is to be conſidered as applicable to the drawer, or, as he may, with more propriety, be called, the maker of a note; when with reſpect to the drawer of a bill, then to the firſt indorſer of the note: the ſubſequent indorſers and indorſees bear an exact reſemblance to one another.

Vide 23 Geo. 3. c. 49.

Till the twenty-third of *George* III, theſe notes and bills were written on a plain piece of paper unſtamped: by a ſtatute made in that year, certain duties were impoſed on every piece of vellum, parchment, or paper, on which bills and notes, falling under certain deſcriptions, ſhould be written, engroſſed, or printed. By a ſubſequent act theſe duties are taken off, and others impoſed in their ſtead.

31 Geo. 3. c. 25. § 1.

By this latter ſtatute, the duties on inland bills and notes vary according to the different claſſes into which they are diſtributed, by the proviſions of the ſame ſtatute.

One diſtinction is marked between thoſe in which the ſum expreſſed does *not* exceed 200*l.*, and thoſe in which it *exceeds* that ſum.

Of thoſe in which the ſum does *not* exceed 200*l.* there are two general diviſions; thoſe payable on *demand*, and thoſe payable *otherwiſe* than on demand.

Of thoſe payable on *demand* a diſtinction is made between bills of exchange, drafts, or orders, for the payment of money on *demand*, and *promiſſory* notes, or *other* notes for the payment of money to the *bearer* on *demand*.

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The latter kind may be re-iſſued without being ſubject to the duty a ſecond time; and the holder has the ſame remedy for the recovery of the ſum expreſſed in them, after their being re-iſſued, as he would have had at firſt. But of theſe there are two claſſes—thoſe which may be re-iſſued from time to time, after payment at the place *where they were firſt iſſued*; and thoſe which may be re-iſſued from time to time, after payment, *at the ſame place*, or *any other place*, than where they were firſt iſſued. The firſt may be for ſums not exceeding 200*l.*, the ſecond for ſums not exceeding 30*l.* *Vide* § 7, 8, 9.

Duties on Bills of Exchange, Drafts, or Orders, for the Payment of Money on demand. *Vide* § 2.

							s.	d.
For any ſum	amounting to	40*s.*	not exceeding	5	guineas		0	3
———	exceeding	5	guineas, —— £.	30		-	0	6
———	exceeding £.	30	—— ——	50		-	0	9
———	exceeding	50	—— ——	100		-	1	0
———	exceeding	100	—— ——	200		-	1	6
For any ſum	from -	200	upwards -	-		-	2	0

Duties on Bills of Exchange, Drafts, or Orders, payable *otherwiſe* than on demand, and Promiſſory Notes, or *other* Notes, payable otherwiſe than to the *bearer* on *demand*.

						s.	d.
For any ſum	amounting to	40*s.*	not exceeding £.	30	-	0	6
———	exceeding £.	30	—— ——	50	-	0	9
———	exceeding	50	—— ——	100	-	1	0
———	exceeding	100	—— ——	200	-	1	6
For any ſum	from -	200	upwards -	-	-	2	0

Duties on Promiſſory or *other* Notes payable to the *bearer on demand*, and re-iſſuable from time to time, after payment at the place where they were firſt iſſued.

						s.	d.
For ſums	amounting to	40*s.*	not exceeding	5	guineas	0	3
———	exceeding -	5	guineas —— £.	30	-	0	6
———	exceeding £.	30	—— ——	50	-	0	9
———	exceeding	50	—— ——	100	-	1	0
———	exceeding	100	—— ——	200	-	1	6

Duties on Promiſſory Notes, or *other* Notes, for the payment of money to the *bearer on demand*, re-iſſuable from time to time after any payment at the *ſame* place, or any *other* place than where they were firſt iſſued.

With reſpect to Foreign Bills, drawn here in ſets, according to the cuſtom of merchants, every Bill of each ſet is ſubject to a ſtamp duty as under.

						s.	d.
For ſums not exceeding £.	100	-	-	-		0	6
For ſums exceeding -	100	not exceeding £.	200			0	9
——— ——— ———	200	-	-			1	0

The

§ 2. The duties are payable by the drawers or makers of the bills or notes
§ 19. reſpectively; and the ſheet or piece of vellum or parchment, or the ſheet or piece of paper, on which the bills or notes are engroſſed, written, or printed, muſt be ſtamped *before* theſe are drawn; and the commiſſioners and their officers are prohibited from ſtamping any vellum, *&c.* at any time *after* any bill of exchange, promiſſory note, or other note, draft, or order, ſhall be engroſſed, written, or printed thereon

And it is enacted, that no bill of exchange, promiſſory note, or other note, draft, or order, liable to the duties, ſhall be pleaded or given in evidence in any court, or admitted in any court to be good, uſeful, or available in law or equity, *unleſs* the vellum, *&c.* on which it ſhall be engroſſed, printed, written, or made, ſhall be ſtamped with a lawful ſtamp to denote the rate or duty, or ſome higher rate or duty in the act contained.

§ 6. It is likewiſe enacted, that if any bill, *&c.* for the payment of any ſum amounting to 40*s.* or upwards, be engroſſed, *&c.* on vellum, *&c.* which ſhall not be ſtamped, *&c.* or which ſhall be ſtamped with a ſtamp of a lower denomination or value than by the act directed; there ſhall be due, anſwered, and paid to his majeſty, *&c.* the full rate or duty chargeable thereon, which ſhall be payable by and charged upon all and every perſon or perſons, ſeverally and reſpectively, who ſhall draw or make, and utter and negotiate, or cauſe to be drawn or made, and uttered and negotiated, any ſuch bill, *&c.* on ſuch vellum, *&c.* not ſtamped, or ſtamped with ſuch lower duty, his, her, and their reſpective executors, adminiſtrators, and aſſigns.

§ 10. And any perſon who ſhall write or ſign, or cauſe to be written or ſigned; or who ſhall accept or pay, or cauſe to be accepted or paid, any of theſe inſtruments, without the *proper* ſtamp, ſhall, for every offence, forfeit the ſum of 20*l.*

§ 7. A penalty of 20*l.* is alſo impoſed on any perſon who ſhall re-iſſue any of the re-iſſuable promiſſory notes, otherwiſe than is permitted by the act.

Theſe penalties may be ſued for in any of the courts at *Weſtminſter*, for
§ 24. offences committed in *England*; and in the court of Exchequer in *Scotland*, for offences committed there, by action of debt, bill, plaint, or information, in which no eſſoin, privilege, wager of law, nor more than one imparlance ſhall be allowed.

§ 25. And any juſtice of peace, reſiding near the place where the offence is committed, is authoriſed and required, on any information exhibited, or complaint made, to ſummon the party accuſed, and the witneſſes on either ſide; and, on due proof made, to give judgment for the penalty, and to iſſue his warrant for levying it on the goods of the offender; and unleſs they be redeemed within ſix days, to cauſe a ſale to be made of the goods taken under the warrant, rendering to the party the overplus, if any; and if goods cannot be found ſufficient to anſwer the penalty, to commit the offender to priſon, there to remain for the ſpace of three months, unleſs ſuch pecuniary penalty ſhall be ſooner paid and ſatisfied; but the juſtice may mitigate the penalty as he ſhall think fit, (reaſonable coſts and charges of the officers and informers, as well in making the diſcovery as in proſecuting the ſame, being always allowed, over and above ſuch mitigation,) ſo as ſuch mitigation do not reduce the penalty to leſs than a moiety over and above the ſaid coſts and charges—provided, that any one who ſhall feel himſelf aggrieved by the judgment of ſuch juſtice, may, on giving ſecurity to the amount of ſuch penalty, together with ſuch coſts as ſhall be awarded in caſe

caſe ſuch judgment ſhall be affirmed, appeal to the next general quarter ſeſſions for the county, riding, or place, which ſhall happen after 14 days next after ſuch conviction ſhall have been made, and of which appeal reaſonable notice ſhall be given, who are empowered to ſummon and examine witneſſes upon oath, and finally to hear and determine the ſame; and if the judgment be affirmed, the court may award the offender to pay ſuch coſts, occaſioned by ſuch appeal, as to them ſhall ſeem meet.

And if any one, being ſummoned to give evidence before ſuch juſtice or § 27.
juſtices, ſhall refuſe to appear, without a reaſonable excuſe to be allowed by ſuch juſtice or juſtices; or, appearing, ſhall refuſe to give evidence, every ſuch perſon ſhall forfeit the ſum of 40*s.* to be levied in the ſame manner as directed with reſpect to the other penalties.

The time limited for a common informer to ſue in is three months, ei- § 24, 25.
ther in the ſuperior courts or before juſtices of peace; and if a common informer ſue within that time, the penalties are divided in moieties between the informer and the king.

If no informer ſue within that time, then the penalties are only recover- § 28.
able in the name of his majeſty's attorney general in *England*, or advocate in *Scotland*, by information in the reſpective courts; and the whole of the penalties go to the king.

And if any perſon ſhall counterfeit, or procure to be counterfeited, any § 29.
ſtamp directed to be uſed by this act; or ſhall counterfeit or reſemble the impreſſion of ſuch ſtamp on any vellum, *&c.* or ſhall utter, vend, ſell, or expoſe to ſale, any vellum, *&c.* liable to the duties, with ſuch counterfeit mark or impreſſion, knowing the ſame to be counterfeited; or ſhall privately or fraudulently uſe any ſtamp or mark directed by this act to be uſed, with intent to defraud his majeſty, *&c.*; he ſhall be adjudged a felon, and ſhall ſuffer death as in caſes of felony, without benefit of clergy.

Drafts or orders for the payment of money to the bearer on demand, bear- § 4.
ing date on or before the day on which the ſame are iſſued, and at the place from which the ſame are drawn and iſſued, and drawn on any banker or bankers or perſon or perſons acting as a banker or bankers, and reſiding and tranſacting the buſineſs of a banker within ten miles of the place where ſuch draft or order ſhall be actually drawn and iſſued, are exempted from the duty.

And all promiſſory and other notes and bills iſſued by the Bank of *Eng-* § 5.
land are exempted from any ſtamp duty, on conſideration of the governors and company paying into the receipt of his majeſty's Exchequer and the annual ſum of 12,000*l.* by half-yearly payments.

It is alſo provided, that nothing in the preſent act ſhall be conſtrued to § 11.
give legality to any bill of exchange or promiſſory note which was not legal before.

The Earl of *Delorane* drew a bill on *Brecknock*, requeſting him to pay to Miſs *Read*, thirty-two pounds and ſeventeen ſhillings out of *W. Steward*'s money, as ſoon as he ſhould receive it; which bill *Brecknock* accepted generally. Dawkes & Ux. v. Delorane, 3 Wilſ. 207. 2 Bl. Rep. 782.

Upon *Brecknock*'s refuſing to pay, an action was brought againſt the drawer as on a bill of exchange, but judgment was given againſt the plaintiff for this among other reaſons, that it was payable out of a particular fund; and it being objected at the bar, that this bill was accepted by *Brecknock* generally, and in an unlimited manner; it was anſwered by the court, that if the bill had been drawn accordingly in a general and unlimited way, both the bill and the acceptance would have been good, but the acceptance here muſt mean that *Brecknock* accepts it to pay out of *Steward*'s money, not out of the drawer's.

And

Banbury v. Liſſet, 2 Str. 1211.

And on the ſame principle which governed theſe caſes, an order from the owner of a ſhip to the freighter, to pay money *on account of freight*, has been held to be no bill of exchange.

Pierſon v. Dunlop, Dougl. 571.

However, ſuch a bill from the freighters of a ſhip to the perſon to whom the freight is due, if good in other reſpects, would certainly not be bad becauſe it was made payable *on account of freight*, becauſe indiſputably there is a *perſonal* credit given to the drawer, the words *on account of freight* only expreſſing the conſideration for which the bill was given

M'Leod v. Snee, 2 Ld. Raym. 1481. 2 Str. 762. Barnard. 12, K. B.

And there may be caſes where the inſtrument may appear at firſt ſight to be payable out of a particular fund, and in reality be otherwiſe, of which deſcription the following caſe is one :—*A. B.* drew a bill of exchange, dated 25th of *May*, by which he requeſted *M'Leod* "one month after date, "to pay to *Snee*, or order, 9*l.* 10*s.* as his quarterly half-pay, to become "due from the 24th of *June* to the 29th of *September* next by advance." *M'Leod* accepted it, and on his refuſal to pay, was ſued in the Common Pleas, where judgment being given againſt him, he brought a writ of error in the King's Bench, and objected to the judgment that this caſe reſembled the former caſes, being payable out of a particular fund; but the court held that this bill was drawn on the particular credit of the drawer, not on that of the half-pay, for it was to be paid as ſoon as the quarter began, and whether that ſhould ever become due or not; and the mention of the quarterly half-pay was only a direction how the drawee was to reimburſe himſelf.

Burchell v. Slocock, 2 Ld. Raym. 1545. 3 Wilſ. 213. 1 Burr. 325.

Of the diſtinction taken between bills and notes in this reſpect, the following is an illuſtration :—"I promiſe to pay to *William Burchell*, the ſum "of 101*l.* 12*s.* three months after date, for value received out of the pre-"miſes in *Roſemary-lane*, late in the poſſeſſion of *Thomas Rowzer Sherwin*:" was held a good note under the ſtatute.

But a bill or note muſt be abſolutely payable at all events, and not depend on any particular circumſtance which may or may not happen in the common courſe of things.

Haydock v. Linch, 2 Ld. Raym. 1563.

Thomas Rogers made a bill of exchange, by which he requeſted *Roger Lynch* to pay to *Henry Haydock*, or order, the ſum of 14*l.* 13*s.* out of a fifth payment, when it ſhould become due: this was held not to be a good bill of exchange, on account of the uncertainty whether any fifth payment might ever become due, as well as on account of its being payable out of a particular fund.

Kingſton v. Long, B. R. M. 24 Geo. 5. Bayley. Appendix. No. 2. *Supra*, 695.

So, an order to pay money, "provided the terms mentioned in certain "letters written by the drawer were complied with," is not a good bill, though the acceptance admit a compliance with thoſe terms, for it was no bill until after ſuch compliance, and if it was not a bill when drawn, it could never afterwards become one.

Its uncertainty in this reſpect was one reaſon of the determination in the caſe of *Dawkes* againſt *Delorane*, it being an order to pay out of *Steward's* money, when received, which might never happen.

Smith v. Boheme, cited 2 Ld. Raym. 1362. 1396.

So, a note "to pay a certain ſum of money, or to render the body of "*J. S*, to priſon by ſuch a day," is not a note on which an action will lie by the ſtatute, after failure of rendering the body to priſon, becauſe it was not neceſſarily and originally for payment of money, but only became ſo by matter *ex poſt facto*.

Appleby v. Biddulph, cited 8 Mod. 363. 4 Vin. 240. pl. 16.

So, neither is a note "promiſing to pay money, if another do not pay it "within a limited time;" for this is only an eventual promiſe.

So,

(*Although it hath*) Bearderfly v. Baldwin, 2 Str. 1151. S. P.

So, a note "promiſing to pay to *A. B.* a ſum of money, value received "on the death of a particular perſon, *provided* he leave me a ſufficient ſum "to pay the ſame, *or if* I ſhall be otherwiſe able to pay it," is not good within the ſtatute, becauſe it is not abſolutely payable at all events, but depends on two contingencies, neither of which may ever happen. Roberts v. Peake, 1 Burr. 323.

In the caſe of notes, however, it is not neceſſary that the time of payment ſhould be abſolutely fixed; it is ſufficient if, from the nature of the thing, the time muſt certainly arrive on which their payment is to depend.

Thus, a note "to pay to *A.* or order, ſix weeks after the death of the "defendant's father, for value received," was held to be negotiable within the ſtatute, for there was no contingency by which it might never become payable, but it was only uncertain as to the time, which, it was ſaid, was the caſe of all bills payable after ſight. Cooke v. Colehan, 1 Str. 1217.

So, a note "payable to an infant, when he the infant ſhould come of "age," and ſpecifying the time when that was to be, *viz.* on the 12th "*June* 1750," was held to be negotiable within the ſtatute, for it would have been clearly good, if it had been made payable on the 12th of *June* 1750, which is a day certain, without mentioning that the plaintiff was then to come of age, and it is not the leſs certain from the addition of that circumſtance. *Per* Lord Mansfield. Goſs v. Nelſon, 1 Burr. 127.

Thus, "a promiſe to pay within two months after ſuch a ſhip ſhall be "paid off," will make a good note: for the paying off of the ſhip is a thing of a publick nature, and morally certain Andrews v. Franklin 1 Str. 24.

Qu. If a private ſhip?

So, "I promiſe to pay to *George Pratt*, or order, 8*l.* on the receipt of "his the ſaid *George Pratt*'s wages, due from his majeſty's ſhip the *Suffolk*, "it being in full for his wages, and prize money, and ſhort allowance mo-"ney for the ſaid ſhip," was held a good note on the authority of the laſt caſe; and there being an averment that the wages were received, the plaintiff recovered. Evans v. Underwood 1 Wilſ. 262. 263.

Neither will the addition of extraneous circumſtances vitiate a note. Thus, "I do acknowledge that Sir *Andrew Chadwick* has delivered me all "the bonds and notes for which 400*l.* were paid him on account of Colo-"nel *Synge*, and that Sir *Andrew* delivered me Major *Graham*'s receipt "and bill on me for 10*l.*, which 10*l.* and 15*l.* 5*s.* balance due to Sir *An-"drew*, I am ſtill indebted for, and do promiſe to pay;" is good. Chadwick v. Allen, 1 Str. 706.

The words "value received," being in general inſerted in bills and notes, there ſeems to have been ſome doubt, whether they were eſſential: in one caſe, where the want of theſe words was objected, a verdict was given on that account againſt the inſtrument, but that caſe ſeems to be of very doubtful authority: in a ſubſequent caſe the ſame objection was made, but as the inſtrument was clearly defective on another ground, the court gave no opinion as to this point. Banbury v. Liſſet, 2 Str. 1212. Dawkes v. Delorane, 3 Wilſ. 207.

On ſeveral occaſions it appears to have been ſaid incidentally by the court and at the bar, that theſe words are unneceſſary. Fort. 282. Barnard, K. B. 88.

8 Mod. 267. 1 Show. 5. 497. 2 Ld. Raym, 1556. 1481. Lutw. 889. 1 Mod. Ent, 310.

And the point is now fully ſettled, that they are not neceſſary; for as theſe inſtruments are always preſumed to have been made on a valuable conſideration, words which import no more cannot be eſſential. White v. Ledwick, B. R. H. 25 Geo. 3. Bayley, Appendix, N. 3.

Whether it be eſſential to the conſtitution of a bill of exchange, that it ſhould contain words which render it negotiable, as "to order," or "to "bearer," ſeems not, hitherto, to have received a direct judicial deciſion. There are two caſes in which the want of ſuch words was taken as an exception, but as there were other objections on which the bill was in both caſes held to be bad, it was not thought neceſſary to decide on that point.

Banbury v. Liſſet, 2 Str. 1212. Dawkes v. Delorane, 2 Wilſ. 212.

In another caſe the ſame exception was taken and over-ruled, but under ſuch circumſtances as that the point was not generally determined. The defendant had given the plaintiff a draught on one *Heddy*, for the payment of a ſum of money for work done by the plaintiff for the defendant: the plaintiff had neglected to demand payment for a conſiderable time after the draught was due; and in the mean time *Heddy* became inſolvent. The plaintiff brought his action for work and labour, and the defendant at the trial proved his having given this draught to the plaintiff in payment. But not being payable to the plaintiff or order, the jury conſidered it as not being a bill of exhange, and gave a verdict for the plaintiff. On an application for a new trial, the court thought it unneceſſary to decide on the general queſtion, whether words importing negotiability were eſſential to the conſtitution of a bill of exchange, becauſe they were of opinion that by accepting the draught, and keeping it ſo long after it became payable, the plaintiff had given credit to *Heddy*, and diſcharged the defendant.

Chamberlyne v. Delarive, 2 Wilſ. 353.

Per Lord Hardwicke, Moore v. Paine, Ca. temp. Hardw. 288.

Yet it has been ruled that ſuch words are not neceſſary in notes, and that the perſon to whom they are made payable may maintain an action on them, within the ſtatute, againſt the maker. And there are ſeveral caſes in the books of reports where ſuch words were omitted, and no exception taken on that account. The reaſon of this indulgence to notes may be, that they have leſs reference to trade and diſtant commerce, being properly no more than engagements between party and party; and the ſtatute being remedial, the benefit of it has been extended beyond the literal words.

It muſt alſo be obſerved, that in moſt of the caſes where the ſeveral inſtruments have been denied the privilege of bills and notes, it is not, for that reaſon, to be concluded that they are of no force: when the fund from which they are to be paid, can be proved to have been productive, or the contingency on which they depend has happened, they may be uſed as evidence of a contract, according to the circumſtances of the caſe, or according to the relation in which the parties ſtand to one another.

Maber v. Maſſias, Bl. Rep. 1072.

William Watts, a merchant, who traded to *Gibraltar*, employed *Moſes Maſſias* as his factor there, who uſed to conſign *Watts*'s goods to certain agents in *Barbary* for ſale. *Maſſias* uſed to keep an account with the agents, and another with *Watts*, but *Watts* had no communication with the agents. On the 21ſt of *May* 1772, *Watts* drew a bill in the following terms, for the balance of an account that day ſtated between him and *Maber* and *Kentiſh*, merchants, with whom he had dealings:

"Sir, pleaſe to pay to Meſſrs. *Maber* and *Kentiſh*, or order, 195*l.* 14*s.* "10*d.* out of the produce of goods you have of mine, now lying at *Gibral*- "*tar*, *Barbary*, and *Leghorn*, as ſoon as the ſame ſhall come into your "hands, after diſcharging the preſent acceptances.

"To Mr. *Moſes Maſſias*, WILLIAM WATTS."
"No. 63, *Preſcot-ſtreet*."

Which bill *Maſſias* accepted in the following words underwritten,

"I agree to conform to this order, MOSES MASSIAS."

Before this bill was paid, *Watts* became a bankrupt, and *Maſſias* refuſing payment, an action was brought againſt him for "money had and received

"to

" to the uſe of the plaintiff." On the trial it appeared, that *Maſſias* had large quantities of goods of *Watts* in his hands in 1773, to the amount of 1657*l.* and more in 1772. That he had paid large ſums for *Watts*, but whether for engagements prior to 1772, or not, did not appear.

The defendant gave evidence of ſeveral prior engagements, but theſe did not cover the whole account; and alſo that there was, at the time of acceptance, and ſtill remained, a balance due to *Maſſias* himſelf of 870*l.* There was a verdict for the plaintiff; and an application being made by the defendant for a new trial, the court obſerved that the queſtion was, Whether the defendant had in his hands 195*l.* for the uſe of the plaintiff? He was proved to have had goods to the amount of 1657*l.*, and that his acceptances, in the common and technical ſenſe of the words, as applied to bills of exchange, together with certain other indorſements by which he had engaged himſelf to pay money for *Watts*, left a balance in his hands more than ſufficient to pay the plaintiffs; if the balance of 870*l.* due to *Maſſias* himſelf, be excluded. For this balance, then unliquidated, it never could have been meant to provide, nor was it meant that the bill or its acceptance ſhould be ſubject to it, for then there would have been fraud in the drawer, and alſo in the acceptor; both knew, or muſt be ſuppoſed to have known, at leaſt *Maſſias* knew how the balance then ſtood. If he meant to have reſerved his own balance, he ſhould have made a ſpecial acceptance; but having accepted it generally in the terms of the draft, ſubject only to prior acceptances, he ſhall not ſhelter himſelf by this concealed balance due to himſelf in the courſe of a running account.

It having been found by experience, that trade and commerce ſuffered materially from the circulation of bills, notes, and drafts for very ſmall ſums, which paſſed as caſh, and many of them being made payable under certain terms and reſtrictions with which the poorer ſort of manufacturers, artificers, labourers, and others could not comply, without ſubjecting themſelves to great extortion and abuſe, the legiſlature has thought proper to lay certain reſtraints on bills or notes under a limited ſum. *Vide* Preamble to ſt. 15 Geo. 3. c. 51.

All notes and bills for the payment of any ſum under twenty ſhillings, which had been iſſued *before* the 24th of *June* 1775, were made payable on demand. 15 Geo. 3, c. 51. § 8.

Notes and bills for leſs than twenty ſhillings, iſſued *after* the 24th of *June* 1775, are declared void. And any perſon publiſhing or uttering ſuch bills or notes, or in any manner engaged in the negotiation of them, is liable to a penalty of not more than 20*l.* nor leſs than 5*l.*, to be recovered and applied in the manner pointed out by the act, which was to continue for five years. § 1. § 2. § 13.

The good effects of this act being found, further proviſions for the ſame purpoſe were made by another two years after. 17 Geo. 3. c. 30.

All promiſſory or other notes, bills of exchange, or drafts, or undertakings in writing, being negotiable or transferable, for the payment of 20*s.*, or for any ſum of money above that ſum and leſs than 5*l.*, or on which 20*s.*, or above that ſum, and leſs than 5*l.*, ſhall remain undiſcharged, iſſued after the firſt of *January* 1778, ſhall ſpecify the names and places of abode of the perſons reſpectively to whom or to whoſe order they ſhall be made payable; ſhall bear date before or at the time of drawing or iſſuing them, and not on any ſubſequent day; ſhall be made payable within the ſpace of twenty-one days next after the day of the date; and ſhall not be transferable or negotiable after the time limited for the payment: and every indorſement ſhall be made before the expiration of that time, and bear § 1.

date at or before the time of making it, and ſhall ſpecify the name and place of abode of the perſon or perſons to whom or to whoſe order the money is to be paid: and the ſigning of every ſuch note, *&c.*, and alſo every indorſement, ſhall be atteſted by one ſubſcribing witneſs at the leaſt; and all notes, *&c.* of the above deſcription not having theſe requiſites ſhall be utterly void.

§ 2. The ſame penalties, recoverable in the ſame way as in the former act, are impoſed on every one uttering, publiſhing, or negociating ſuch notes, *&c.* without the requiſites preſcribed.

§ 3. And all negotiable notes, *&c.* iſſued before the 1ſt of *January*, for any ſum between the ſum of 20*s.* and 5*l.*, or on which 20*s.* or leſs than 5*l.* remained undiſcharged, are made payable on demand.

§ 4. And this act and the former act are continued not only for the reſidue of the five years of the former, but alſo for other five years.

27 Geo. 3. c. 16. And by a ſubſequent ſtatute, both the former are made perpetual.

3. Who ſhall be ſaid liable to the Payment thereof; and therein of ſuing the Drawer, Indorſer, or Acceptor.

Neither is the engagement of an indorſor diſcharged by an ineffectual *execution* againſt the drawer, or any prior or ſubſequent indorſor.

Hayling v. Mulhall, 2 Bl. Rep. 1235. A bill was indorſed by *Sheridan*, and afterwards by one *Boon*, and came into the hands of *Hayling*, who ſued *Boon*, and took him in execution, and afterwards let him out on a letter of licence without paying the debt. He then ſued *Sheridan*, and held him to bail: *Sheridan* not paying the bill, *Hayling* brought a third action againſt *Mulhall*, one of the bail, who inſiſted that the debt was ſatisfied by the impriſonment of *Boon*. But it was obſerved by the court, that each indorſor is independent of the reſt, and that the bill-holder had a right to ſue all the indorſors till the bill was ſatisfied: the law indeed ſo highly regards the liberty of the ſubject, that the taking of his body in execution is, with reſpect to him, a full ſatisfaction of the debt. But it only operates as a diſcharge to the identical perſon ſo impriſoned; it does not diſcharge even his goods after his death, ſince the ſtatute of *James* the Firſt. The remedy ſtill remains, after the death or diſcharge, againſt every other indorſor.

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(*It hath been*) And it is now ſettled, that to entitle the indorſee to recover againſt the indorſor of an *inland* bill of exchange, it is not neceſſary to demand the money of the firſt drawer. Heylin v. Adamſon, 2 Burr. 669.

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(*Indorſement is a*) But a blank indorſement will transfer the property, and is more frequent than an indorſement in full. Its effect is, to render the bill or note afterwards transferable by delivery only as if it were payable to bearer, for by only writing his name, the indorſor ſhews his intention that the inſtrument ſhould have a general currency, and be transferred by every poſſeſſor. Dougl. 633. 639.

(*So, if A having*) Hence, a man to whom a bill was delivered with a blank indorſement, and who carried it for acceptance, was admitted, in an action of trover for the bill againſt the drawer, to prove the delivery of it to the latter. Lucas v. Haynes, 1 Salk, 130. 2 Ld. Raym. 871.

(*As to the*) It is abſurd to indorſe them: they paſs merely by tranſfer. *Vide infra.*

Miller v. Race, 1 Burr. 452. A bank note for 21*l.* 10*s.* payable to one *William Finney*, or bearer, on demand, was ſent by *Finney* under convoy by the general poſt to his correſpondent in *Oxfordſhire*; the mail on the ſame night was robbed, and this

this note among others taken and carried away by the robber; it afterwards came into the poſſeſſion of one *Miller*, an innkeeper, for a full and valuable conſideration, in the uſual courſe of his buſineſs, without any notice or knowledge of its having been taken out of the mail. *Finney*, hearing of the robbery, applied to the bank to ſtop the payment of this note, which was ordered, on his entering into ſecurity to indemnify the bank: *Miller* afterwards preſented the note for payment, and delivered it to *Race*, a clerk of the bank, who refuſed either to pay it, or redeliver it. *Miller* brought an action of trover againſt *Race*, for the recovery of the note; and a caſe ſtating theſe circumſtances coming before the court, it was held, that the plaintiff was entitled to recover; becauſe there appeared no circumſtance of colluſion in him; he had taken the note in the uſual courſe of his buſineſs, for a valuable conſideration, and the currency of theſe notes and the nature of trade required that the fair holder ſhould be protected even againſt the true owner, who could only recover them back from the finder, or any other perſon who had given no value for them.

Vaughan, a merchant in *London*, gave to *Bicknell*, one of his ſhips huſbands, a draft on his banker, Sir *Charles Aſgill*, payable to ſhip *Fortune*, or bearer: *Bicknell* loſt the draft: the perſon who found it, or at leaſt was in poſſeſſion, however he might have obtained that poſſeſſion, went four days after the note was payable, to the ſhop of *Grant*, a tradeſman at *Portſmouth*, and having bought ſome tea, gave him the note in payment, and deſired to have the balance. *Grant* ſtepped out to make inquiry who *Vaughan* might be, and being informed he was a reſponſible man, and that the note was in his hand-writing, gave the charge out of the note, retaining the price of the tea. *Vaughan* being appriſed that *Bicknell* had loſt the note, ſent notice to Sir *Charles Aſgill* not to pay it. Payment being accordingly refuſed, *Grant* brought his action againſt *Vaughan* as the drawer. The cauſe was tried by a ſpecial jury of merchants, who found for the defendant. On an application for a new trial, the court held, that theſe notes were transferable by mere delivery, and however the true owner may have loſt them, the fair poſſeſſor for a valuable conſideration was entitled to the money, and therefore granted a new trial. Grant v. Vaughan, 3 Burr. 1516. 1 Bl. Rep. 485.

The ſame principle applies to the caſe of a bill negotiated with a blank indorſement.

A bill was drawn at *Halifax*, by *Rhodes* and another, on *Smith*, *Payne*, and *Smith*, bankers in *London*, payable to *William Ingham*, or order, thirty-one days after date, for value received. *Ingham* indorſed it in blank; *John Daltry* received it from him, and indorſed it in the ſame manner, and delivered it to *Joſeph Fiſher*; it was ſtolen from *Fiſher at York*, without any indorſement by him: *Peacock*, a mercer at *Scarborough*, afterwards received it from a man unknown, who called himſelf *William Brown*, and by that name indorſed it to *Peacock*, of whom he bought cloth and other articles in the way of his trade as a mercer, and gave him that bill in payment, receiving the balance in caſh and ſmall bills: it appeared, that *Peacock* did not know the drawers, but had, ſeveral times before that, received bills drawn by them, which were duly paid. *Peacock* tendered this bill for acceptance and payment to the drawees, who refuſed; on which he brought an action as the indorſee of *Ingham* againſt the drawers. A verdict by conſent was found for the plaintiff, ſubject to the opinion of the court of King's Bench, on a ſpecial caſe ſtating the preceding facts. The court held, that there was no difference between a bill or note indorſed blank, and one payable to bearer. They both paſs by delivery, and poſſeſſion Peacock v. Rhodes et al. Dougl. 613.

ſeſſion proves property in both caſes. The holder of either cannot with propriety be conſidered as aſſignee of the payee. An aſſignee muſt take the thing aſſigned, ſubject to all the equity to which the original party was ſubject: if this rule were applied to bills and notes, it would ſtop their currency; it would render it neceſſary for every indorſee to inquire into all the circumſtances, and the manner in which the bill came to the indorſor: but the law is now clearly ſettled, that a holder coming fairly by a bill or note, is not to be affected with the tranſaction between the original parties, except in ſuch caſes as depend on particular acts of parliament.

But a transfer by indorſement, where that is neceſſary, can only be made by him who has a right to make it, and that is ſtrictly only the payee, or the perſon to whom he or his indorſees have transferred it, or ſome one claiming in the right of ſome of theſe parties.

Where a bill or note is drawn in favour of two or more in partnerſhip with one another, an indorſement by one will bind both, if the inſtrument concern their joint trade: ſo, where it is in favour of them *or* either of them, an indorſement by one is a ſufficient transfer, though they be not in partnerſhip.

Corvick v. Vickery, Dougl. 653. in the notes.

So, where a bill drawn by two is made payable to them or their order, it would ſeem from principle that either might transfer without the other; for when two perſons join in the ſame bill, they hold themſelves out to the world as partners, and, for that purpoſe are to be treated as ſuch; and when a bill goes out into the world, the perſons to whom it is negotiated are to collect the ſtate and relation of the parties from the bill itſelf. If they appear on the bill as partners, it may be of leſs public detriment to ſubject them to the inconvenience of being treated as ſuch, than to permit them to deny that they are ſo. But there is an univerſal uſage among all the bankers and merchants in *London*, that in ſuch a caſe, an indorſement by one of the payees only is void.

If a man become bankrupt, the property of bills and notes of which he is the payee or indorſee, veſts in his aſſignees, and the right to transfer is in them. And if in fact he indorſe a bill or note after his bankruptcy, and that be diſcovered before it be paid, the aſſignees may recover it back from his indorſee in an action of trover; and if the money be received, they may recover the money in an action for ſo much money paid to their uſe.

Beawes, 469, 470.

Rawlinſon v. Stone, 3 Wilſ. 1. 2 Str. 1260. 2 Barnes, 137. cited 2 Burr. 1225. 1 Term Rep. 487.

If he die, it devolves to his perſonal repreſentatives, his executors, or adminiſtrators; and they may indorſe it, and their indorſee maintain an action, in the ſame manner as if the indorſement had been by the teſtator or inteſtate. But on their indorſement they are liable perſonally to the ſubſequent parties, and not as executors; for they cannot charge the effects of the teſtator.

King, Ex. v. Thorn, 1 Term Rep. 487. *Vide* alſo 10 Mod. 315.

They may alſo be the *indorſees* of a bill or note in their quality of executors or adminiſtrators; as, where they receive one from their teſtator or inteſtate, and in that character they may bring an action on it againſt the acceptor or any of the other parties.

1 Ld. Raym. 575. 3 Term Rep. 80.

A bill or note may be indorſed at any time after it has iſſued, even after the day of payment. However, the indorſement of a note after it is due, throws a degree of ſuſpicion upon it, and in an action againſt the maker by the indorſee, the former is in ſuch caſe entitled to go into evidence to ſhew, that the note has been paid as between him and the indorſer.

In

In an action by an indorſee of a promiſſory note, payable on demand, againſt the maker, the defendant was admitted to give evidence, that the note had been indorſed to the plaintiff a year and a half afterwards; and to impeach the conſideration, by ſhewing that it had originally been given for ſmuggled goods; and that payments had been made upon it at ſeveral times. There was no privity brought home to the plaintiff, but Mr. J. *Buller* was of opinion, that he ought to be nonſuited; for he ſaid, it had been repeatedly ruled at *Guildhall*, that wherever it appears, that a bill or note has been indorſed over ſome time after it is due, which is out of the uſual courſe of trade, that circumſtance throws ſuch a ſuſpicion on it, that the indorſee muſt take it on the credit of the indorſor, and muſt ſtand in the ſituation of the perſon to whom it was payable; and here, the conſideration was illegal. He therefore nonſuited the plaintiff. Banks v. Colwell, at Launceſton Spring Aſſizes, 1788.

In an action by an indorſee to a promiſſory note againſt the maker, it appeared, that the note was indorſed ſome time after it was due, and there were many circumſtances which led the court and jury to conclude that it was fraudulently obtained; whereupon a verdict was found for the defendant. Upon a motion for a new trial, it was refuſed on the merits, and *Buller* J., at the ſame time ſaid, it has never been determined, that a bill or note is not negotiable after it becomes due; but if there are any circumſtances of fraud, and it comes into the hands of a plaintiff by indorſement after it is due, I have always left it to the jury upon the ſlighteſt circumſtance to preſume, that the indorſee was acquainted with the fraud. The reſt of the court concurred in this opinion. Taylor v. Mather, Eaſt. 27 G. 3. B. R. 3 Term Rep. 83. note.

In an action by an indorſee of a promiſſory note againſt the maker, the plaintiff reſted his caſe upon the proof of the maker's and payee's handwriting. The note appeared on the face of it to have been drawn on the 6th of *October* 1788, payable to *Sandal* or order, and to have become due on the 13th of *November*: it had *Sandal*'s indorſement upon it, and had been noted for non-payment. Whereupon the defendant's counſel offered to prove theſe facts; that *Sandal*, having indorſed it in blank, delivered it to *Taddy*, by whom it had been noted for non-payment. That on the 6th of *December*, *Sandal*, having been paid by the defendant, the maker of the note, took it up from *Taddy*, and afterwards, without the knowledge or conſent of the defendant, negotiated it to the plaintiff. But Lord *Kenyon*, being of opinion that, unleſs knowledge was brought home to this plaintiff, it would make no difference between theſe parties, rejected the evidence, and the plaintiff had a verdict. Upon a motion for a new trial, his Lordſhip concurred with the reſt of the court in granting it, confining himſelf however to this ground, that the note appeared to be noted for non-payment at the time the plaintiff received it. Brown v. Davies, 3 Term Rep. 80.

It is no objection to the claim of an indorſee, that the indorſement to him does not contain the words "to order."

Manning had given a promiſſory note to *Statham* or order; *Statham* aſſigned it to *Witherhead*, and *Witherhead* to *More*, who, on non-payment at the time, brought an action againſt *Manning*: on a demurrer to the declaration, exception was taken, that the aſſignment to *Witherhead* was made without ſaying to him or order, and that therefore he could not aſſign it over to *More*. But it was held by the whole court, that the indorſement was ſufficient; for if the original note be aſſignable, then, to whomſoever it may be aſſigned, he has the whole intereſt in it, and may aſſign it as he pleaſes; an aſſignment to him comprehends his aſſigns. More v. Manning, Comyns, 311. in C. B. Hil. 6 G. 1. cited 2 Burr. 1222.

In

Acheſon v. Fountain, Mich. 9 G. 1. B. R. 1 Str. 457. cited 2 Burr. 1223.

In another caſe the plaintiff had declared on an indorſement made by *William Abercrombie*, by which he appointed the payment to be to *Louiſa Acheſon*, "or order;" on the bill being produced in evidence, it appeared to be originally made payable to *Abercrombie*, or order, but *Abercrombie's* indorſement was only this. "Pray pay the contents to *Louiſa Acheſon*." "It was objected, that the indorſement did not agree with the declarati- "on." The court however gave judgment, on the ground of a general propoſition in law, that a bill is negotiable without the addition of thoſe words to the indorſement; the legal import of ſuch indorſement being, that the bill was payable to order, and that the plaintiff might on this have indorſed it over to another, who would have been the proper order of the firſt indorſor.

Edie v. Eaſt India Company. 2 Burr. 1216. 1 Bl. Rep. 295.

Colonel *Clive* drew a bill, payable to Mr. *Cambell*, or order, on the *Eaſt India* Company, who accepted it; Mr. *Cambell* indorſed it to Mr. *Robert Ogilby*, but the words "or order" being originally omitted, were afterwards inſerted by another hand before the trial: *Ogilby* indorſed it over to Meſſrs. *Edie* and *Laird*, or order, and afterwards, before the payment, became inſolvent: *Edie* and *Laird* brought an action againſt the Company as acceptors, who refuſed payment, on pretence that *Ogilby* had no right to aſſign to the plaintiffs: the real queſtion was, Who ſhould bear the loſs, Mr. *Cambell* or the plaintiffs? for the *Eaſt-India* Company, if they did not pay to the plaintiffs, muſt pay to Mr. *Cambell*. The court were clearly of opinion, that the plaintiffs had a right to recover; that the law was ſettled by the two laſt caſes; that ſuch an indorſement as that to *Ogilby* was good, and gave the indorſee a right of indorſing over.

2 Burr. 1227. Dougl. 639.

Yet an indorſement may be reſtrictive, and then it operates to preclude the perſon to whom it is made from transferring the inſtrument to another, ſo as to give him a right of action, either againſt the perſon impoſing the reſtriction, or againſt any of the preceding parties; it may give a bare authority to the indorſee to receive the money for the indorſor; as if to ſay, "Pray pay the money to ſuch a one for my uſe," or uſe ſuch other expreſſions as neceſſarily import that he does not mean to transfer his intereſt in the bill or note, but merely to give a power of receiving the money. In ſuch a caſe it would be clear that no valuable conſideration had been paid; but the intention of reſtraint muſt appear on the face of the indorſement.

Dougl. 640.

So, if the payee direct by indorſement, that "the within muſt be cre- "dited to the account of a third perſon." This is not a transfer of the bill to that third perſon, but only an authority to the drawees to give him credit for ſo much; the payee does not mean to make himſelf liable as indorſor, or to enable the other to raiſe money on the bill.

And, if in ſuch a caſe the drawee accept the bill, inſtead of cancelling it, and an indorſement be forged and the bill negotiated, the party who ſhall advance money on it muſt ſuſtain the loſs; and if afterwards a friend of the drawer, by miſtake, pay the bill for his honour, the drawer may recover back the money, in an action for money had and received to his uſe; for it was the duty of the party advancing the money on the bill to read the ſpecial indorſement, and he muſt ſuffer for his negligence.

Ancher v. Bank of England, Dougl. 637.

Thus, where a bill was drawn by a houſe in *Denmark* on a houſe in *London*, payable to a perſon reſiding in *Denmark*, or his order, and the payee made ſuch a ſpecial indorſement; the drawees accepted and gave notice to the drawers and to the perſon in whoſe favour the indorſement was made, that they had received the bill, and placed it to the account of the latter; the clerk of the acceptors forged an indorſement to himſelf, or order, from the

the perſon to whoſe account the money was to be credited, and diſcounted it at the bank; the acceptors failed before the day of payment, and a friend of the drawers went to the bank and paid the bill for their honour: the drawers afterwards recovered back the money from the bank, on the ground that this ſpecial indorſement reſtrained the negotiability of the bill, and that the money was paid by miſtake.

An indorſement may be made on a blank note, before the inſertion of any date or ſum of money, in which caſe, the indorſor is liable for any ſum, at any time of payment that may afterwards be inſerted; and it is immaterial whether the perſon taking the note on the credit of the indorſement knew whether it was made before the drawing of the note or not; for in ſuch a caſe the indorſement is equivalent to a letter of credit for any indefinite ſum.

One *Galley* having had frequent money tranſactions with *Ruſſel* a banker, and having overdrawn his caſh account, *Ruſſel* ſuſpecting his credit, refuſed to advance him any more money, without the addition of the name of ſome indorſor of whom he ſhould approve: on this *Galley* applied to *Langſtaffe*, who indorſed his name on five copperplate checks, made in the form of promiſſory notes, but in blank, that is, without any ſum, date, or time of payment, mentioned in the body of the notes. *Galley* afterwards filled up the blanks with different ſums and dates, and *Ruſſel* diſcounted the notes. *Galley* becomes a bankrupt, and *Ruſſel* demanded payment of *Langſtaffe*, and, on his refuſal, brought an action, in which the court thought he was entitled to recover, though it appeared that he knew the notes were blank at the time of the indorſement. Ruſſel v. Langſtaffe, Dougl. 514.

It is ſaid, that on a transfer by delivery, the perſon making it ceaſes to be a party to the bill or note; that ſuch a transfer is a ſale, and that he who ſells it, does not become a new ſecurity, and is not liable to refund the money if the bill ſhould not be paid. Bank of England v. Newman, 1 Ld Raym. 442.

12 Mod. 241. Lambert v. Pack, 1 Salk. 128. 7th reſolution.

But this can only be true to its full extent when applied to the caſe of a demand by a ſubſequent party, when one or more have intervened between him and the party againſt whom he makes the demand: as between the immediate parties to the tranſfer, this diſtinction muſt be taken, that when the bill or note has been given in payment of a precedent debt, or for a valuable conſideration at the time of the tranſfer, without being diſcounted; then, though the perſon who has given the money for the bill or note cannot recover againſt the perſon who received it, as indorſor, yet he may certainly recover in an action for money had and received for his uſe, as the tranſferrer muſt be underſtood to undertake that the bill ſhall be duly paid. But if the bill or note be *diſcounted* for the accommodation of the tranſferer, then the tranſfer is a ſale, and the doctrine here laid down will apply. Kyd on Bills of Exch. 90.

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(*It ſeems clear*) See *acc.* Julian v. Shobrooke, 2 Wilſ. 9. In Pillans v. Van Mierop, *per* Lord Mansfield, 3 Burr. 1672. Sproat v. Mathews, 1 Term Rep. 182.

A drawee of a bill underwrote it thus: "Mr. *Jackſon*, pleaſe to pay "this bill, and charge it to Mr. *Newton*'s account." It was contended, that this was not an acceptance, for that the party did not mean to become the principal debtor. It was only a direction to *Jackſon*, to pay out of a particular fund. But the court held, that the underwriting being a direction to pay the ſum, it was of no importance to what account it was to be placed Moor v. Withy, Tr. 10 Geo. 3. B. R. Bull. N. P. 270.

placed when paid: that was a tranſaction between the parties themſelves, and this was a ſufficient acceptance.

Powell v. Monnier, 1 Atk. 611.

A bill was ſent to the drawee for acceptance; he kept it for ten days before it became due without any objection; and whilſt it continued in his hands, he entered it in his bill-book, under a particular number and wrote the number on the bill, and at the bottom the day when it would become due, and then ſent it back, refuſing to accept it: it was proved, that it was the common practice of the drawee to enter and mark all bills in the ſame manner, whether he intended to accept them or not: the court ſeemed to think, that theſe circumſtances alone did not amount to an acceptance.

Smith v. Niſſen, 1 Term Rep. 269.

If a merchant be deſired to accept a bill on the account of another, and to draw on a third, in order to reimburſe himſelf, and in conſequence he draw a bill on that third perſon; the bare act of drawing this bill will not amount to an acceptance of the other, for the party evidently ſhews he meant only to make himſelf liable, in caſe the bill drawn by him ſhould be accepted and paid.

Beawes, 466.

An agreement to accept or honour a bill will, in many caſes, be equivalent to an acceptance, and whether that agreement be merely verbal or in writing is immaterial: if *A.*, having given or intending to give credit to *B.*, write to *C.* to know whether he will accept ſuch bills as ſhall be drawn on him on *B.*'s account, and *C.* return for anſwer that he will accept them; this is equivalent to an acceptance, and a ſubſequent prohibition to draw on him on *B.*'s account will be of no avail, if, in fact, previous to that prohibition, the credit has been given.

Pillans v. Van Mierop, 3 Burr. 1663.

White, a merchant in *Ireland*, deſired to draw on the plaintiffs, *Pillans* and *Roſe*, merchants at *Rotterdam*, for 800*l.* payable to one *Clifford*, and propoſed to give them credit on a good houſe in *London* for their reimburſement, or any other mode of reimburſement: the plaintiffs, in anſwer, deſired a confirmed credit on a houſe of rank in *London*, as the condition of their accepting the bill: *White* named the houſe of the defendants as that houſe of rank: the plaintiffs honoured the draft, and paid the money, and then wrote to the defendants, *Van Mierop* and *Hopkins*, merchants in *London*, deſiring to know whether they would accept ſuch bills as the plaintiffs ſhould in about a month's time draw on their houſe for 800*l.* on the credit of *White*: the defendants agreed to honour the bill; but, before it was drawn, *White* failed, and then the defendants wrote to the plaintiffs, informing them that *White* had ſtopped payment, and deſiring them not to draw, as they could not accept their draft. The plaintiffs however drew, holding the defendants not at liberty to retract their engagement. And ſo held the court of King's Bench.

Beawes, 454. Pierſon v. Dunlop, Cowp. 572. 574. 1 Atk. 711. Powell v. Monnier. Maſon v. Hunt, Doug. 286. 299.

The mere anſwer of a merchant to the drawer that he will "duly honour his bill," is not of itſelf an acceptance, unleſs accompanied with circumſtances which may induce a third perſon to take the bill by indorſement: but if there be any ſuch circumſtances, it may amount to an acceptance, though the anſwer be contained in a letter to the drawer.

And an agreement to accept may be expreſſed in ſuch terms as to put a third perſon in a better condition than the drawer. If one man, to give credit to another, make an abſolute promiſe to accept his bill, the drawer, or any other perſon, may ſhew ſuch promiſe on the exchange, to procure credit, and a third perſon advancing his money on it, has nothing to do with

with the equitable circumſtances which may ſubſiſt between the drawer and acceptor.

3. *Whether an Acceptance may be qualified.*

The acceptance may direct the payment to be made at a place different from that mentioned in the bill, as, at the houſe of a banker; in which caſe, if the holder neglect to demand payment within a reaſonable time, and the banker afterwards fail, he muſt ſtand to the loſs. Biſhop v. Chitty, 2 Str. 1195.

But if the banker continue ſolvent, the holder is not bound to prove a demand on the banker in an action againſt the acceptor. Smith v. Delafontaine, B. R. Trin. 25 Geo. 3. Bayley App. No. 5.

An acceptance may alſo be "to pay when certain goods conſigned to "the acceptor, and for which the bill is drawn, ſhall be ſold;" for it would affect trade if factors were not allowed to uſe this caution when bills are drawn on them, before they have an opportunity to diſpoſe of the goods. Smith v. Abbot, 2 Str. 1152.

So, an acceptance "on account of the ſhip *Thetis* when in caſh for the "ſaid veſſel's cargo" is ſufficient to bind the acceptor. Julian v. Shebrooke, 2 Wilſ. 9.

On the ſame principle, an acceptance "to pay as remitted from the "place where the perſon on whoſe account the acceptance is made re-"ſides," ſeems binding after the remittance made. Banbury v. Liſſet, 2 Str. 1212.

But what ſhall be conſidered as an abſolute or conditional acceptance is a queſtion of law to be determined by the court, and is not to be left to the jury. 1 Term Rep. 182.

A bill was drawn in *New England* for a ſum of money advanced there, for the repairs of a ſhip, of which *Lutwidge*, the drawee, reſiding at *Whitehaven*, was the freighter. *Wilkinſon*, the holder of the bill, applied to a merchant in *London*, to ſend the bill to *Lutwidge* for acceptance: the merchant ſent it incloſed to the drawee, who by letter acknowledged the receipt, and wrote thus: "The bill which you ſent me I will pay, in caſe "the owners of the *Queen Ann* do not; and they living in *Dublin*, I muſt "firſt apply to them; I hope to have their anſwer in a week or ten days: "I do not expect they will pay it, but I judge it proper to take their ad-"vice before I do, with which I requeſt you will acquaint Mr. *Wilkinſon*, "and that he may reſt ſatisfied of the payment." In another letter he wrote, "I have not had an opportunity of ſending the bill to *Ireland*, but "will take the firſt opportunity, and then will remit to the gentlemen con-"cerned, according to the promiſe." The bill not being paid, an action was brought againſt *Lutwidge*, as acceptor, in which he inſiſted that theſe letters did not amount to an abſolute acceptance, but were only conditional, to pay in caſe the owners of the *Queen Ann* did not; and that his promiſe to procure payment from them was in favour of the plaintiff; but the Chief Juſtice thought it was rather in favour of himſelf; that the letters were a complete acceptance, and amounted to this; that he wiſhed the holder of the bill to give him time to write to *Ireland*, but aſſured him that at all events the money ſhould be ſecured, whether the owners of the *Queen Ann* paid it or not. Wilkinſon v. Lutwidge, 1 Str. 648. Raymond.

A bill was drawn on *Mathews*, payable to one *Lenox*, or order, and by indorſement came into the hands of *Sproat*: *Sproat*'s clerk preſented the bill for acceptance to *Mathews*, who lived in *London*, and who told him, "that the drawer had conſigned a ſhip and cargo to him and another per-"ſon Sproat v. Mathews, 1 Term Rep. 182.

" ſon in *Briſtol*; but as he could not tell whether the ſhip would arrive at " *London* or *Briſtol*, he could not accept at that time:" the clerk, by the " conſent of *Mathews*, left the bill, and afterwards called, in company with his maſter, to know whether *Mathews* would accept the bill or not; who, on being preſſed, declared " the bill was a good one, and would " be paid, even if the ſhip were loſt."

The court held that this was only a conditional, not an abſolute acceptance. *Mathews* had three events in contemplation; the arrival of the ſhip at *Briſtol*, her arrival at *London*, or her being loſt: if the ſhip arrived in *London*, the cargo being conſigned to him, he would have effects to reimburſe himſelf; if ſhe were loſt, he had the policy of inſurance, by which he could indemnify himſelf by recovering againſt the underwriters; but if ſhe arrived in *Briſtol*, the cargo was conſigned to another, he would have no effects: in either of the former events he meant to accept the bill; in the latter he did not.

Vide Dougl. 286. If the acceptance be in writing, and the drawee intends that it ſhould be only conditional, he muſt be careful to expreſs the condition in writing as well as the acceptance; for if the acceptance ſhould, on the face of it, appear to be abſolute, he cannot take advantage of any verbal condition annexed to it, if the bill ſhould be negotiated and come to the hands of a perſon unacquainted with the condition, and even againſt the perſon to whom the verbal condition was expreſſed, the burden of proof will be on the acceptor.

A conditional acceptance, when the conditions on which it depends are performed, becomes abſolute.

Pierſon v. Dunlop, Cowp. 571. *Nichol* was the captain of a ſhip of which *Pierſon* was the owner. The ſhip was freighted with naval ſtores by *M Lintot*, who, being unable to diſcharge the freight, drew a bill on *Dunlop* and Co. payable fifteen days after ſight to the order of *Nichol*, and gave *Nichol* a certificate or navy bill, aſſigned to *Dunlop* and Co. as a ſecurity till the bill of exchange ſhould be accepted: *Nichol* indorſed the bill, and ſent it to *Pierſon*, together with a letter from *M'Lintot* to *Dunlop* and Co. in which was incloſed the certificate which *M'Lintot* deſired them to tender at the Navy-office, and at the ſame time he adviſed them, that he had drawn on them as above. On the 2d of *October* 1776, *Pierſon* ſent this letter, with the certificate incloſed, and alſo the bill of exchange, to *Dunlop* and *Co.*; when the bill was demanded again the next day, the defendants delivered it up, ſaying, " it " would not be accepted till the navy bill was paid;" but they refuſed to deliver the navy bill, ſaying, they would receive the money themſelves. It was held, that this was a conditional acceptance, which, on the receipt of the money, became abſolute. *Nichol*, the captain, had a lien on the naval ſtores for his freight; the certificate was a ſecurity for that freight; it was given into his poſſeſſion as a pledge for the money till the bill ſhould be paid It was not ſent to *Dunlop* and Co. by the poſt in the uſual courſe, but was incloſed to *Pierſon* as his ſecurity. He was therefore not bound to part with it till the bill was accepted. *Dunlop* and Co. by detaining it, and ſaying that the bill would not be accepted till the navy bill ſhould be paid, undertook, on that event, to accept and pay the bill of exchange.

But if the conditions, on which the agreement to accept a bill is made, be not complied with, that agreement will be diſcharged.

Maſon v. Hunt, Dougl. 297, As, if a merchant undertake to accept bills to a certain amount, on condition that a cargo of an equal value be conſigned to him, and an order given

given for inſurance; if the cargo conſigned do not equal the value, he is not bound to accept.

When a bill is drawn for the account of a third perſon, and is accepted according to its tenor for his account, and he fails without making proviſion for its payment, the acceptor muſt diſcharge the bill, and can have no redreſs againſt the drawer. Beawes, 456.

But if the drawee do not chooſe to accept on the account of him for whoſe account he is adviſed the bill is drawn, he may accept for the account and honour of the drawer. *Id. ibid.*

Or, if a bill, made payable to order, be indorſed by a ſubſtantial man before acceptance be demanded, the drawee, if he have any doubt about the drawer, or of him on whoſe account it is drawn, may accept it for the honour of the indorſor; but in this caſe he muſt firſt have a formal proteſt made for non-acceptance, and ſhould ſend it without delay to the indorſor for whoſe honour he has accepted it. *Id. ibid.*

Such acceptances as theſe are called acceptances *ſupra* proteſt; and have this effect with reſpect to the ſecurity of the acceptor, that they give him a right to call on the party for whoſe honour he accepts; and in the caſe of an acceptance for the honour of the indorſor, on him and all the parties before him; whereas a ſimple acceptance, according to the tenor of the bill, gives him a remedy only againſt the drawer, or againſt him on whoſe account the bill is drawn, as the caſe may be. *Id.* 458.

The method of accepting *ſupra* proteſt is this; the acceptor muſt perſonally appear with witneſſes before a notary, (whether the ſame who proteſted the bill or not, is of no importance,) and declare that he accepts ſuch proteſted bill in honour of the drawer or indorſor, *&c.* and that he will ſatisfy the ſame at the appointed time; and then he muſt ſubſcribe the bill thus, "Accepted *ſupra* proteſt, in honour of *T. B.*" &c.

But this acceptance *ſupra* proteſt may be ſo worded, that though it be intended for the honour of the drawer, yet it may equally bind the indorſor, and in ſuch a caſe it muſt be ſent to the latter. *Id.* 457.

If the perſon on whom the bill is drawn refuſe to accept it, any *third* perſon after proteſt for non-acceptance may accept *ſupra* proteſt for the honour of the bill or of the drawer, or of any particular indorſer: if he accept for the honour of the bill or of the drawer, he is bound to all the indorſees as well as to the holder: if in honour of a particular indorſor, then to all ſubſequent indorſees. *Id. ibid.*

Any one accepting a bill *ſupra* proteſt, though without the orders or knowledge of the perſon for whoſe honour he accepted it, has a remedy againſt that perſon, who is bound to ſatisfy him as if he had acted entirely by his directions, for his commiſſion, poſtage, and other charges. Beawes, 457, 458.

If a bill be proteſted for non-acceptance, and after it has been accepted *ſupra* proteſt by a third perſon, the drawee, on receiving freſh advice and orders, determine to accept and pay it, the acceptor *ſupra* proteſt may permit him, though the holder cannot be obliged to free him from his acceptance; and if the two acceptors agree, the drawee muſt pay the other his commiſſion, charges, *&c.* as it was by his acceptance that the bill was prevented from being returned proteſted. *Id.* 457.

If the acceptor of a bill for the honour of the drawer or indorſor, receive his approbation of the acceptance, then he may ſafely pay the bill without any proteſt for non-payment. But if the perſon, for whoſe honour the bill was accepted, either return no anſwer to the advice, or expreſs a diſapprobation of the acceptance, then the acceptor *ſupra* proteſt muſt cauſe *Id.* 458.

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a formal proteſt to be drawn up for non-payment againſt him to whom the bill was directed, and on his continuing to refuſe payment, muſt pay it for him.

Id. ibid. When a bill is proteſted for non-payment, any man may pay it under proteſt, for the drawer's or indorſor's honour, even he who made or he who ſuffered the proteſt; but he muſt previouſly declare before a notary, for whoſe honour he diſcharges it; and of this the notary muſt give an account to the parties concerned, either jointly with the proteſt, or in a ſeparate inſtrument.

Beawes, 459. He now diſcharges a bill proteſted for non-payment, in honour of the drawer, has his remedy againſt the latter, but not againſt the indorſors; but he who diſcharges a bill proteſted for non-payment, in honour of an indorſor, has his remedy not only againſt that indorſor, but againſt all that were before him, including the drawer; but he has no right againſt ſubſequent indorſors.

Id. 458. A man, after having given a ſimple acceptance to a bill, cannot ſatisfy it under proteſt, in honour of an indorſor, becauſe as acceptor, he has already bound himſelf to that indorſor; but a drawee, not having yet accepted the bill, may diſcharge it for the honour of the indorſor or drawee, as if he were a third perſon unconcerned.

Id. ibid. Yet it is ſaid that the poſſeſſor of a bill, proteſted for non-payment, is not bound to admit of its diſcharge from a third perſon under proteſt, either in honour of the drawee or of any indorſor, unleſs he declare and prove that the honour of that bill was particularly recommended to him: and if the proteſted bill be indorſed by the poſſeſſor's correſpondent, and were remitted by him, then, the poſſeſſor ought not to admit of any payment in honour of the indorſements, but under the expreſs condition, that the payer ſhall have no redreſs againſt the ſaid correſpondent.

4. Of the Effect of an Acceptance.

Id. 455. The effect of the acceptance is to give credit to the bill, and to render the acceptor liable according to the tenor of his acceptance; the very act of accepting implies an acknowledgement that he has effects of the drawer in his hands.

Symonds v. Parminter, 1 Wilſ. 185. If therefore the drawee accept a bill generally, and by reaſon of his non-payment, the drawer is obliged to pay it, the latter, as drawer, may maintain an action againſt him, not only for the principal ſum, but, in caſe of a proteſt, for damages, intereſt, and coſts.

If indeed the drawee have no effects of the drawer in his hands, and notwithſtanding accept the bill, he has his remedy, if he pay it, againſt the drawer; but with regard to every body beſides, the acceptor is conſidered as the original debtor, and to be entitled to have recourſe againſt him, it is not neceſſary for the holder to ſhew notice given to him of non-payment by any other perſon.

Dougl. 249.

Mar. 17. Beawes, 454. When a bill is once accepted abſolutely, it cannot in any caſe be revoked, and the acceptor is at all events bound, though he hear of the drawer's having failed the next moment, even if the failure was before the acceptance.

But the acceptor may be diſcharged by an expreſs declaration of the holder, or by ſomething equivalent to ſuch declaration.

Black v. Peele, cited Dougl. 49. *Black* held, as indorſee, a bill drawn by one *Dallas*, and accepted by *Peele*. *Black* arreſted *Peele*, but finding that no conſideration had been gi-

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en for the acceptance, his attorney took ſecurity from *Dallas*, and ſent word to *Peele*, "that he had ſettled with *Dallas*, and he needed not to "trouble himſelf any further." *Dallas* afterwards became bankrupt, and then *Black* demanded payment of *Peele*. The cauſe was tried firſt before Lord *Mansfield*, and afterwards by Chief Juſtice *De Grey*, who both held, that the acceptor was diſcharged.

In another caſe a book of the plaintiff's was produced in which the bill was entered, and over againſt it this memorial, "Mr. *Pulteney*'s accept- "ance annulled" The jury, however, gave a verdict for the plaintiff; but the court of Exchequer granted a new trial, on the ground that this was an implied diſcharge; and on the ſecond trial before Chief Baron *Skinner*, one *Alexander*, who had indorſed the bill to the plaintiff, was produced as a witneſs on the part of the defendant, and ſwore that *Walpole* had poſitively agreed to conſider *Pulteney*'s acceptance as at an end; on which the jury found for the defendant. *Walpole* had kept the bill from 1772 to 1775 without calling on *Pulteney*. Walpole v. Pulteny, citedDougl. 249.

But no circumſtances of indulgence ſhewn to the acceptor by the holder, nor any attempt by him to recover of the drawer, will amount to an expreſs declaration of diſcharge.

Dunſter accepted a bill merely to lend his credit, and to accommodate *Wheate*, the drawer. *Fitzgerald*, the payee, indorſed it to *Dingwall*, and delivered it to him in payment for jewels. After it became due, the plaintiff, underſtanding that the acceptor never had any conſideration for it, and that *Wheate* was the real debtor, wrote to one *Ready*, *Wheate*'s attorney, on the 6th of *February*, and on the 4th of *November* 1775, preſſing him for payment. *Dunſter*, on the 13th of *February* 1775, wrote a letter to *Dingwall*, thanking him in ſtrong terms for not proceeding againſt *him*, but mentioning in the ſame letter, that he had been informed by a perſon who had been ſent from him to *Dingwall* on the buſineſs, that *Wheate* had taken up the bill, and given another to *Dingwall*'s ſatisfaction. It did not appear that *Dingwall* took any notice of that letter. But he for ſome time received intereſt on the bill from *Wheate*, and alſo the principal due by another bill, made at the ſame time, and drawn and accepted by the ſame parties, and under like circumſtances. The plaintiff ſuffered ſeveral years to elapſe without calling on *Dunſter*, or treating him as his debtor. The queſtion was, Whether the plaintiff, by his conduct, had diſcharged the acceptor? and the court unanimouſly held, that he had done nothing from which it could be concluded he meant to abandon his claim againſt him. He had done right in applying to *Wheate* for payment, as he was appriſed that he was in fact the debtor, and *Dunſter* was ſo far ſenſible of his kindneſs, as to thank him for his indulgence in a letter; had the ſuggeſtion in that letter been true, relative to the plaintiff's having delivered up the bill to *Wheate*, that might have made a material difference: but the plaintiff having returned no anſwer to the letter, and the fact not having been attempted to be proved at the trial, it was probable the aſſertion was not warranted. This caſe had no reſemblance to the two preceding caſes which had been cited in argument. Dingwall v. Dunſter, Dougl. 247.

Neither will any length of time ſhort of the ſtatute of limitations, nor the receipt of part of the money from the drawer or indorſer, nor a promiſe by indorſement on the bill by the drawer to pay the reſidue, diſcharge the holder's remedy againſt the acceptor.

A bill was drawn by one brother and accepted by another. When it became due, the payee received of the drawer 3*l*. 15*s*. 4*d*. and at the ſame time Ellis v. Galindo, Dougl 250. in the notes.

time the following indorſement was made on the bill: "Received on ac. "count of this bill 3*l.* 15*s.* 4*d.*:" "Balance remaining due 26*l.* 4*s.* 8*d.* "I promiſe to pay Mr. *Thomas Ellis*, within three months from the date "of this." Signed by *James Galindo*, who was the drawer. The balance was never paid, and at the diſtance of three years an action was brought againſt the acceptor; the cauſe was tried before Lord *Mansfield*, who thought the acceptor was diſcharged, and nonſuited the plaintiff. The ground of his Lordſhip's opinion probably was, that the indorſement was as a new bill accepted by the plaintiff in payment of the old; and on an application for a new trial, his Lordſhip ſaid, he did not think that this caſe at all interfered with the determination in *Dingwall* and *Dunster*. The plaintiff's counſel contended that the indorſement was made to prevent an imputation of neglect, becauſe delay in coming againſt an acceptor may diſcharge a drawer or indorſor. The court all ſeemed to think that this was a queſtion of intention, and ought therefore to have been left to the jury, but they refuſed a new trial on account of the ſmallneſs of the ſum.

Bacon v. Searles, 1 H. Bl. Rep. C. B. 88.

But, when the holder of a bill receives part of the money from the drawer, he cannot recover more than the reſidue from the acceptor; and where the drawer pays the whole, the acceptor is completely diſcharged.

Burrowes v Jemino, 2 Str. 733.

By the law of *Leghorn*, if a bill had been accepted and the drawer had failed, and the acceptor had not ſufficient effects of the drawer in his hands at the time of acceptance, the acceptance became void. This happening to be the caſe of one *Burrowes*, he inſtituted a ſuit at *Leghorn*, to diſcharge himſelf of his acceptance, which was accordingly vacated by a ſentence in the court there. He afterwards returned to *England*, and was ſued here on his acceptance; on which he filed a bill in Chancery for an injunction and relief. Lord Chancellour *King* was clearly of opinion, that this cauſe was to be determined according to the laws of the place where the bill was negociated; and the acceptance having been vacated by a competent juriſdiction, that ſentence was concluſive, and bound the court here.

If the drawee offer a conditional acceptance, and the holder, inſtead of acquieſcing, do ſomething which ſhews that he does not admit ſuch acceptance, the drawee is not bound, even if the event afterwards happen on which the acceptance was to depend.

Sproat v. Mathews, 1 Term Rep. 182.

A bill payable to one *Lenox*, or order, forty days after ſight, was drawn on the defendant; *Lenox* indorſed it to the plaintiff: *Allen*, the plaintiff's clerk, preſented the bill to the defendant, who lived in *London*, for acceptance: the defendant told him that the drawer had conſigned a ſhip and cargo to him and another perſon at *Briſtol*, but as he could not then tell whether the ſhip would arrive at *London* or *Briſtol*, he could not accept at that time: on which *Allen* ſaid that he would leave the bill upon this condition, that in the event of the defendant's not accepting it as from the day when it was preſented, he ſhould be at liberty to note it for non-acceptance as from that time: to this the defendant aſſented, and the bill was accordingly left at his houſe till a future day, when *Allen* called again, in company with the plaintiff, to know whether the defendant would accept the bill or not, who, on being preſſed to accept it, ſaid that the bill was a good one, and would be paid, even if the ſhip were loſt. *Allen* immediately on this carried the bill to a notary publick, and had it noted for non-acceptance from the time when it was firſt left with the defendant. The ſhip afterwards arrived ſafe at the port of *London*, and the defendant diſpoſed of the cargo. This being a conditional acceptance, the conduct of the plaintiff was held to

to have been a waiver of it, and to have precluded him from holding the defendant to his engagement.

Though an agreement to accept, on condition of a certain fund being conſigned to the acceptor for the diſcharge of the bill, may amount to an acceptance of the performance of the conditions, yet, if the indorſee take the fund out of the hands of the drawee, he diſcharges him from his engagement.

Rowland Hunt, in *Dominica*, agreed with a houſe there, that his partner, *Thomas Hunt*, in *London*, ſhould, on a cargo of tobacco being conſigned to him, with the bills of lading, and an order for inſurance, accept ſuch bills as that houſe ſhould draw on him, at the rate of 80*l. per* hhd., from ninety days to ſix months ſight: inſurance for the ſum of 3600*l.* was ordered on forty hhds. of tobacco, which *Thomas Hunt* procured for a premium of 303*l.* He afterwards received a letter, adviſing him of ſix bills of exchange being drawn on him for 3200*l.* in conſequence of *Rowland Hunt*'s agreement, payable to one of the partners of the houſe, on account of forty hhds. of tobacco, and indorſed by him to *Maſon*. The bills arrived, and were preſented for acceptance. *Thomas Hunt* refuſed to accept them, on an apprehenſion that the tobacco was not worth the money at which it was valued. After a negotiation of ſome days, *Maſon* took the bill of lading for the forty hhds. and the policy of inſurance out of the hands of *Thomas Hunt* The tobacco afterwards arriving, was received and ſold by the plaintiff *Maſon*, and produced only 1400*l.* The occaſion of this difference between the real produce and the valued price did not appear. Under the direction of Lord *Manſfield*, a verdict was given for the defendant; and on an application for a new trial, his Lordſhip expreſſed himſelf thus:—An agreement to accept, may in many inſtances amount to an acceptance: but an agreement is ſtill but an agreement, and if it be conditional, and a third perſon, knowing of the conditions annexed to the agreement, take the bill, he takes it ſubject to ſuch agreement. Here there were many things ſpecified as the conditions of the acceptance—the number of hhds. to be delivered—of a certain value rated by the hhd.—the inſurance—the bills of lading—the conſignment. On the face of the agreement, I thought at the trial, and ſtill incline to think, that the meaning of the parties was, that tobacco ſhould be conſigned which ſhould be worth 80*l. per* hhd.: this fell immenſely ſhort of that ſum. It is plain the *Hunts* never *meant* to be in advance, and I think ſo great a difference in the value ſuch a fraud as to entitle the defendants to relief againſt the agreement. But as to this the reſt of the court have doubted, chiefly becauſe there is no evidence to ſhew how the decreaſe in the value aroſe; whether from the inferiority of the quality, or the fluctuation in the market. But the reſt of the court are extremely clear that the ſubſequent conduct of the plaintiff makes an end of the whole, and I think the reaſons are unanſwerable. As to that part of the caſe, it ſtands thus: the *Hunts* ſay, "We are not bound: this is an "impoſition:—the tobacco is of inferior value. The letter repreſents it "as worth 80*l.*, the inſurance makes it 90*l. per* hhd., and it turns out not "to be worth 40*l.*" If *Maſon* had meant to ſay, "You are liable, and ſhall pay the bills," what would his conduct have been?—He would have left the policy of inſurance and the bills of lading in their hands, and ſued them upon the acceptance. The temptation to accept was the commiſſion on the conſignment, and they were to have the ſecurity of the goods and the inſurance. But the plaintiff undoes all this, and ſays, "Then I will "take all from you, ſecurity, commiſſion," &c. This was ſaying, "I "will

Maſon v. Hunt, Dougl. 284, 297.

" will ſtand in your place, but not ſo as to be anſwerable for more than " the produce of the tobacco." It is impoſſible the defendants could mean to accept, without any benefit or ſecurity. We are all clear, that this made an end of the agreement.

1 Ld. Raym 744. Kellock v. Robinſon, 2 Str 745. cited 1 Wilſ. 48

Though the receipt of part from the drawer or indorſer be no diſcharge to the acceptor for more than the part received, yet the receipt of part from the acceptor of a bill, or the maker of a note, is a diſcharge to the drawer and indorſors in the one caſe, and to the indorſors in the other, unleſs due notice be given of the non-payment of the reſidue; for the receipt of part from the maker or acceptor without notice, is conſtrued to be a giving of credit for the remainder, and the undertaking of the preceding parties is only conditional, to pay in default of the original debtor, on due notice given: but where due notice is given that the bill is not duly paid, the receipt of part of the money from an acceptor or maker will not diſcharge the drawer or indorſors; for it is for their advantage that as much ſhould be received from others as may be.

Bull. N. P. 271. cites Johnſon v Kenyon, C. B. Hil. 5 Geo. 3. *Vide* Johnſon v. Kenyon, 2 Wilſ. 262.

The receipt of part from an indorſor, is no diſcharge of the drawer or preceding indorſer, for more than the part received.

Hull v. Pitfield, 1 Wilſ. 46.

One *Scraiſton* drew a note, by which he promiſed to pay to one *Pitfield* or order, the ſum of 200*l.*, and indorſed it to *Hull*. *Hull* brought an action againſt *Scraiſton*, in which he held him to ſpecial bail; *Hull* recovered interlocutory judgment againſt *Scraiſton*, on which his bail paid the debt and coſts, amounting to 220*l.* 15*s.* *Hull* executed an inſtrument between himſelf on the one part, and the bail on the other, reciting the note, and that he had recovered interlocutory judgment on it againſt *Scraiſton*: that the bail had purchaſed the note, and paid the debt and coſts, in conſideration of which *Hull* aſſigned over to them the note and the interlocutory judgment, with a power of attorney to make uſe of *Hull*'s name to ſue the indorſor, and covenanted in the common manner, not to do any act to hinder the bail from recovering the money on the note. An action was afterwards brought in *Hull*'s name againſt *Pitfield* the indorſor, on which theſe circumſtances were ſtated, and the court held the indorſor was diſcharged by the payment by the bail in the former action, as much as if the drawer had paid the money himſelf.

7. Of the Proteſt: *And herein,*

1. *Of the Neceſſity and Validity of the Proteſt.*

A proteſt is made for non-acceptance, non-payment, and alſo for better ſecurity. This laſt is uſual, when a merchant, who has accepted a bill, happens to become inſolvent, or is publickly reported to have failed in his credit, or abſents himſelf from change before the bill he has accepted has become due, or when the holder has any reaſon to ſuppoſe it will not be paid; in ſuch caſes he may cauſe a notary to demand better ſecurity, and on that being refuſed, make proteſt for want of it; which proteſt muſt, as in other caſes, be ſent away by the next poſt, that the remitter or drawer may take the proper means to procure better ſecurity.

Mar 27. 1 Ld. Raym 743.

Leſtley v. Mills, 4 Term Rep. 175. The noting is a minute

In making a proteſt there are three things to be done; the noting, demanding, and drawing up the proteſt: but the noting is unknown in the law, as diſtinguiſhed from the proteſt; it is merely a preliminary ſtep, and has grown into practice only in modern times. The party making the demand muſt have authority to receive the money, and in caſe that be refuſed, the

the drawing up of the proteſt is mere matter of form, the demand being the material part.

made by the officer upon the bill itſelf, in conſequence of the drawee's refuſing to accept or pay, as the caſe may be, conſiſting of his (the officer's) initials, the month, the day, and the year, with his charges for minuting. The proteſt itſelf is a ſolemn declaration afterwards drawn up by the officer, that the bill has been preſented for acceptance or payment, which was refuſed, and that the holder intends to recover all damages, which he, or the deliverer of the money to the drawer, may ſuſtain on account of the non acceptance.

Where the drawee cannot be found at the place mentioned in the bill, or has abſconded, proteſt is to be made for non-acceptance in the ſame manner as if acceptance had been refuſed on preſentment. Mal. 265.

So alſo, if the drawee offer an acceptance differing from the tenor of the bill, and the holder be inclined to admit it without giving up his claim on the other parties, he muſt proteſt it for that cauſe; as, if the drawee offer an acceptance for part, the holder may permit him to accept in that way; but then he muſt cauſe it to be proteſted for non-acceptance of the whole, and ſend the proteſt to his correſpondent, that he may endeavour to procure ſecurity for the remaining ſum. When the bill becomes due, the holder muſt preſent it for payment, and may receive the ſum for which it was accepted, and write a receipt for ſo much on the bill; but he muſt proteſt it for non-payment of the reſt, and ſend back the proteſt with the bill. Mar. 17, 18.

The demand of payment of a *foreign* bill muſt be made by the notary publick himſelf, and not by his clerk; and even in the caſe of an *inland* bill, it is doubtful, whether the demand, as the foundation of the proteſt made in conſequence of the ſtatute of *W.* 3. above mentioned, can be made by the notary's clerk, or by any other perſon, than the notary himſelf. Leſley v. Mills, 4 Term Rep. 170.

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(*As to inland*) The practice certainly was formerly, as here ſtated, to leave the reaſonableneſs of the time in which payment was to be demanded to the jury. But as this was productive of endleſs uncertainty, it is now conſidered as a queſtion of law ariſing out of the fact. Metcalfe v. Hall, B. R. Trin. 22 Geo. 3. Bull N. P. 275 Appleton v. Sweetapple, B. R. Mich. 23 Geo. 3. Bayley on Bills, 73. Tindal v. Browne 1 Term Rep. 167. The periods of time within which bills are to be preſented, are, however, ſtill unfixed. The only rule that can be applied is, that due diligence muſt be uſed. Due diligence is the only thing to be looked at, whether the bill be foreign or an inland one, whether it be payable at ſight, or ſo many days after or in any other manner.

Where the payment of a bill is limited at a certain time after ſight, it is evident that the holder muſt preſent it for acceptance, otherwiſe the time of payment would never come: it does not appear, however, that any preciſe time, within which this preſentment muſt be made, has in any caſe been aſcertained: but it muſt be done as ſoon as, under all the circumſtances of the caſe, it conveniently can be. Kyd on Bills, 117.

Whether the holder of a bill payable at a certain time after the date, be bound to preſent it for acceptance immediately, or, whether he may wait till it become due, and then preſent it for payment, is a queſtion which ſeems never to have had a direct judicial determination: in practice however it frequently happens that a bill is negotiated and transferred through many hands without acceptance, and not preſented to the drawee till the time of payment, and no objection ever made on that account. Mar. 12. *Vide* 5 Burr. 2671. 1 Term Rep. 713.

Where indeed a bill is remitted to a factor or agent, to procure acceptance, for the benefit of his principal, it is the duty of the factor to uſe all diligence to have it accepted, and to give advice to his principal of the event, that he may take the proper ſteps in caſe of non-acceptance; and the factor Mar. 12. 13. Beawes, 454.

may be liable to make good any loſs to his principal ariſing from his negligence: but this does not affect the bill itſelf, nor the right of the principal on it.

Bleſard and Hirſt, 5 Burr. 2670

If however, the holder in fact preſent the bill for acceptance, and that be refuſed, he is bound to give regular notice to all the preceding parties to whom he intends to reſort for non-payment; to the drawer, that he may know how to regulate his conduct with reſpect to the drawee, and make other proviſion for the payment of the bill; and to the indorſors, that they may ſeverally have their remedy in time againſt the parties on whom they have a right to call: and if, on account of his delay, any loſs accrue by the failure of any of the preceding parties, *he* muſt bear the loſs.

Goodall v. Dolley, 1 Term Rep. 712.

Bleſard v. Hirſt, 5 Burr. 2670

Thus, if in the mean time the drawer fail, the holder cannot call on the payee indorſor, becauſe *he* can have no remedy againſt the drawer.

Goodall v. Dolley, 1 Term Rep. 712. 5 Burr. 2670.

So, alſo, if the drawee fail, the holder cannot recover againſt either the drawer or indorſor, becauſe, if he could, a loſs muſt fall on one of them, as the drawer can have no remedy againſt the drawee.

Nor will it make any difference, though the indorſer, from an ignorance of the law, thinking himſelf bound to make good the money, promiſe afterwards to take up the bill at ſome future time.

1 Term Rep. 712.

Much leſs can the indorſor be bound by a propoſal to diſcharge the bill by inſtalments, made after the return of the bill for non-payment, under an ignorance of acceptance being refuſed; more eſpecially, if that propoſal be rejected by the indorſee.

Mar. 17.

If an acceptance varying from the tenor of the bill be offered by the drawee, the holder acquieſcing muſt ſend the ſame notice to the preceding parties, as if acceptance were refuſed, otherwiſe he cannot have recourſe to them; for to admit of ſuch acceptance without notice is to give credit to the acceptor.

Metcalf v. Hall. B. R. Tr. 22 Geo. 3. 2 H. Bl. 569.

It ſeems eſtabliſhed, that the next day after a banker's draft is given, is the ſtated time allowed by law for demanding payment, in order to exonerate the holder from the conſequences of the drawer's inſolvency.

Although no preciſe rule can be laid down as to the time when bills payable at ſight, or ſo many days after, are to be preſented for payment, yet it is certain, that if the holder do not preſent them, he ought to put them in circulation. If he keep them by him, and do neither, he is guilty of laches and cannot recover on them.

We have ſeen above, that it is the duty of the holder of a bill, whether accepted or not, to preſent it for payment within a limited time; for otherwiſe the law will imply that payment has been had, and it would be prejudicial to commerce if a bill might riſe up to charge the drawer at any diſtance of time, when all accounts might be adjuſted between him and the drawee.

Reed v. Coats, Dom. Proc. Feb. 21, 1794.

The ſame diligence, and the ſame attention to the uſual rules of negociation is required from the party who takes a bill by way of ſecurity for an antecedent debt, as from one who receives it in the common courſe of buſineſs, or in ſolutum of a debt. A contrary opinion appears to have prevailed in *Scotland*, and was ſanctioned by the deciſions of the courts of that country. Thus, a bill drawn by *A.* upon and accepted by *B.*, payable twelve months after date, was given to *C.*, by way of ſecurity for the payment of a bill which had been indorſed by *A.* to *C.*, and had been diſhonoured. In the receipt which *C.* gave for the bill ſo given in ſecurity,

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it was declared, that it was in no reſpect to exonerate the acceptors of the original bill, or any of the parties thereby bound, till actual payment of the bill given in ſecurity was made. Almoſt three years elapſed without *C.*'s taking any one ſtep to obtain payment of this laſt bill. About that time the acceptors failed, upon which *C.* demanded payment of the original bill from the parties whoſe names appeared upon it, and on their refuſal, he inſtituted a ſuit againſt them in the court of ſeſſion, and obtained two interlocutors in his favour. Upon appeal to the Lords of this country, theſe interlocutors were reverſed, and the defenders were aſſoilzied.

The time of payment of a bill is the laſt of the three days of grace, and on that day the money muſt be demanded; and if the laſt day be *Sunday* or a great holiday, the demand muſt be made on the ſecond. Taſſel v. Lewis, 1 Ld. Raym. 743. Coleman v. Sayer, 2 Str. 829. *Vide* Beawes, 461.

And the holder is not bound to wait till the laſt moment of the laſt day of grace, for the undertaking of the acceptor is, to pay the bill on demand on any part of the laſt day of grace. Leftley v. Mills. 4 Term Rep. 173.

The three days of grace are allowable on promiſſory notes, as well as upon bills of exchange. Brown v. Harraden, 4 Term Rep. 148.

A preſentment either for payment or acceptance muſt be made at ſeaſonable hours: and ſeaſonable hours are the common hours of buſineſs in the place where the party lives to whom the preſentment is to be made.

It is not enough to ſay in the notice, that the drawee or maker refuſes, is inſolvent, or has abſconded; but it muſt be added, that the holder does not intend to give him credit. The purpoſe of giving notice is not merely that the indorſer ſhould know that default has been made, for he is chargeable only in a ſecondary degree; but to render him liable, it muſt be ſhewn that the holder looked to him for payment, and gave him notice that he did ſo. A caſe might eaſily be imagined, where the indorſer might have notice from the holder, and yet would not be liable; as, if that notice contained circumſtances which ſhewed that the indorſee had given time and credit to the acceptor or maker. As to bills, *vide* 1 Str. 441. 515. Daggliſh v. Weatherby, 2 Bl. Rep. 747. As to notes, *vide* 1 Str. 541. 2 Str. 1087. Tindal v. Brown. 1 Term Rep. 170.

It is therefore neceſſary that notice ſhould come from the indorſee himſelf: it is not ſufficient that the indorſor ſhould be informed by ſome third perſon, as by the drawee or maker, that he does not chooſe to accept, or cannot pay.

With reſpect to acceptance, it is uſual to leave a bill for that purpoſe with the drawee till the next day, and that is not conſidered as giving him time; it being underſtood to be the uſual practice: but if, on being called on the next day, he delay or refuſe to accept according to the tenor of the bill, the rule now eſtabliſhed, where the parties, to whom notice is to be given, reſide at a different place from the holder and drawee, is, that notice muſt be ſent by the next poſt. Under the ſame circumſtances, the ſame rule obtains in the caſe of non-payment. Mar. 26. 1 Term Rep. 169.

So, alſo, in caſe the drawee or maker has abſconded, or cannot be found, notice of theſe circumſtances, either in caſe of non-acceptance or non-payment, muſt be ſent by the firſt poſt.

The reaſon why the law requires notice is, that it is preſumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and that if the latter has notice that the bill is not accepted, or not paid, 1 Term Rep. 410.

paid, he may withdraw them immediately. But if the drawer have no effects in the other's hands, then he cannot be injured for want of notice, and if it be proved on the part of the plaintiff, that, from the time the bill was drawn, till the time it became due, the drawee never had any effects of the drawer in his hands, notice to the latter is not neceſſary in order to charge him, for he muſt know whether he had effects in the hands of the drawee or not: and if he had none, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice, that it has been diſhonoured.

Bickerdike v. Bollman, 1 Term Rep. 405.

A queſtion ariſing on the validity of a commiſſion of bankrupt on account of the inſufficiency of the debt due to the petitioning creditor, the facts appeared to be theſe: the bankrupt being indebted to the petitioning creditors in the ſum of 115*l.* 3*s.* 8*d.* on the 15th of *September* 1784, drew a bill for 20*l.* on the defendant, "who, till the time of the bankruptcy and "of the bill becoming due, was a creditor of the bankrupt," payable to "the petitioning creditors, two months after date, and paid it to them on account of part of their debt: the bill was preſented for payment on the 18th of *November* following, and diſhonoured. No notice, however, was ever given by the petitioning creditors to the bankrupt, or left at his houſe; a commiſſion iſſued againſt the drawer on the 20th of *November*, on which he was declared a bankrupt in the afternoon of the 24th; that commiſſion was afterwards ſuperſeded, and another commiſſion was iſſued on the petition of the parties, on the amount of whoſe debt the preſent queſtion aroſe. If the petitioning creditors, by not giving notice to the bankrupt of his bill being diſhonoured, had made the bill their own, their debt was reduced within 100*l.*, and then the commiſſion could not be ſupported; but if notice was not neceſſary, the bill was not paid; their debt remained as it originally was, and the commiſſion was valid. On the principles before ſtated, the court held, that notice in this caſe was not neceſſary, and therefore the commiſſion was good.

1 Term Rep. 714.

Yet though it appear that the drawer had no effects in the hands of the drawee, no action can be maintained againſt the *indorſor* if no notice was given him of the bill being diſhonoured; for though the drawer may have received no injury, the indorſor, who muſt be preſumed to have paid a valuable conſideration for the bill, probably has.

Rogers v. Stephens, 2 Term Rep. 713.

Though in the caſe where the drawer has effects in the hands of the drawee, the want of notice cannot be waived by a ſubſequent promiſe by him to diſcharge the bill; yet where he had no effects, it may; though it appear that in fact he ſuſtained an injury for want of ſuch notice; ſuch a ſubſequent promiſe is an acknowledgment that he had no right to draw on the drawee, and if he has in fact ſuſtained damage, it is his own fault.

See Rogers v. Stephens, 2 Term Rep. 714. Leſtley v. Mills, 4 Term Rep. 170.

But where damage in ſuch a caſe has been ſuſtained, and no ſubſequent promiſe appears, it may be very doubtful whether want of notice can be waived.

But there is a difference between foreign and inland Bills in this reſpect: the former muſt be preſented for payment *before* the expiration of the laſt day of grace, and in time to have the proteſt ſent off the ſame night if the poſt then ſets out: but on inland bills, the proteſt cannot be made till *after* the expiration of three days, and notice may be ſent at any time within *fourteen* days after the proteſt.

To the conſtitution of a bill of exchange, it is not neceſſary that the words "value received" ſhould be inſerted. and the want of theſe in a

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foreign bill cannot deprive the holder of the benefit of a proteſt; but that benefit in caſe of non-payment is not given to inland bills which want theſe words; and therefore they cannot be proteſted for non-payment: for the act of Queen *Anne* provides, that "where theſe words are wanting, or the "value is leſs than twenty pounds, no proteſt is *neceſſary* either for non-"acceptance or non-payment."

In foreign bills, there is no diſtinction between thoſe payable at ſuch a time after *date*, and after *ſight*; but the ſtatute confines the benefit of proteſt on inland ones to thoſe payable after *date*; ſo that in *ſtrictneſs* there can be no proteſt on thoſe payable after ſight: and this has been lately ſo adjudged.

In foreign bills, where the acceptance is in words only, or in ſome collateral writing, a proteſt may be made for non-payment, as well as if the acceptance had been in writing on the bill: but the ſtatute of *William* confines the proteſt for non-payment to thoſe bills on which the acceptance is written; and therefore, in order to have the benefit of a proteſt for non-payment, where the acceptance is collateral, the holder muſt proteſt for non-acceptance. Leſtley v. Mills, 4 Term Rep. 170. *Vide* Mar. 17.

But in practice a proteſt is hardly ever made for non-acceptance of an inland bill; it is only noted for non-acceptance, and if not paid when due, it is frequently proteſted for non-payment: however, notice muſt be given of the non-acceptance and noting, otherwiſe, the holder takes the riſk upon himſelf.

In the caſe of a foreign bill, noting alone for non-acceptance will not be ſufficient, it muſt alſo be *proteſted* for non-acceptance; nor will the omiſſion to make ſuch proteſt be ſupplied by a ſubſequent proteſt for non-payment. Rogers v. Stephens, 2 Term Rep. 713.

Wherever intereſt is allowed, and a new action cannot be brought for it, which is the caſe on bills of exchange and promiſſory notes, the intereſt is to be calculated up to the time of ſigning final judgment. 2 Burr. 1086.

Where a bill indorſed over is not duly paid, the indorſee may charge the indorſor with intereſt, exchange, and other incidental expences, beyond the amount of 5 *per cent*, if ſuch charges be reaſonable, warranted by uſage, and not made a colour for uſury: thus, the conſtant courſe has been with reſpect to bills returned, proteſted, from *India*, to allow 10*s*. *per* pagoda, which includes intereſt, exchange, and all other charges; and this, notwithſtanding the current price of exchange at which the bill was diſcounted, may have been greatly below 10*s*, as, at 6*s*. 6*d*.: and the indorſee will alſo be entitled to intereſt at 5 *per cent*. from a reaſonable time after notice given to the indorſor of the bill having been returned unpaid. Auriol v. Thomas, 2 Term Rep. 52.

8. Of the Action and Remedy on a Bill of Exchange, and Manner, of declaring and pleading therein.

In ſtating a bill or the note, regard muſt be had to the legal operation of each reſpectively. 1 Burr 314, 327.

It has been decided, that the legal operation of a bill or of a note, payable to a fictitious payee, is, that it is payable to the bearer, and therefore if that deciſion be right, it is proper, in the ſtatement of ſuch a bill, to allege that the drawer thereby requeſted the drawee to pay ſo much money to the bearer; in the ſtatement of ſuch a note, that the maker thereby promiſed to pay ſuch a ſum to the bearer. Or in ſuch a caſe, the plaintiff may ſtate Vere v. Lewis, 3 Term Rep. 183. Minet v. Gibſon, *Id* 485. Collins v. Emet. 1 H. Bl. 313.

ſtate all the ſpecial circumſtances, and if the verdict correſpond with them, he will be entitled to recover.

A bill or note payable to the order of a man, may, in an action by him, be ſtated as payable to himſelf, for that is its legal import: or it may be ſtated in the very words of it, with an averment that he made no order.

Semb. 1 Burr. 323. If a note purport to be given by two, and be ſigned only by one, a declaration generally as on a note by that one who ſigned it will be good; for the legal operation of ſuch a note is, that he who ſigned it promiſed to pay.

Burchell v. Slocock, 2 Ld. Raym. 1545. On a note to pay jointly *and* ſeverally, a declaration againſt one in the terms of the note will be good.

Butler v. Maliſſey, Str. 76. Neale v. Ovington, 2 Ld. Raym. 1544. 2 Str. 819. Where a note is given by two, to pay jointly *or* ſeverally, the payee may ſue both or either; if he ſue both, he may declare on the note in the words of it jointly *or* ſeverally: but if he ſue either of them ſingly, it was formerly held, that he could not declare in that way, but that he muſt ſtate the note as given only by one, and that the joint *or* ſeveral note would be good evidence to ſupport ſuch a declaration.

Rees v. Abbot, Cowp. 832. But the doctrine in the latter caſe has been ſince over-ruled; and it is is now held, that in an action on a joint *or* ſeveral promiſſory note, againſt one, a declaration that he and another made their promiſſory note, by which they *jointly or ſeverally* promiſed to pay, is good: for if *or* muſt be underſtood as a diſjunctive, the election, whether the note ſhall be joint or ſeveral, is in the perſon to whom it is given, and by ſuing one, he ſhews his election to conſider it as a ſeveral note: but in this caſe, the true conſtruction of the word *or* is, that it is ſynonymous with *and*. They both promiſe that *they* or *one* of them ſhall pay; therefore the liability is on *both*, and on *each*. The nature of the tranſaction forces this conſtruction.

Ibid. per Buller, J. 1 Str. 22. And if the note had been joint only, and it had been ſtated as a ſeveral one, no advantage could have been taken of this but by a plea in abatement.

Where the payment of a bill or note is limited at a certain time after the date, it muſt be ſtated as being made on the day of the date, that it may appear on the face of the declaration, at what time it became due; if the bill have no date, as on the day when it iſſued, or the firſt day the plaintiff had knowledge of its exiſtence; for an inſtrument not dated muſt be conſidered as dated at the time of the delivery.

2 Ld. Raym. 1082.

2 Show. 422. But in ſtating the bill or note, it is not neceſſary to allege that it bore date, though that be generally done; it is ſufficient that the date appear by implication, which it does from the allegation, that on ſuch a day the drawer made the bill or note.

Ereſkine v. Murray, 2 Ld. Raym. 1542, 1543. Taylor v. Dobbins, M. 7 G. 1. B. R. 2 Ld. Raym. 1543. Elliot v. Cooper, 2 Ld. Raym. 1376. In ſtating the drawing of a bill or note, it is unneceſſary to ſay that the drawer ſubſcribed it with his own hand-writing, though that is generally done; the allegation that he made his bill of exchange or promiſſory note, and, in the caſe of the former, that he directed the bill to the drawee, by which he requeſted him to pay, and in the caſe of the latter, that by ſuch note he promiſed to pay, ſufficiently implies that his name was ſomewhere on the inſtrument, and that he or ſomebody by his authority wrote it; otherwiſe it could not with propriety be ſaid that he requeſted in the one caſe or promiſed in the other.

If

If the bill was in fact drawn by a ſervant, by the authority of a maſter, it is ſufficient to ſtate it as drawn by the maſter himſelf, unleſs the ſubſcription be alleged, and then it muſt be ſtated according to the truth of the caſe that the ſervant, by the authority of his maſter, drew and ſubſcribed the bill on his maſter's account. *Vide* 12 Mod. 346.

The ſame obſervations apply to the caſe of an indorſement or acceptance by the ſervant, by the authority, and on the account of his maſter. *Vide* 12 Mod. 564.

Where partners are concerned in the drawing, negotiating, or accepting of a bill or note, the uſual way of introducing the partnerſhip is to mention it by way of inducement, and to ſtate that one of them, according to the cuſtom of merchants, ſubſcribed, accepted, or indorſed the bill for the partnerſhip account: but the alluſion to the cuſtom is not abſolutely neceſſary; nor is it abſolutely neceſſary that it ſhould be directly charged that the partner acting for the reſt ſubſcribed, accepted, or indorſed for the partnerſhip; it is ſufficient if, on the whole, it appear to have been ſo. *Vide* Morg. Prec. 43. 2 Ld. Raym. 1484.

Where a bill is drawn in ſets, and the action is brought on the firſt, the uſual way of ſtating the requeſt to the drawee is, "that he requeſted him "to pay that firſt of exchange, (ſecond and third not paid,) following the "very form of the bill;" and then it is not neceſſary, in the ſubſequent part of the declaration, to aver that the ſecond and third were not paid, for if either of them was paid, that would be a ſufficient defence at the trial. Eſſington v. Eaſt, 11 Ld. Raym. 810. 1. Salk. 130 Wegerſloſe v. Keene, 1 Str. 224.

In an action againſt the acceptor, it muſt be alleged that he accepted the bill, for the acceptance is the foundation of the action; but the manner of acceptance needs not to be alleged. Ereſkine v. Murray, 2 Str. 817. 2 Ld Raym. 1542.

And if the acceptance be alleged generally without any ſpecification of time, evidence of acceptance after time of payment will maintain the declaration, though the acceptance be alleged to have been according to the tenor and effect of the bill, for this ſhall be conſtrued as a general promiſe to pay the money, and the words, "according to the tenor and effect of the "bill," ſhall be rejected as ſurpluſage; but if the acceptance be alleged to have been *before* the time of payment, perhaps evidence of an acceptance after will not do. 1 Ld. Raym. 364, 365. 574, 575. 1 Salk. 127. 129. Carth. 459.

In an action againſt the drawer or indorſor of a bill, or againſt the indorſor of a note, it is abſolutely neceſſary, on account of non-payment of the bill or note, to ſtate a demand of payment from the acceptor of the bill or the maker of the note, and due notice of refuſal given to the party againſt whom the action is brought; for theſe circumſtances are abſolutely neceſſary to entitle the plaintiff to maintain his action; and a verdict will not help him on a writ of error. Ruſhton v. Aſpinall, Dougl. 654.

Due notice of the diſhonour of a foreign bill can only be by proteſt; yet the omitting to allege a proteſt in the declaration is only matter of form; notice being alleged generally, it ſhall be preſumed to have been given with all the neceſſary formalities, and if theſe be not proved at the trial, the plaintiff cannot recover. Salomons v. Stavely, B. R. M. 24 G. 3. Doug. 684. in the notes.

It is not neceſſary, in an action againſt an indorſor, to ſtate that the indorſee demanded the money of the drawer of a bill, or the firſt indorſor of a note, becauſe ſuch demand is not neceſſary to be made in order to complete the title of the indorſee.

Whether the drawer of a bill, or the indorſor of a bill or of a note, receiving the bill or the note in the regular courſe of negotiation before it has become due, can maintain an action on it, againſt the acceptor or maker, in

Per J. Ashhurſt, Tr. 14 G. 3. Louviere v. Lonbray, 10 Mod. 36 Beck v. Bobley, Tr. 14 G. 3. B. R. 1 H. Bl. 89. in the notes.

in the character of indorſee, ſeems undecided: that ſuch actions have been brought, has been incidentally ſaid from the bench; but the only caſe in which it is directly held, that the drawer may maintain an action in the character of indorſee, is no authority to eſtabliſh this point: for there it appears that the bill was proteſted for non-payment before the indorſement; and a more recent caſe, determined on principle, clearly ſhews that a drawer or indorſor cannot maintain an action againſt the acceptor in the character of indorſee, where the indorſement is after the refuſal of payment; becauſe, when a bill is returned unpaid, either on the drawer or indorſor, its negotiability is at an end.

Vide Symonds v. Parminter, 1 Will. 185. *Vide* Morg. Prec. 43, 44. 50.

The action, therefore, in which the drawer or indorſor, after payment of the money in default of the acceptor, may recover, the firſt againſt the acceptor, and the latter againſt any of the preceding parties, muſt be brought in their original capacity as drawer or indorſor, and not as indorſee.

2 Show. 180.

In this action, after ſtating the drawing of the bill, the delivery, the neceſſary indorſements, the preſentment for acceptance, and the acceptance or refuſal to accept, it muſt be further ſtated, that at the proper time it was preſented to the acceptor for payment, who refuſed, or that the acceptor could not be found; and if on a foreign bill, a proteſt for non-payment may be ſtated; then that it was returned to the plaintiff, and that the defendant had notice of the premiſes.

1 Will. 185. *Vide* Morg. Prec. 44.

It may alſo be ſtated, that the plaintiff paid the contents of the bill, and, in the caſe of a proteſt, the coſts, intereſt, and damages ariſing from the delay; but this does not ſeem abſolutely neceſſary; that the bill was returned to the plaintiff implies payment by him.

Piſhop v. Hayward, 4 Term Rep. 470.

One who has indorſed a bill or note cannot, in general, maintain an action on a re-indorſement to him, againſt the party to whom he indorſed it.

Starkey v. Cheeſeman, 1 Ld. Raym 538. 1 Salk. 128. Carth. 409.

It is not neceſſary, in any action on a bill of exchange or promiſſory note, to ſtate an expreſs promiſe by the defendant: the law implies a promiſe where the party is liable; and therefore it is ſufficient, after ſtating the circumſtances, to ſay, that by theſe he became liable to pay.

1 Vent. 15. *Vide* 1 Salk. 24. 1 Term Rep. 276.

But it is uſual to allege an expreſs promiſe after ſtating the liability, that no exception may be taken to the addition of other counts in *aſſumpſit*, which are uſually added; for it is ſaid, that where the declaration was upon the cuſtom, and likewiſe on an *indebitatus aſſumpſit*, the judgment was arreſted, which could not have been the caſe had an expreſs promiſe been added to the count on the cuſtom, becauſe it is an eſtabliſhed rule in pleading, that wherever the ſame plea may be pleaded, and the ſame judgment given on different counts, they may be joined in the ſame declaration.

Tatlock v. Harris, 3 Term Rep. 174.

Inſtead of bringing an action on the cuſtom or on the ſtatute, the plaintiff may in many caſes uſe a bill or note, only as evidence in another action; and where the inſtrument wants ſome of the requiſites to form a good bill or note, the only uſe he can make of it is to give it in evidence; or if the count on the inſtrument be defective, he may give it in evidence, in ſupport of ſome of the other counts for money had and received, or money lent and advanced, according to the circumſtances of the tranſaction.

A bill

A bill is preſumptive evidence of money lent by the payee to the drawer, and a note of money lent by the payee to the maker, and both, conſequently, of money had and received to the uſe of the holder, whether they be payable to the bearer, or to the order of the payee.

Vide Grant v. Vaughan 3 Burr. 1516. *Vide* 3 Term Rep. 183.

He who transfers a bill or note without indorſement, gives no additional credit to the inſtrument, and therefore cannot be ſued on the inſtrument itſelf; nor is he liable to anſwer in any ſpecies of action to any holder but him to whom he immediately transferred it, and to him only for the conſideration on which it was given, whether for work and labour, goods ſold and delivered, money lent and advanced, or any other legal conſideration.

But if the party who took the bill or note did not uſe due diligence to obtain payment from the acceptor or maker, nor give due notice of their default to the party from whom he received it; the latter may either plead, or give in evidence, the bill or note, to an action on the original conſideration.

Vide Chamberlyne v. Delarive, Wilſ. 2353.

The holder of the bill or note may ſue all the parties who are liable to pay the money, either at the ſame time or in ſucceſſion, and he may recover judgment againſt all, if ſatisfaction be not made by the payment of the money before judgment obtained againſt all; and proceedings will not be ſtaid in any one action, but on payment of the debt and coſts in that action, and the coſts in all the others in which he has not obtained judgment.

Vide Golding v. Grace 2 Bl. Rep. 749.

But though he may have judgment againſt all, yet he can recover but one ſatisfaction. But though he be paid by one, he may ſue out execution for the coſts in the ſeveral actions againſt the others.

2 Veſey, 115.

And if he have recovered judgment in more than one action, a tender of the principal recovered in one, and the coſts in all the reſt, will prevent him from taking out execution; and it will be conſidered as a contempt of the court, if he take out execution againſt more than one.

Windham v. Wither. Idem v. Trull, 1 Str. 515.

Macdonald drew a bill of exchange for 20*l.* on *Bovington*, who accepted it; the bill afterwards came into the hands of *Thompſon*, who recovered judgment againſt *Bovington*, and charged him in execution. *Bovington* having obtained his diſcharge under the Lord's act in that ſuit, *Thompſon* ſued *Macdonald* the drawer, and recovered the amount of the bill, on which *Macdonald* ſued *Bovington*, on his acceptance, and charged him in execution. On a rule to diſcharge *Bovington* out of cuſtody, it was contended, that he had ſatisfied the debt, by being in execution at the ſuit of *Thompſon*, and that he was not liable to be ſued again for the ſame ſum. But the court ſaid, that nothing could be more clear than that this was not a ſatisfaction of the debt as between theſe parties, though it was as between the defendant and *Thompſon*: that to the holder it was a mere *formal* ſatisfaction, and not like actual payment: that the preſent plaintiff, having been obliged to pay the amount of the bill ſince the defendant was charged in execution at the ſuit of *Thompſon*, had a right to have recourſe to this defendant as acceptor; for that by this payment a new cauſe of action aroſe againſt the defendant, without regard to what had paſſed in the former action.

Macdonald v. Bovington, 4 Term Rep. 825.

The plea generally pleaded to this action is that of *non aſſumpſit*: but the defendant may, if the truth will warrant him, plead *non aſſumpſit infra ſex annos*; for by ſtatute 21 *Jac.* 1. *c.* 16. actions on the caſe, except upon *accounts* between merchants, muſt be brought within ſix years: and by the expreſs

§ 2. expreſs proviſion of the ſtatute of Queen *Anne*, all actions on promiſſory notes muſt be brought within the ſame time as is limited by the ſtatute of *James*, with reſpect to actions on the caſe.

But an acknowledgment of the debt, or a promiſe to pay, made within ſix years of the commencement of the action, will take the caſe out of the ſtatute.

8 W. & M. 5 Mod. 314. To an action on the caſe on a bill of exchange againſt the defendant as acceptor, he pleaded, that after acceptance he gave a bond in diſcharge of it: it was held that this plea was bad, becauſe it amounted to the general iſſue; for the debt on the bill being extinguiſhed by the bond, the defendant ought to have pleaded *non aſſumpſit*, and to have given the bond in evidence.

1 Ld. Raym. 444. Jenys v. Fowler, Str. 946. Price v. Neal, 3 Burr. 1354. 1 Bl. Rep. 390. In an action againſt the acceptor, it is a general rule that the drawer's hand is admitted, becauſe the acceptor is ſuppoſed to be acquainted with the writing of his correſpondent, and by his acceptance he holds out to every one who ſhall afterwards be the holder, that the bill is truly drawn.

On a bill payable to bearer, there is no perſon through whom the holder derives his title: in an action againſt the acceptor, therefore, he has only to prove the hand-writing of the acceptor himſelf.

Smith v. Cheſter, 1 Term Rep. 654. In an action againſt the acceptor of a bill payable to order, the plaintiff muſt prove the hand-writing of the payee or firſt indorſor; and this, though it were on the bill at the time it was accepted: if his indorſement be ſpecial to "another perſon," or to "another, or his order," the ſame rule, on the ſame principle, applies to the indorſement of that other perſon, as it does to the indorſement ſpecifically made of every ſubſequent indorſor, between the payee and plaintiff. If the indorſement of the payee be general, the proof of his hand-writing is ſufficient; that of any other of the indorſors is not requiſite, though all the ſubſequent indorſements be ſtated in the declaration; for by indorſing generally, the payee has ſhewn his order to be, that the bill ſhould be payable to any ſubſequent holder; and accordingly it has been ſhewn, that any ſuch ſubſequent holder may declare as the indorſee of the firſt indorſor, or of that indorſor who firſt indorſes in blank: but in this caſe, in order to render the evidence correſpondent to the declaration, all the ſubſequent names muſt be ſtruck out, either at the time of the trial or before.

Vide Collins v. Emett, 1 H. Bl. 313. In an action by an indorſee againſt the drawer, the ſame rules obtain with reſpect to proof of the hand-writing of the indorſors, as in an action againſt the acceptor.

That of the drawer himſelf muſt of courſe be proved: it muſt alſo be proved, that the plaintiff has purſued that diligence with reſpect to the drawee, and given ſuch notice to the drawer, of the default of the former, as we have ſeen to be neceſſary on his part to entitle him to have recourſe to the latter.

From the rule that, in an action againſt the drawer or acceptor of a bill payable to order, there muſt be proof of the ſignature of the firſt indorſor, and of all thoſe to whom an indorſement has been ſpecially made, has ariſen the queſtion which has ſo long agitated the commercial world on the ſubject of indorſements, in the name of fictitious payees.

Minet v. Gibſon, 3 Term Rep. 483. The reſult of the caſes upon this point ſeems to be, that in all caſes, where the holder of ſuch a bill declares againſt the acceptor, as on a bill

payable

payable to the bearer, it is sufficient to maintain the action, that he should prove, 1. That the payee was fictitious, and, 2. That the defendant knew this at the time when he accepted the bill;—or 1. That the payee was fictitious, and, 2. That the defendant had given a *general* authority to the drawer, *&c.* to draw bills upon him in the name of fictitious payees. Gibson v. Hunter, 2 H. Bl. 288.

In an action by an indorsee against an indorsor, it is not necessary to prove either the hand of the drawer or of the acceptor, or of any indorsor before him against whom the action is brought; for by his indorsement, he virtually undertakes to every subsequent holder, that the names of the drawer, acceptor, and previous indorsors are really in the hand-writing of those to whom they respectively purport to belong. 1 Ld. Raym. 174. Str. 444. 2 Burr. 675.

The same diligence also, with respect to the drawee, and the same notice to the defendant as indorsee, must be proved in this action, as in that against the drawer, every indorsor being, with respect to subsequent indorsees or holders, a new drawer. But proof of a demand from the drawer, and notice of non-payment by him, is not necessary.

Where the action is by an indorsor who has paid the money, proof must be given of the payment. 1 Ld. Raym. 743.

In an action by the drawer against the acceptor, it is necessary to prove the hand-writing of the latter; demand of payment from him, and refusal; the return of the bill, and payment by the plaintiff: but it does not appear necessary to prove, that the acceptor had in his hands effects of the drawer; his acceptance is presumption that he had, and if he had not, the proof must lie upon himself. *Vide* Louviere v. Laubray, 10. Mod. 36, 37. Symonds v. Parminster, 1 Wils. 185.

In an action on the case by the acceptor against the drawer, the plaintiff must prove the hand-writing of the defendant, and payment of the money by himself, or something equivalent to that, such as his being in prison in execution. *Vide* 3 Wils. 18.

In actions against the drawer or indorsor, the protest is sufficient evidence that the bill is not paid; and the mere production of the protest is sufficient; it is not necessary to prove either the writing of the notary, or to give any account how the plaintiff had the protest; for that would be destructive to public commerce, and throw too great a difficulty on transactions of this kind: and beyond seas, it is said, that it is sufficient to shew the court the protest without producing the bill itself; but here in general the bill itself must be shewn, as well as the protest, because the whole declaration must be proved, which cannot be without giving the bill in evidence. 12 Mod. 345. Gilb. L. E. 118. Gilb. L. E. 119.

But in an action against the drawer of a bill which was lost, it was held by *Holt*, C. J. that proof of the defendant's having owned that he had made the bill was sufficient. Hart v. King, 12 Mod. 309.

With respect to a promissory note, the same rules, of what is necessary to be proved, apply, as in a bill of exchange; the maker being in the place of the acceptor; the payee, after indorsement, in that of the drawer; and the indorsers and indorsees the same in each.

In general, direct proof is required of the signature of those parties whose indorsement must be proved: but with respect to the party himself against whom the action is brought, proof of other circumstances may be sufficient to supply the place of actual proof of his signature; particularly, confession. Thus, where the defendant was sued as indorsor of a note, and it was proved, that a person to whom application had been made to discount it, sent it to the defendant, who looked on it, and said it was his hand,

hand, and that the note, which had ſome months to run, would be paid when due; the Chief Juſtice would not permit the defendant to ſhew forgery, by ſimilitude of hands, becauſe that would tend to deſtroy all negotiation of bills and notes. But he ſeemed inclined to have admitted actual proof of forgery, if the defendant could have given it, but this he was unable to do, and the plaintiff had a verdict.

Ld. Hardwicke. Cooper v. Le Blanc, 2 Str. 1051.

So, where a letter was produced under the defendant's hand, in which he wrote to a friend that he had received a bill of exchange from the drawer on the acceptor, bearing date ſuch a day, and payable to him or order ſix months after date, and in all theſe circumſtances the bill agreed with the letter, though no ſum was mentioned in the letter, this was thought ſufficient evidence that the defendant had had the bill in queſtion in his poſſeſſion; and to ſhew that he had indorſed it over, it was proved that he had ſaid he had come to town to haſten the trial of a cauſe brought againſt him on an indorſement he had made on a bill of exchange, and that in fact he had brought down this very cauſe by proviſo.

Dale v. Lubbock, 1 Barnard. B. R. 198.

But where, in an action againſt any one party, proof of the ſignature of another is neceſſary to ſupport the action againſt the defendant, that proof muſt be direct; confeſſion of the party whoſe ſignature it purports to be, will not be ſufficient evidence. Thus in an action againſt the drawer or acceptor of a bill, or maker of a note, a confeſſion of an indorſor that he indorſed the bill or note, will not be proper proof of the indorſement.

Barnes 436. Hemmings v. Robinſon.

But where an action is brought againſt one, on a joint and ſeveral promiſſory note, ſigned by him and others, proof of payment by one of the others, of intereſt and part of the principal within ſix years before the action brought, will be ſufficient to bind the defendant, and take the caſe out of the ſtatute as to him.

Whitcomb v. Whiting, Dougl. 652.

Where a bill is accepted, or a bill or note is drawn or indorſed by one of two or more partners, on the partnerſhip account, proof of the ſignature of the partner accepting, drawing, or indorſing, is ſufficient to bind all the reſt.

Pinkney v. Hall, 1 Salk. 126. 1 Ld. Raym. 175. *vide* Carvick v. Vickery, Dougl. 653. Gilb. L. E. 117.

Where a ſervant has a general authority, to draw, accept, or indorſe bills or notes, proof of his ſignature is ſufficient againſt the maſter; but his authority muſt be proved.

Subſequent aſſent, it ſeemeth, is evidence of authority.

Comb 450.

A general cuſtom of the ſervant's ſignature, and payment by the maſter, is ſufficient proof of a general authority; and a general authority will continue to bind the maſter till its determination be generally known. Therefore, if a ſervant, having authority, draw a bill of exchange in ſo ſhort a time after he is diſmiſſed, that the world cannot take notice of his being out of ſervice; or, if he were a long time out of ſervice, but that kept ſo ſecret, that the world could not take notice of it, the bill in thoſe caſes will bind the maſter.

12 Mod 346.

Where notice is to be given by the poſt, it ſeemeth, that proof of putting the letter into the poſt is ſufficient, that being in general all that is in the plaintiff's power to prove, though this in one place is denied.

1 Barnard. B. R. 198.

Where the defendant ſuffers judgment by default, and the plaintiff executes a writ of enquiry; it is ſufficient for the latter to *produce* the note or bill, without any proof of the defendant's hand: this was determined ſo long

long ago as the 14th G. 2. in a case in the King's Bench, where the plaintiff having offered *collateral* evidence to prove the defendant's hand, the court not only held that this was sufficient, but said, that the note being set out in the declaration, was admitted by the default, and that the only use of producing it was, to see whether any money was indorsed on it as paid. Bevis v. Lindsell, B. R. 2 Str. 1149. Green v. Hearne, 3 Term Rep.

One such judgment, a writ of inquiry is not necessary, for the court on application by the plaintiff will, if no good reason shewn to the contrary, refer it to the proper officer to ascertain the damages and costs, and calculate the interest. Ruled Anon. B. R. Hil. 26 Geo. 3. Bailey, 67.

Rashleigh v. Salmon, C. B. T. 29 Geo. 3. 1 H. Bl. 252.

(M) Of Bills of Lading.

A Bill of Lading is a memorandum or acknowledgment, signed by the master of a ship, that he has received certain goods, which he undertakes to deliver at the intended place to the person named in the bill of lading. It is, regularly, made treble; one for the merchant who loads the goods; another for the consignee of the goods; and the third for the master of the ship.

The bill of lading is assignable, the undertaking being, generally, to deliver to the order or assigns of the shipper. But whether the first indorsement or assignment passes the right of property, whether the instrument be negotiable or not, is a point upon which our courts have differed, and which hath not yet been settled. See Evans v. Martlett, 1 Ld. Raym. 271. Wright v. Campbell,

4 Burr. 2046. 1 Bl. Rep. 628. S. C. Snee v. Prescot, 1 Atk. 245. Caldwell v. Ball, 1 Term Rep. 205. Hibbert v. Carter, *id.* 745. Lickbarrow v. Mason, 2 Term Rep. 63. 1 H. Bl. 357. S. C. 5 Term Rep. 367. S. C. Fearon v. Bowers, 1 H. Bl. 364. note. Salomons v. Nissen, 2 Term Rep. 674.

But, admitting that the assignment of the bill of lading will in general transfer the property, yet, if there be any fraudulent circumstances between the assignor and the assignee, if the assignee has full notice that the vendor has not been paid for the goods, the assignment will not in that case divest the vendor of his legal right to stop them *in transitu* in the event of the consignee's insolvency. Wright v. Campbell. 4 Burr. 2046. 1 Bl. Rep. 618. S. C. Salomons v. Nissen, 2 Term Rep. 764.

(N) Of the Provisions for the Encouragement of Shipping and Navigation.

1. Of the Plantation Trade: And,

1. Of the General Trade with the Foreign Dominions of his Majesty in *Asia*, *Africa*, or *America*.

NO goods or commodities may be imported into, or exported out of, any colony or plantation to his Majesty, in *Asia*, *Africa*, or *America*, belonging, or in his possession, but in *British*-built ships, owned by *British* subjects, and navigated by a master and three fourths at least of the mariners *British* subjects. St. 7 & 8 W. 3. c. 22.

Except

(a) Stat. 27 G. 3. c. 27. ſtat. 30 G. 3. c. 29. ſtat. 31 G. 3. c. 39. ſtat. 33 G. 3. c. 50. (b) Stat. 28 G. 3. c. 6. § 9. (c) Stat. 33 G. 3. c. 50. § 10. 11, 12.

Except ſuch goods and commodities as may be imported into, and exported from the free ports in the iſlands of *Jamaica*, *Grenada*, *Dominica*, and *New Providence*, and from the port of *St. John's* in the iſland of *Antigua*, by foreign ſhips, owned and navigated by the ſubjects of ſome foreign *European* ſovereign or ſtate, or by any perſons inhabiting any country on the continent of *America*, under the dominion of ſome foreign *European* ſovereign or ſtate, (*a*); except ſalt, which may be exported from *Turk's Iſland*, in ſhips belonging to any of the *United States* (*b*): and except ſugar and coffee the produce of any foreign country or plantation, which may be imported into ſuch port or ports in the iſlands called *Caicos*, as his majeſty in coúncil ſhall approve, in foreign ſhips (*c*)

(d) Stat. 12 Car. 2. c. 4. §. 18. ſt. 25 Car. 2. c. 7. ſt. 3 & 4 Ann. c. 5. § 12. ſt. 8 G. 1. c. 18. § 22 ſt. 4 G. 3. c. 15. § 27. (e) St. 20 G. 3. c. 10.

No ſugar, tobacco, cotton-wool, indigo, ginger, ſuſtick, or other dying woods, rice, molaſſes, copper ore, coffee, pimento, cocoa-nuts, whale-fin, raw ſilk, hides or ſkins, pot or pearl aſhes, iron or lumber, of the growth, production, or manufacture of any *Britiſh* plantation in *Aſia*, *Africa*, or *America*, may be tranſported to any place whatſever (*d*), other than to ſome *Britiſh* plantation, or to *Great Britain*, or to *Ireland* (*e*).

(f) Stat. 12 G. 2. c. 30. (g) Stat. 5 G 3. c. 45. § 22.

Except ſugars, which may be carried from the ſugar colonies to any part in *Europe*, in a ſhip clearing out from *Great Britain*, and having a licence from the commiſſioners of the cuſtoms for that purpoſe (*f*); and lumber, which may be carried from any *Britiſh* colony or plantation to the *Madeiras*, or the *Weſtern Iſlands*, called *Azores*, or to any part of *Europe* to the ſouthward of *Cape Finiſterre* (*g*).

(h) Stat. 5 G. 2. c. 9. (i) Stat. 5 G. 3. c. 39. (k) Stat. 9 G. 3. c. 28. § 1, 2. (l) St. 7 G. 1. ſt. 1. c. 21. § 9.

All other goods and commodities, not ſo enumerated, being the growth, production, or manufacture of any *Britiſh* colony, or plantation in *Aſia*, *Africa*, or *America*, may be tranſported to any place whatſoever; except hops to *Ireland* (*h*); rum, and other ſpirits to the *Iſle of Man* (*i*); rum to *Guernſey* and *Jerſey* (*k*); and *Eaſt India* goods, which muſt be brought to the port of *London* (*l*).

(m) Stat. 15 Car 2. c. 7. § 6. (n) Stat. 20 G. 3. c. 10.

No goods or commodities of the growth, production, or manufacture of *Europe*, may be imported into any land, iſland, plantation, colony, territory, or place, to his Majeſty belonging, or in his poſſeſſion in *Aſia*, *Africa*, or *America*, but ſuch as ſhall be ſhipped in *Great Britain* (*m*) or *Ireland* (*n*).

(a) Stat. 15 Car. 2. c. 7. § 7. (b) Stat. 9 G. 3. c. 28.

Except ſalt for the fiſheries of *Newfoundland*, and wines from the *Madeiras* (*a*), and from the *Weſtern Iſlands* of *Azores*; and craft, cloathing, or other goods, the growth, production, or manufacture of *Great Britain*, *Guernſey*, or *Jerſey*, or food or victuals, the growth, production, or manufacture of *Great Britain*, *Ireland*, *Guernſey* or *Jerſey*, from *Guernſey* or *Jerſey* to *Newfoundland*, or any other *Britiſh* colony, where the fiſhery is carried on, for the uſe of the fiſhery (*b*).

Lands, iſlands, territories, or places, to his Majeſty belonging, in *Aſia*, *Africa*, or *America*, not being colonies or plantations, are not included in any of the foregoing prohibitions or reſtrictions, other than the laſt-mentioned prohibition, and the reſtriction that all goods and commodities muſt be imported into and exported out of them in *Britiſh*-built ſhips, or in *Britiſh*

tiſh ſhips owned by his Majeſty's ſubjects, and navigated by a maſter and three-fourths at leaſt of the mariners *Britiſh* ſubjects.

2. Of the Trade of the Colonies with the Territories of the *United States*.

Sugar, molaſſes, coffee, cocoa-nuts, ginger, and pimento, and all goods and commodities which were not prohibited in the year 1788, to be exported into any foreign country in *Europe*, may be exported from the *Weſt India* Iſlands to the *United States*. St. 28 G. 3. c. 6. §. 3.

No goods or commodities may be imported from the *United States* into the *Weſt India* Iſlands, except tobacco, pitch, tar, turpentine, hemp, flax, maſts, yards, bowſprits, ſtaves, heading-boards, timber, ſhingles, and lumber of any ſort; horſes, neat-cattle, ſheep, hogs, poultry, and live-ſtock of any ſort; bread, biſcuit, flour, peas, beans, potatoes, wheat, rice, oats, barley, and grain of every ſort, being the growth or production of any of the territories of the *United States*. St. 28 G. 3. c. 6. § 1.

No goods or commodities may by imported from the *United States* by ſea or coaſtwiſe into the province of *Quebec*, or the countries or iſlands within that government, or up the river *St. Laurence*, nor at all into the provinces of *Nova Scotia* or *New Brunſwick*, the iſlands of *Cape Breton*, *St. John's*, or *Newfoundland*, or any country or iſland within their reſpective governments. § 12. 41.

Except pitch, tar, and turpentine, the growth and production of the *United States*, which may be imported from any of the territories of thoſe ſtates into the provinces of *Nova Scotia* and *New Brunſwick*, in *Britiſh*-built veſſels, owned and navigated by *Britiſh* ſubjects. St. 33 G. 3. c. 50. § 14.

Except alſo that the governors of *Nova Scotia*, *New Brunſwick*, the iſlands of *Cape Breton*, and *St. John's*, may, in caſes of publick emergency and diſtreſs, authorize the importation of ſcantling, planks, ſtaves, heading-boards, ſhingles, hoops, or ſquared timber of any ſort; bread, biſcuit, flour, peas, beans, potatoes, wheat, rice, oats, barley, or grain of any ſort, for a limited time; and the governor of *Newfoundland*, being empowered by order of his Majeſty in council, may authorize, in caſe of neceſſity, the importation of bread, flour, *Indian* corn, and live-ſtock, for the then enſuing ſeaſon only. St. 28 G. 3. c. 6. § 13.

Goods and merchandize, being the growth or production of any of the territories of the *United States* of *America*, may be imported directly from thence in *Britiſh*-built ſhips, owned by *Britiſh* ſubjects, and navigated according to law, or in ſhips built in the countries belonging to the *United States*, owned by ſuch ſubjects, and navigated by a maſter and three-fourths of the mariners of thoſe countries; namely, unmanufactured goods and merchandize, (except fiſh-oil, blubber, whale-fins, and ſpermaceti); and alſo tobacco, pig-iron, bar-iron, pitch, tar, turpentine, roſin, pot-aſh, pearl-aſh, indigo, maſts, yards, and bowſprits, upon the ſame duties as if they came from any *Britiſh* iſland or plantation in *America*. Secondly, Fiſh-oil, blubber, whale-fins, ſpermaceti, and all other goods and merchandize (except ſnuff), upon the loweſt of the duties impoſed by law upon thoſe articles, if they came from countries not under the *Britiſh* dominion. Thirdly, Snuff upon the ſame duties as if it was the product and manufacture of *Europe*. This ſtands upon the order of council of 1ſt April 1792, made by virtue of ſt. 23 G. 3. c. 39. continued by ſt. 36 G. 3. c. 38. The duties to be taken on the ſecond claſs of goods and merchandize are thoſe contained in the tables and ſchedules A. D. and F. of the conſolidation act, 27 G. 3. c. 13. and thoſe enacted by any law paſſed ſubſequent touching the duties in thoſe ſchedules. Snuff is further to be ſubject to the regulation of ſtat. 29 G. 3. c. 68.

2. Of the Trade with *Aſia*, *Africa*, and *America*.

St. 12. Car. 2. c. 18. § 3. No goods or commodities of the growth, production, or manufacture of *Aſia*, *Africa*, or *America*, may be imported into *Great-Britain*, in any other than in *Britiſh*-built ſhips, or in *Britiſh* ſhips owned by his Majeſty's ſubjects, and navigated by a maſter and three-fourths at leaſt of the mariners *Britiſh* ſubjects.

This is the only direct exception; but ſome of the inſtances which are given as exceptions under the next head of exceptions, are exceptions alſo to this, as far as they relate to ſhips.

Except ſuch goods and commodities of the growth or production of the *United States*, as are permitted by the before mentioned order in council to be imported in ſhips belonging to the *United States*.

This reſtriction applies as well to the trade with the plantations, as the general trade with Aſia, Africa, and America; and is founded on the conſtruction of the fourth ſection of the act of navigation.

No goods or commodities of the growth, production, or manufacture of *Aſia*, *Africa*, or *America*, may be ſhipped or brought from any other place or country, but only from thoſe of their growth, production, or manufacture, or from thoſe ports where they can only, or are, or uſually have been, firſt ſhipped for tranſportation.

(*a*) Stat. 12 Car. 2. c. 18. § 12. (*b*) § 13. (*c*) § 14. (*d*) § 15. (*a*) Stat. 7 Ann. c. 8. (*b*) Stat. 14 G. 2. c. 36. (*c*) Stat. 13 G. 1. c. 15. ſt. 7 G. 2. c. 18. (*d*) Stat. 5 G. 3. c. 30. (*e*) Stat. 16 G. 3. c. 52. 15 G. 3. c. 35. (*f*) Stat. 27 G. 3. c. 19.

Except the commodities of the *Streights* or *Levant* ſeas, from the uſual ports of lading them within the *Streights* or *Levant* ſeas (*a*); *Eaſt India* commodities, from the uſual ports for lading them to the ſouthward and eaſtward of the *Cape of Good Hope* (*b*); the goods of the *Spaniſh* or *Portugueſe* plantations or dominions, from the ports of *Spain* or *Portugal*, or the *Weſtern Iſles*, commonly called *Azores*, or the *Madeira* or *Canary Iſlands* (*c*); all bullion and prize-goods, from any port in any ſort of ſhips (*d*); jeſuits bark, ſarſaparilla, balſam of *Peru* and *Tolu*, and all drugs the produce of *America*, from the *Britiſh* plantations (*a*); raw ſilks or other goods of *Perſia*, from any place belonging to the Emperor of *Ruſſia*, in *Britiſh*-built ſhips (*b*); cochineal and indigo, from any port, in *Britiſh* ſhips, or ſhips of a ſtate in amity (*c*); gum ſenega, coarſe printed calicoes, cowries, arangoes, and other *Eaſt India* goods, prohibited to be worn here, from any port in *Europe*, in *Britiſh*-built ſhips (d); cotton-wool, and goat-ſkins, raw or undreſſed, from any place, in *Britiſh*-built ſhips (*e*); and goods the merchandize of the dominions of the Emperor of *Morocco*, from *Gibraltar*, in *Britiſh* ſhips (*f*).

3. Of the *European* Trade.

St. 12 Car. 2. c. 18. § 8. amended by ſt. 27 G. 3. c. 18. § 10. No goods or commodities of the growth, production, or manufacture of *Europe*, hereinafter enumerated and deſcribed, namely, no goods or commodities the growth, production, or manufacture of *Muſcovy*, or of any territories belonging to the Emperor of *Ruſſia*; nor any ſort of maſts, timber, or boards; no foreign ſalt, pitch, tar, roſin, hemp, or flax, raiſins, prunes, olive-oils; no ſorts of corn or grain, ſugar, pot-aſhes, wines, vinegar, or ſpirits called aquavitæ, or brandy-wine; may be imported but in *Britiſh*-built ſhips, or in *Britiſh* ſhips owned by his Majeſty's ſubjects, and navigated by a maſter and three-fourths at leaſt of the mariners *Britiſh* ſubjects, nor any currants or commodities of the growth, production, or manufacture of any country belonging to the *Turkiſh* empire, may be imported but

but in *Britiſh*-built ſhips, owned by *Britiſh* ſubjects, and navigated by a maſter and three-fourths at leaſt of the mariners *Britiſh* ſubjects; or in ſhips of the built of any country or place in *Europe* under the dominion of the ſovereign or ſtate in *Europe* of which ſuch goods are the growth, production, or manufacture; or of the built of ſuch port where the ſaid goods can only be, or uſually are, firſt ſhipped for tranſportation, and navigated by a maſter and three-fourths at leaſt of the mariners of that country, place, or port.

No ſort of wines (other than Rheniſh), no ſort of ſpicery, grocery, tobacco, pot-aſhes, pitch, tar, ſalt, roſin, deal boards, fir timber, or olive-oil, may be imported from the *Netherlands* or *Germany*, upon any pretence, in any ſort of ſhips or veſſels whatſoever. Stat. 13 & 14 Car. 2. c. 11. § 23.

Except timber, fir planks, maſts, and deal boards, the production of *Germany*, from any port or place in *Germany*, by *Britiſh* ſubjects, in *Britiſh*-built ſhips (*g*); and wines (*b*), the growth or production of *Hungary*, the *Auſtrian* dominions, or any part of *Germany*, from the *Auſtrian Netherlands*, or any port or place belonging to the Emperor of *Germany* or the Houſe of *Auſtria*, in any ſuch ſhips or veſſels as are deſcribed in the preceding clauſe. (*g*) Stat. 6 Geo. 1. c. 16. (*b*) Stat. 22 G. 3. c. 78. § 2. amended by ſtat. 27 Geo. 3. c. 19. § 10.

Bullion and prize-goods, and all other goods and commodities, of the growth, production, or manufacture of *Europe*, (not prohibited abſolutely to be imported,) may be imported from any country, place, or port, in any ſort of ſhips, owned and navigated in any ſort of manner: for bullion and prize-goods are excepted by the fifteenth ſection out of all the proviſions of the act of navigation; and what is not prohibited by ſtatute muſt of courſe be open and free.

4. Of the Coaſting Trade

No perſon may lade or carry on board any ſhip or veſſel, other than a *Britiſh*-built ſhip, or a *Britiſh* ſhip owned by *Britiſh* ſubjects, and navigated by a maſter and three-fourths at leaſt of the mariners *Britiſh* ſubjects, any commodities, or things, of what kind ſoever, from one port or creek of *Great Britain* or *Ireland*, or of the iſlands of *Guernſey* or *Jerſey*, to another port or creek of the ſame, or any of them. St. 12 Car. 2. c. 18. § 6.

Every foreign-built ſhip or veſſel bought and brought into *Great Britain*, to be employed in carrying goods and merchandize from port to port, is to pay at this port of delivery, for every voyage, five ſhillings *per* ton, over and above all other duties. St. 1 Ja. 2. c. 18.

5. Of the Fiſheries.

Freſh fiſh of every kind, caught by the crew of any *Britiſh*-built ſhip or veſſel, owned by *Britiſh* ſubjects, uſually reſiding in *Great Britain*, *Ireland*, *Guernſey*, *Jerſey*, or *Man*, and navigated by a maſter and three-fourths at leaſt of the mariners *Britiſh* ſubjects, may be imported in ſuch ſhips free of duty. St. 27 G. 3. c. 13. § 32.

No ſort of fiſh whatever of foreign fiſhing (except eels, ſtock fiſh, anchovies, ſturgeon, botargo or caveare, turbots, lobſters, and oyſters) may be imported into *Great Britain*. St. 10 & 11 W. 3. c. 24. St. 1 G. 1. ſt. 2. c. 18.

enforced by ſtat. 9 G. 2. c. 33.; and ſtat. 26 G. 3. c. 81. § 43, 44. Oyſters are not ſpecially excepted in any ſtatute; but there is a duty on them in the conſolidation act, which, not being leviable on Britiſh caught fiſh, muſt be conſtrued as a permiſſion to import foreign-caught oyſters.

St. 5 G. 1. c. 18. §. 6 St. 26 G. 3. c. 81. § 16.

Perpetual bounties are payable on the export of pilchards or ſhads, cod-fiſh, ling, or hake, whether wet or dried, ſalmon, white herrings, red herrings, and dried red ſprats, being of *Britiſh* fiſhing and curing.

St. 26 G. 3. c. 81. as to the Britiſh fiſheries continued by 27 G. 3 c. 10. and 35 G. 3. c. 56. ſtat. 26 G. 3. c. 41. continued, and amended by

Temporary bounties are payable on the tonnage of ſhips carrying on the *Britiſh* and the *Greenland* fiſheries; on the quantity of fiſh taken in the *Britiſh* and the *Newfoundland* fiſheries; on the quantity of oil, head-matter, blubber, and whale-fins, taken in the *Southern* whale-fiſhery; and on the export of pilchards, ſeal ſkins, head-matter, blubber, and whale-fins, taken in the *Newfoundland*, *Greenland*, and *Southern* whale-fiſheries, may be imported free of duty, provided *Britiſh* ſhips are employed, owned by *Britiſh* ſubjects uſually reſiding in the king's *European* dominions, and navigated by a maſter and three-fourths at leaſt of the mariners uſually reſiding in the king's *European* dominions.

29 G. 3. c 53. 31 G. 3. c. 43. 32 G. 3. c. 22. as to the Greenland fiſhery; ſtat. 26 G. 3. c. 26. as to the Newfoundland fiſhery; ſtat. 26 G. 3. c. 50. continued by ſtat. 35 G. 3. c 92. as to the Southern whale-fiſhery.

6. Of *Britiſh* Ships.

St. 26 G. 3. c 60. § 1, 2.

A BRITISH-BUILT ſhip is ſuch as has been built in *Great-Britain* or *Ireland*, *Guernſey*, *Jerſey*, or the *Iſle of Man*, or in ſome of the colonies, plantations, iſlands, or territories in *Aſia*, *Africa*, or *America*, which at the time of building the ſhip belonged to, or were in the poſſeſſion of, his Majeſty; or any ſhip whatſoever which has been taken or condemned as lawful prize.

But ſuch *Britiſh*-built ſhips as ſhall be rebuilt or repaired in any foreign port or place, to an amount exceeding fifteen ſhillings *per* ton, ſhall not be conſidered as *Britiſh* built, unleſs ſuch repairs ſhall be proved to have been neceſſary to enable the ſhip to perform her voyage.

A BRITISH ſhip, is FIRST, ſuch as is foreign built, and before 1ſt *May* 1786 belonged wholly to any of the people of *Great Britain* or *Ireland*, *Guernſey*, *Jerſey*, or *the Iſle of Man*, or of any colony, iſland, plantation, or territory in *Aſia*, *Africa*, or *America*, in poſſeſſion of his Majeſty.—SECONDLY, ſuch as has been built or rebuilt on a foreign-made keel or bottom, and regiſtered before 1ſt *May* 1786, as a *Britiſh* ſhip.—THIRDLY, ſuch as had been to be repaired or rebuilt on a foreign-made keel or bottom before 1ſt *May* 1786, and has ſince been regiſtered by order of the commiſſioners of the cuſtoms in *England* or in *Scotland*.

26 G. 3. c. 60. § 3. 28.

Every ſhip or veſſel having a deck, or being of the burden of fifteen tons, and belonging to a ſubject in *Great Britain* or *Ireland*, *Guernſey*, *Jerſey*, or *the Iſle of Man*, or any colony, plantation, iſland, or territory, to his Majeſty belonging, muſt be regiſtered by the perſon claiming property therein, who is to obtain a certificate of ſuch regiſtry in the port to which the ſhip or veſſel properly belongs; and the certificate is to diſtinguiſh the ſhip or veſſel under one of theſe two claſſes; CERTIFICATES OF BRITISH PLANTATION REGISTRY; or, CERTIFICATES OF FOREIGN SHIPS REGISTRY FOR THE EUROPEAN TRADE, BRITISH PROPERTY.

§ 5.

The port to which a ſhip ſhall be deemed to belong, is the port from and to which ſhe uſually trades, or, being a new ſhip, ſhall intend to

§ 6.

trade, and at or near which the huſband, or acting and managing owner, uſually reſides. No ſhip, the property of the king or royal family, nor

§ 7.

any lighters, barges, boats, or veſſels, of any built or deſcription whatever, uſed ſolely in rivers or inland navigation, need be regiſtered; and no ſhip built in the *United States*, or owned by the people thereof, during the

time

time the prohibitory acts were in force, and not before regiſtered, is entitled to be regiſtered, unleſs it has been condemned as prize, or having been ſtranded ſhall have been built or rebuilt, and regiſtered in the manner before practiſed and allowed. No ſubject, whoſe uſual reſidence is out of the king's dominions, ſhall, during ſuch reſidence, be entitled to be owner in whole or in part of a *Britiſh* ſhip to be regiſtered under this act, unleſs he is a member of ſome *Britiſh* factory, or agent for, or partner in, any houſe or copartnerſhip actually carrying on trade in *Great Britain* or *Ireland*. § 8.

An oath is to be taken before the perſon making the regiſtry and granting the certificate by the owner; and, if there are two joint owners, by both, if they both live within twenty miles of the port, otherwiſe by one: if more than two, then by the greater part, not exceeding three, if ſuch greater number of them are reſident within twenty miles of the port; or by one, if all ſhall be reſident at a greater diſtance; and where one of three joint owners takes the oath, he is alſo to ſwear, that thoſe who are abſent are not reſident within twenty miles of *London*, and have not wilfully abſented in order to avoid the oath, or are prevented by illneſs. § 10. § 11.

No ſhip is to be permitted to clear out as a *Britiſh* built ſhip, or a *Britiſh* ſhip, or to be entitled to the privileges of a *Britiſh*-built ſhip, or a *Britiſh* ſhip, unleſs the owner has obtained a certificate of regiſtry; and any ſhip departing from port without being ſo regiſtered, and obtaining ſuch a certificate, ſhall be forfeited. § 32.

All ſhips not entitled to the privileges of a *Britiſh* built ſhip, or a *Britiſh* ſhip, and all ſhips not regiſtered as aforeſaid, are deemed, although they may belong to *Britiſh* ſubjects, to all intents and purpoſes, alien or foreign ſhips. St. 27 G. 3. c. 19. § 13.

As often as the property of a ſhip is transferred from one *Britiſh* ſubject to another, in whole or in part, the certificate of the regiſtry is to be truly and accurately recited in words at length in the bill or other inſtrument of ſale, otherwiſe the bill of ſale is to be void. St. 26 G. 3. c. 60. § 17. This clauſe of the act is general, and applies to a transfer of ſhips at ſea; and if the requiſitions of it are not ſtrictly complied with, the vendee, or perſon claiming under the bill of ſale, has neither a legal, nor equitable, intereſt in the ſhip. Rolleſton v. Hibbert, 3 Term Rep. 406. Hibbert v. Rolleſton, 3 Br. Ch. Ca. 371. Camden v. Anderſon, 5 Term Rep. 709.

As often as the maſter of a ſhip is changed, a memorandum thereof is to be indorſed on the certificate by the proper officer of the cuſtoms. § 18.

The owner is to cauſe the name by which the ſhip is regiſtered to be painted on a conſpicuous part of the ſtern; and ſuch name is not to be changed. § 19.

If a certificate of regiſtry is loſt or miſlaid, or, if a ſhip ſhall be altered in form or burden, or from any denomination of veſſel to another, by rigging or fitting, ſhe muſt be regiſtered *de novo*, and a new certificate granted. § 22, 23.

Maſters of ſhips are, on demand, to produce their certificates to the principal officer in any port within the king's dominions, or to the *Britiſh* conſul or chief officer in any foreign port. § 34.

A ſhip had originally been regiſtered, and was ſaid to be bought by *Macneal* at *Savannah* in *South Carolina*. Having taken in a cargo there, he ſailed for *Naſſau*, where he applied to the governor for a regiſter. The officer whoſe duty it was to make out the certificate of regiſtry, alleged that he had no printed forms left, but that he was ready to make an indorſement Macneal's caſe. Reeves' Shipping, 501.

dorſement upon the old certificate, on *Macneal*'s taking the oath preſcribed by ſtat. 26 *G.* 3. *Macneal* afterwards ſailed to *Savannah*, and returned again to *Naſſau* with a cargo, where the ſhip was ſeized; but on a hearing in the court of Admiralty, ſhe was releaſed as not forfeited,

On the part of *Macneal* it was now contended, that the ſale of a *Britiſh* ſhip in a foreign port was not an act forbidden by any law; that he did all in his power to obtain a fair and legal regiſtry; that it was a blunder in the collector not to give him a certificate, alleging he had no printed forms; that on his return to *Naſſau* he meant to renew his endeavours to obtain a regiſtry, his intention being to trade between *Naſſau* and *Savannah*; and that in the caſe of a change of property in a foreign port, he was left at large as to the *proper* port for the regiſtry of the ſhip; and having declared his intention to trade thereafter from *Naſſau*, that, and that only, became the *proper* port where the ſhip ſhould be regiſtered.

Lord Camden. Upon which it was obſerved by the Lord Preſident, how material it was to aſcertain, in caſes where a ſhip was ſold, whether in a foreign or *Britiſh* port, what ſhall be the port to which ſuch ſhip ſhall be ſaid *to belong*, and within what ſpace of time ſhe ſhall repair to ſuch port? For if it ſhould be once laid down that ſuch a ſhip might regiſter in any other port than that where ſhe was firſt regiſtered, he was ſatisfied the act of the 28th of the king, which, he ſaid, is founded upon the beſt principles, and is wiſely and ſagaciouſly contrived by the noble perſon who was the author of it to prevent the many frauds committed under the act of King *William*, would be wholly diſappointed of its effect.

He then conſidered the defects in ſtat. 7 & 8 *Will.* 3. the frauds that were committed under it, and to what thoſe frauds were owning. It directs, that in all caſes of change, whether of the name or the property of the ſhip, if in another port, it ſhould be regiſtered *de novo*; but in neither caſe does the act give any direction to point out the particular port where ſuch ſhip ſhould be regiſtered. The conſequence of this want of proviſion in the act had been the multitude of frauds that were continually practiſed in the regiſtry of ſhips; for in any port whatſoever, if a perſon preſented himſelf and took the oath required by that act, he was entitled to have the ſhip regiſtered. For it was remarkable, that the act required no other ſecurity than the tranſient oath, as he called it, of any man whatſoever, who choſe to offer himſelf, and who the next minute might ſlip away and never be heard of afterwards. He ſaid, he did not wonder that the noble perſon who framed the ſtatute of the 26th of the king conſidered theſe frauds, and the preventing of them, as particularly deſerving his attention; and he was very happy to ſay, that if they were right in the judgment they were then going to give, he believed they ſhould ſo fully ſecond the deſign of this act, that he would defy any man finding a loop-hole to evade it.

He thought that ſtat. 26 *G.* 3. was an act which in every view of it ſhould be conſidered as a remedial act; it was for preventing a publick miſchief, to amend and alter ſtat. 7 & 8 *Will.* 3. It had appeared that frauds without number were committed under that act; and that was, and was ſtated to be, the reaſon of making this act.

The rule, therefore, of conſtruction in applying and explaining the act, ſhould be ſuch as will moſt aid in advancing the means of relief and in ſuppreſſion of fraud. And ſhould it be conſidered in any light as a penal act, he was clearly of opinion, that every thing from ſuch a conſideration ſhould be controlled by the other character of it as a remedial act.

He

He obſerved, that by ſect. 5. of the act, the port where the regiſtry ought to be made, was expreſsly defined *the port from and to which ſhe has uſually traded;* and if a new ſhip, *the port to and from which ſhe intends to trade.* It is eſſentially neceſſary, and expreſsly required, that the huſband's or acting owner's reſidence ſhould be near ſuch port. This circumſtance of reſidence ſeems to be made the moſt indiſpenſable requiſite in the ſection. Beſides this, there are added ſecurities, controls, ſurveys of the ſhip; all which, if complied with, eſpecially that of reſidence near the port, it ſhould ſeem that fraud would be almoſt impoſſible.

He forbore making more obſervations on the act, except only as to one point; that is, *how long time ſhould be allowed after the change of property in the ſhip for arriving at the proper port where the ſhip ought to be regiſtered:* for if the time allowed were indefinite, ſo that a ſhip might be trading from port to port without regiſtering, the deſign and object of the act would be at an end.

It is remarkable, that ſtat. 7 & 8 *Will.* 3. ſpecifies no time for new regiſtering; no more does ſtat. 26 *G.* 3.; but the latter act does in one clauſe decide what is to be done in a particular caſe; and he thought the direction there given might, by analogy, be applied to all caſes of a new regiſtry—"or to any other port in which ſhe can be legally regiſtered by "this act." Now there is no caſe under this act but that of a change of property in a foreign port. Every court before which a caſe of this ſort comes, is to conſider *the time.* Common ſenſe and common reaſon muſt ſay, a ſhip ſhall be at liberty to navigate without a regiſter, and ſhall be protected by law, if in the mean time ſhe is uſing due diligence to reach a port where a regiſter may be obtained. As for inſtance, ſuppoſe, a ſhip is ſold at ſea, and ſhe is then making a voyage under a charter-party, and the port at which ſhe firſt arrives after ſuch ſale is not a proper port for her regiſtering, he held ſhe would be juſtified in going to ſuch port; but that no further delay would be excuſed, as ſhe ought in convenient time to proceed to the port where ſhe can be regiſtered.

Upon the whole the rule is this: Where the property of a ſhip is tranſferred in a foreign port, ſhe muſt with all due diligence proceed to the proper port where ſhe may be regiſtered: this port muſt be that of which ſhe is, as it were, an inhabitant. This circumſtance is a part of the certificate, is a part of the oath, and is eſſentially neceſſary to the regiſtry.

Compare *Macneal*'s ſituation with theſe requiſites. He was ſaid to be the purchaſer of this ſhip at *Savannah*; nothing more appears of him: it might fairly be aſked, Who is he? Whence comes he? What property has he? what relations? what friends? By his own account he paid only a part of the purchaſe-money, for the remainder he was to draw on merchants in *Jamaica*: whether thoſe bills were paid or not. does not appear. Theſe merchants, by his account, were to become part owners of the ſhip; which alone makes his oath incorrect, and brings great ſuſpicion on the whole tranſaction. He comes to *Savannah* with a cargo belonging to ſome *American* merchants, but which in the bill of lading is made to belong to *Macneal*; all which was probably a mere colour to give him the credit of the property, in order to enable him to obtain a regiſtry.

He conſidered it as a fundamental objection to this ſhip, that *Macneal* had no known reſidence. He looked upon him as a ſea-vagabond; and obſerved, that he felt he was under the neceſſity of ſwearing with care; for in his oath he did not go farther than to ſay, "he had not been a reſident "in any country not under the dominion of his Majeſty."

On

On this ſingle objection, without taking into conſideration any other, the court might decide againſt this ſhip. But he had thought it proper to give more at large the ſenſe of the court upon the policy of the act, becauſe it is extremely material that its principle ſhould be thoroughly underſtood; and as to the point in queſtion, if the act was not ſcrupulouſly adhered to, he was perſuaded the whole of its regulations would be futile and uſeleſs. It became the more neceſſary to be thus explicit, as the Judge below had ſeemed greatly to have miſunderſtood the act; declaring, that *Macneal* had offended only againſt the latter of the act, and not againſt its ſpirit. Indeed, ſaid his Lordſhip, it is in general beyond ſea, in our plantations, that the laws of navigation are broke through and evaded; added to which, the application of them is left for a time with governors, collectors of the cuſtoms, and other perſons not ſufficiently converſant with legal matters, who contribute to aggravate ſuch miſchiefs by miſconſtruction and falſe interpretations of the law.

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Miſnomer and Addition.

(B) What Names and Additions are required by Law, and muſt be truly inſerted: And herein,

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(*If the Chriſtian*) But if plaintiff ſues defendant by the name he ſubſcribed to the bond, &c. and defendant pleads a mitnomer, plaintiff may reply he is as well known by the one name as the other, and give in evidence the defendant's actual ſubſcription by that name.

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(*In the time*) This ſtatute is to be taken ſtrictly, and confined to thoſe caſes where proceſs of outlawry lies; therefore want of proper addition is not pleadable to an information in nature of a *quo warranto*. Rex v. Brough, 1 Wilſ. 244..

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(*It is a good*) In Shelly v. Wright, Barnes, 338. it is ſaid not to be uſual to ſet aſide ſuch a plea upon motion; but that the plaintiff ought to demur.

(D) Of the Difference between a Miſtake in Grant, Obligations, &c. and Judicial Proceedings.

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(*But in grants*) So, in judicial proceedings. 1 Str. 316.

MORTGAGE.

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(A) Of the Original and ſeveral Kinds of Mortgages.

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(*This has been*) The mortgagor is only *like* a tenant at will to the mortgagee: his *legal* intereſt is inferior to that of a ſtrict tenant at will. Dougl. 22. 282-3.

Great inconvenience having been ſuffered by mortgagees, from the difficulty and delay attending bills to foreclose, a mode of contracting has been invented by which the mortgager may, after a given time, procure his principal and intereſt, by a ſale of the mortgaged eſtates, without being under the neceſſity of applying to a court of equity. This is done by taking a conveyance of the fee to truſtees in truſt for the mortgagee for a term of years ſubject to redemption, with remainder to the truſtees in truſt, in default of payment at the time ſtipulated, to ſell the eſtate, and to apply the purchaſe-money, after defraying the expences incurred in diſcharging the truſt, in payment of the mortgage-money, and intereſt, and then to pay over the reſidue to the mortgagor. 1 Pow. Mortg. 12.

(B) What ſhall be deemed a Mortgage, or an Eſtate redeemable.

Again, where the plaintiff being ſeiſed in fee of the lands in queſtion worth 200*l. per annum*, mortgaged the ſame in 1637, to the defendant's father for 250*l.* and agreed and alſo ſealed a deed for the abſolute ſale thereof, if the money were not paid at the end of ſeven years; a redemption was decreed, notwithſtanding; for the defendant's father, having exhibited a bill againſt the plaintiff for the land or the money, made it evident that it was only a mortgage originally, and being ſo at firſt, the ſubſequent agreement could not alter it. Bowen v. Edwards, 1 Rep. Ch. 222. 13 Car. 2.

And although a mortgagee have a power to mortgage or to ſell the lands mortgaged abſolutely, in caſe of failure of payment at a given time, a court of equity will, nevertheleſs, conſider any conveyance by him to be ſubject to redemption, if it be evident from the *res geſtæ*, that the vendee did not depend upon the power; as, if the equity of redemption be excepted in the in the conveyances. Thus, a conveyance of lands was made, by leaſe and releaſe, by *A.* to *B.* and his heirs, and by a defeazance bearing date with the releaſe, it was agreed that if *A.* repaid 1000*l. &c.* borrowed of *B.*, within a year from the date of the indenture, then *B.* ſhould re-convey to him; but if he failed to pay the money within the year, then *B.* ſhould mortgage, or abſolutely ſell the lands, free from redemption, and out of the money raiſed by ſuch mortgage or ſale, pay the ſaid 1000*l. &c.* and intereſt, and be accountable for the overplus to *A.* and his heirs. A fine was alſo levied to *B.* in order to bar *A*'s wife of dower. Afterwards, the money not being paid at the time ſtipulated, *B.* agreed to convey the eſtate for a certain ſum of money, and in the agreement, and alſo in the conveyances, an exception was made, and in ſuch exception the defeazance was mentioned. Croſt v. Powell, Comyns, 603.

ed. And afterwards a queſtion aroſe, Whether the purchaſer had an abſolute eſtate, or an eſtate redeemable? And it was contended that he had an abſolute eſtate, for that the eſtate conveyed to *B.* was an abſolute eſtate, and though there was a defeazance executed at the ſame time, yet that was to have operation only within a twelvemonth, after which period, *B.* was inveſted with a power to ſell abſolutely free from all equity of redemption; conſequently, it then became a truſt for *B.* to ſell, and where an eſtate was conveyed to truſtees to ſell, the vendee, by virtue of ſuch ſale, had an abſolute fee, free from all charges and power of redemption. And the fine, it was ſaid, paſſed the right of the then owners in the eſtate, and made it abſolute. But it was anſwered, and reſolved by the court, that the eſtate was redeemable, for the eſtate conveyed by *A.* to *B.* was, in its nature, a mortgage to him, and though the money was not paid within the year, yet the mortgagor might ſtill have redeemed at any time while the eſtate continued in *B.*; and then, though *B.* had a power on non-payment within the year, to mortgage or ſell in order to raiſe the money lent, and to be accountable for the overplus, it was not then to be conſidered what he might have done, but what he *had* done; and it was evident, that it was not *B*'s intention to convey an abſolute and indefeazible eſtate, for he had not conveyed it abſolutely, and free from the equity of redemption; but had inſiſted upon having the defeazance inſerted. If then, as was the caſe, *B.* on non-payment of the money within a year, ſtood as a truſtee for *A.* ſubject to the defeazance, his (*B*'s) vendee coming in with notice of that truſt, would ſtand in his place, and muſt be conſidered as taking the conveyance, liable, in equity, to the performance of the truſt; and the fine made no difference, for it only operated to ſtrengthen the eſtate and free it from the dower of the wife, but it confirmed it in *in ſtatu quo*, and did not diſcharge it from the equity of redemption to which it was before liable.

Vide Copleſtone v. Boxwil', 1 Chan Ca. 1. 3 Salk. 141.

It ſeems queſtionable whether a power of redemption can be ſet up upon a ſubſequent agreement, made after an abſolute conveyance executed; for if it be a mortgage, it muſt be ſo *ab initio* on the original agreement. And therefore, where one having the reverſion expectant upon the determination of a leaſe for life, in an eſtate worth 1000*l. per annum*, conveyed it in fee to *W. R.*, in conſideration of 100*l.* and no more, and the tenant for life died, a pretence was ſet up that this conveyance was no more than a mortgage, becauſe *W. R.* had declared *that he did not* know how long he ſhould enjoy the eſtate, and that he would take his money again with intereſt: *ſed dubitatur per curiam;* and one reaſon was, becauſe matter ſubſequent will not make it a mortgage, if it was not ſo upon the original agreement.

But although courts of equity will not ſuffer the mortgagee to clog the redemption with any ſtipulation for a purchaſe, at a ſpecifick price agreed upon at the time of the loan, becauſe the admiſſion of ſuch a practice would furniſh an inlet to great fraud and impoſition upon the mortgagor; yet, a mere agreement that, in caſe of ſale, an opportunity of pre-emption ſhould be given to the mortgagee, would, it ſeems, be decreed; but it muſt be claimed at a reaſonable time; for where *A.*, the plaintiff's brother, died, having previouſly mortgaged lands to *B.* by deed, containing covenants to reconvey upon ſix months notice of payment of the principal and intereſt, and that in caſe the eſtate ſhould be ſold, *B.* ſhould have the pre-emption; *B.* got the counterpart into his hands after *A*'s death; then the plaintiff gave him ſix months notice that he would pay off the mortgage, which he refuſed to accept; upon which, the plaintiff exhibited his bill for a re-conveyance

Orby v. Trigg, 2 Eq. Ca. Abr. 599. 24. S. C. 9 Mod. Ca. in Law and Eq. 2.

ance of the eſtate, having entered into articles for the ſale of it; in his anſwer, inſiſted on the covenant for pre-emption; but it appearing that neither the plaintiff nor purchaſer knew any thing of this covenant, the counterpart of the deed having been in *B*'s cuſtody; that the plaintiff, on application for it, had been denied it, the mortgagee inſiſting only on payment, alleging the ſecurity was too narrow for the money lent, and threatening to foreclose, never having mentioned his claim to pre-emption until after the eſtate was ſold; it was ſaid, he ought not to ſet it up to the prejudice of the purchaſer, having had time to claim it, if he had pleaſed, before the eſtate was ſold; and it was decreed accordingly.

A diſtinction hath been made by the court of Chancery, between contracts originally founded upon lending and borrowing money, with an agreement for a purchaſe in a certain event, and caſes where, after a mortgage, a new agreement hath been entered into and executed by the parties for an abſolute purchaſe, although there be a ſubſequent declaration that the mortgagor may have his eſtate upon payment of intereſt, principal and coſts; or, where a releaſe of the equity of redemption is given with a collateral agreement to re-convey, upon repayment of the purchaſe-money; and, in the latter caſes, it hath been determined that no re-purchaſe ſhall be had, unleſs upon ſtrict performance of the conditions ſtipulated. Thus, *A*. a joint-tenant with *B*. her ſiſter made an abſolute conveyance to *C*. in fee for 104*l*. which was admitted to be intended only as a mortgage; ſome time after, in 1708, thoſe deeds were cancelled, and then *A*. in conſideration of 184*l*. (including the 104*l*. paid by *C*.) conveyed the eſtate *ut ſupra*, but with a farther covenant not to agree to any partition without *C*'s conſent. *B*. was in poſſeſſion till 1710, when *C*. ejecting her out of the moiety, enjoyed it quietly till 1726, at which time *A*. brought a bill for redemption, to which *C*. pleaded himſelf an abſolute purchaſer. The receipts given for the money, mentioned it to be purchaſe-money. In 1710, there was an agreement that *A*. might have the eſtate again, if deſired, on payment of principal, intereſt, and charges. It was firſt heard before the Maſter of the Rolls, who diſmiſſed the bill. Afterwards it came on before Lord Chancellour *Talbot*, who obſerved the caſe was very dark; the firſt deed was admitted to be a mortgage, the ſecond was made in the ſame manner, excepting the covenant reſpecting the partition, which was the darkeſt part of the caſe; for to ſuppoſe that it was an abſolute conveyance, and to take a covenant from one who had nothing to do with the eſtate, made both the covenant and parties vague and ridiculous; but that it would be equally ſo if the deed was ſuppoſed to be an actual conveyance, ſo that it was of no great weight, and ought to be laid out of the queſtion; that he was inclined, upon the whole, to think the conveyance in 1708 was at firſt an abſolute conveyance. The agreement in 1710, for the repurchaſe, ſhewed it was not redeemable at firſt; the acquieſcence of ſixteen years upon *C*'s poſſeſſion, was a ſtrong evidence of it; and his Lordſhip, upon the circumſtances of the caſe, affirmed his Honour's decree.

Barrel v. Sabine, 1 Vern. 268.

Cotterel v. Purchaſe, Ca temp. Talb. 61.

So, lands in *Wales* were mortgaged for 400*l*. and afterwards, neither principal or intereſt being paid at the time limited, the mortgagee brought an ejectment, got poſſeſſion of the premiſes, and then obtained a releaſe of the equity of redemption from the mortgagor, upon payment of 350*l*. more; a note was given at the time of executing the releaſe, that the releaſee, on payment of the 750*l*. and all charges of repairs within a year by the releaſor, ſhould ſell and convey to him the premiſes. Payment having been neglected for ſixteen years, redemption was not allowed, the note

Endſworth v. Griffith, 15 Vin. Abr. 468. pl. 18. 2 Eq Ca. Abr. 595. pl. 6. 1 Brown's Parl Ca. 149.

note being conſidered as an original agreement between the parties to ſell and convey the premiſes upon the terms therein mentioned, but not that the releaſor ſhould be at liberty to redeem the ſame.

Another exception hath been made to this general rule, namely, where a conditional conveyance is made, to be void upon payment of a certain ſum certain, within a ſtipulated time, in contemplation of a ſettlement, or family proviſion Thus, *A.* ſeized of a copyhold in fee, ſurrendered it, upon his marriage, to the uſe of himſelf and his wife in ſpecial tail, remainder to her in fee, upon condition that, if he paid 50*l.* at a day certain, to the daughter that the wife had, then the whole ſurrender would be void. The day elapſed, the 50*l.* not paid, and the huſband died without iſſue. On a bill to redeem, brought by his heir againſt a purchaſer from the wife, the defendant pleaded that he was a purchaſer for a valuable conſideration without notice; and it was reſolved, that this was not originally deſigned for a mortgage, but that the party, by ſettling it thus, had left it in his election, either to perform the condition by paying the money, or to let the ſettlement ſtand; he had choſen the latter, and the plea was allowed.

King v. Bromley, 2 Eq. Ca. Abr. 595. 8.

One, upon his marriage, covenanted that his wife ſhould be paid 1000*l.*, within two years after his death, and, for performance thereof, entered into a ſtatute; but prior to the covenant and ſtatute, he had mortgaged part of the lands for 500*l.* for certain years. Afterwards he deviſed theſe lands to his wife and her heirs, if the 1000*l.* were not paid to her, according to the marriage-covenant, ſhe paying off the ſaid 500*l.* He died, leaving his wife executrix, to whoſe hands aſſets came; the 1000*l.* not being paid to the wife, ſhe paid off the 500*l.* and had the mortgage-lands aſſigned to her. She then conveyed over the mortgage-lands in fee by fine and deed. The queſtion was, Whether the heir of the covenantor could redeem, paying the 1000*l.* and the 500*l.* with intereſt upon diſcount of the profits? And the Lord Chief Baron was of opinion he could not; for the deviſe to the wife was abſolute, if the 1000*l.* were not paid at the time appointed.

Sir Nich. Wooliton v. Aſton, Hardr. 511.

A diſtinction hath been likewiſe taken, betweeen mortgages, and defeazible purchaſes, ſubject to repurchaſes within a *time limited*, where the intereſt is taken by way of rent-charge; for, in the latter caſes, the ſtipulations made between the parties muſt be ſtrictly adhered to, or the eſtate of the grantee will become abſolute. Thus, *I. S.* granted a rent-charge in fee of 48*l.* a year to *B.*, upon condition, that if *I. S.* ſhould, at any time, give notice to pay in the conſideration-money (being 800*l.*) by inſtalments, *viz.* 100*l.* at the end of every ſix months; and ſhould, purſuant to ſuch notice, pay the ſame and intereſt *at any time during his lifetime*, then the grant to be void. There was no covenant for *I. S.* to pay the money, and the rent-charge was much leſs than what the intereſt came to (intereſt being then 8 *per cent.*); *B.* had conveyed it over after *I. S.*'s death, to a *purchaſer with collateral ſecurity* for quiet enjoyment, and the *purchaſer* had afterwards made a marriage ſettlement upon it. The queſtion was, Whether it was redeemable after ſixty years? And it was decreed, by Lord *Cooper*, that it was not. His Lordſhip obſerved, it was material that at the time of making the mortgage, intereſt was at 8 *per cent.*, the rent-charge, therefore, was much leſs than the intereſt of the money; conſequently, the payment of the rent-charge could not be taken as the payment of the intereſt; that ſeveral circumſtances occurred in this caſe, which, though each of them ſingly might not be of force to bar the redemption, yet, joined together, were ſtrong enough to previl over it; that

Hoyer v. Levington, 1 P. Wms. 268.

the

the mortgagee seemed to have allowed a consideration for purchasing the equity of redemption after the death of the mortgagor; first, by taking the rent of 48*l. per annum*; secondly, by agreeing to have his money by instalments; thirdly, by leaving it only at the election of the mortgagor, whether he would redeem or not; that there could be no reason given why such a contingent right of redemption might not, upon fair and equitable terms, be purchased; that length of time, where so great as in the present case, was a good bar of redemption of a rent-charge, as well as of land; and that the mortgagor was not bound to pay the money by any covenant.

The reporter observes upon the last case, that is was thought length of time was the principal objection to the redemption; but, in the case of *Mellor* v. *Lees*, which came on before Lord Chancellour *Hardwicke*, upon an appeal from the rolls, the doctrine that such limited agreements for redemption, or rather repurchase, were legal, was confirmed. In this case a mortgage was made of an estate by the plaintiff's grandfather, *Thomas Mellor*, in 1689, to *John* and *James Whitehead*; the *Whiteheads* afterwards, on the 5th of *June* 1689, mortgaged the same estate to *Cartwright* and *Haywood*, and their heirs, for securing 200*l.*, to which *Thomas* and his son, *John Mellor*, were parties; and *Cartwright* and *Haywood*, in order to secure themselves the interest, made a lease to the plaintiff's father, and to his assigns, dated the 12th of *June* 1689, for five thousand years, at the rate of 12*l.* a year, for the three first years, and 10*l.* a year for the remainder of the term; *and if, in the space of three years*, the 200*l.* was paid with interest, then the premises were to be reconveyed. Receipts had been given sometimes for interest, and sometimes for a rent-charge; the last receipt was in 1730. The 200*l.* lent, was money left under one *Sutton*'s will in 1687, and directed to be laid out in the purchase of lands in fee, in *Lancashire* or *Cheshire*; the rents to be applied towards clothing twenty-four aged and needy housekeepers. The estate, at the time of the mortgage, was worth 500*l.* only, but was now valued at 900*l.* The plaintiff, on the 20th *January* 1738, had given notice that he would pay in the money; but the defendant, a new trustee of the charity, had refused to take it, insisting that it was an absolute purchase. And it was so decreed by *Fortescue*, Master of the Rolls, which decree was upon appeal to the Chancellour confirmed, his Lordship saying, that the bill was properly dismissed at the Rolls, not so much upon general rules, as upon the particular circumstances of the case, and the similitude of it to the case of *Floyer* v. *Levington*.

2 Atk. 494.

It seems, from the determination in the case of *Tasburgh* and *M'Namara* v. Sir *Robert Echlin et al.* that such a contract respecting lands, limiting the payment of the money advanced and interest thereupon *to a particular period*, would be considered in the nature of a conditional purchase, and no redemption allowed thereof, after the time stipulated.

Tasburgh v. Echlin et al. 4 Brown's Parl. Ca. 142.

This case came before the House of Lords upon an appeal from a decree made by the Lord Chancellour of *Ireland*, in the year 1732, on the following circumstances, *viz.* King *James* I. by his letters patent under the great seal, dated the 17th of *June* 1608, granted divers lands to *John King* and *John Bingley*, and their assigns, for 116 years to commence from the 18th of *May* then last past, at a certain yearly rent. The residue of this term, by deed dated the 26th of *May* 1677, became vested in *John Tasburgh*, father of *Henry Tasburgh*, the appellant in the cause. King *Charles* I. by his letters patent, dated the 25th of *March* 1647, granted the same premises to Sir *Maurice Eustace* and his heirs at a like rent, but without

without reciting or taking any notice of the term of 116 years. Sir *Maurice*, by his will dated the 20th of *June* 1665, deviſed the premiſes, *inter alia*, to his nephew Sir *John Euſtace* in fee; who by virtue thereof, or as heir at law of the teſtator, became entitled to the reverſion and inheritance of the premiſes, expectant on the determination of the term of 116 years. The premiſes being only of the clear yearly value of 200*l.*, Sir *John*, in conſideration of 200*l.*, paid him by the ſaid *John Taſburgh*, did by leaſe and releaſe, dated the 30th and 31ſt of *May* 1681, grant and convey the ſame to *Charles Taſburgh* and his heirs, in truſt for *John Taſburgh*; in which indenture of releaſe there was a proviſo to the following effect, viz. that if Sir *John Euſtace*,, his heirs, executors, or adminiſtrators, ſhould pay to *Charles Taſburgh*, his executors, adminiſtrators, or aſſigns, at the end of five years, to be accounted from the date of the releaſe, the ſum of 200*l.* with full intereſt for the ſame, at the rate of 10*l.* *per cent. per annum*, according to the cuſtom of the kingdom of *Ireland*; that then it ſhould be lawful for him and his heirs, into the premiſes to re-enter, and the ſame to repoſſeſs and enjoy as in his and their former right. But if Sir *John*, his heirs, executors, or adminiſtrators, ſhould fail in payment of the money with intereſt, at the time limited, that then the eſtate of the ſaid *Charles Taſburgh* ſhould be abſolute and indefeazible, as well in equity as in law; and that Sir *John*, his heirs and aſſigns, ſhould, on failure of payment as aforeſaid, be for ever debarred from all right and relief in equity, againſt the tenor of the ſaid releaſe. And Sir *John* did thereby, for himſelf and his heirs, releaſe unto *Charles Taſburgh*, his heirs and aſſigns for ever, all his right in equity to redeem the premiſes, in caſe of failure of payment as aforeſaid: and there was no covenant in the deed, on the part of the grantor, to repay the 200*l.*, or the intereſt thereof, as is uſual in mortgages. The five years mentioned in the proviſo being elapſed, and no part of the 200*l.*, or the intereſt thereof having been paid, *John Taſburgh* (having no remedy at law to compel the payment, the eſtate being only a reverſion expectant upon the determination of a term of which there were then 43 years unexpired) exhibited a bill, in *April* 1687, in the name of *Charles Taſburgh*, againſt Sir *John Euſtace*, ſetting forth the nature of the conveyance, and praying payment at a certain day, or that the conditional eſtate of *Charles Taſburgh* in the premiſes (in caſe it ſhould be adjudged to be a defeazible or redeemable eſtate) ſhould be made abſolute to him and his heirs; and that in that caſe Sir *John Euſtace* might be foreclоſed of all right or equity of redemption of the premiſes, and might make farther abſolute conveyances and aſſurances to the ſaid *Charles Taſburgh*, according to the tenor and true meaning of the indentures of leaſe and releaſe. Sir *John*, being ſerved with a *ſubpœna* to anſwer this bill, ſtood out all proceſs of contempt to a ſequeſtration, and in *May* 1688, appeared by his ſix clerk, and prayed a commiſſion for taking his anſwer in *England*, which was granted by conſent. But it was ordered that, unleſs the ſame was returned by the 22d of *June* following, the cauſe ſhould be ſet down to be heard, and the bill taken *pro confeſſo*. Sir *John* having neglected to anſwer at the time limited, farther time was given him; but he ſtill neglecting to anſwer, a decree was made the 11th *December* 1688, that he ſhould be foreclоſed, unleſs the principal, intereſt, and coſts were paid before the 11th *December* 1689. Afterwards Sir *John Euſtace* returned to *Ireland*, and lived until the year 1706, when he died without iſſue; but he never took any one ſtep to impeach theſe proceedings or decree; nor did he ever attempt to ſeek a redemption of the premiſes, but acquieſced under the decree for

18 years.

18 years. *Henry Taſburgh*, the appellant, ſucceeded to his eſtate on the death of his father, in 1691, and entered thereupon. And not imagining that, after an acquieſcence of 34 years under the decree, any perſon would ſet up a claim thereto under Sir *John Euſtace*, he by indenture, dated the 24th of *April* 1722, in conſideration of a fine of 300*l*., demiſed the ſame to the appellant *George M'Namara* for the term of 31 years, at the clear yearly rent of 250*l*. But the value of lands in *Ireland* riſing conſiderably, a bill was exhibited in the court of Chancery there, in *September* 1723, by ſeveral perſons in right of their wives, (nieces and coheireſſes of Sir *John Euſtace*,) alleging, that the decree of foreclоſure was obtained by ſurpriſe, fraud, and impoſition; and praying it might be reverſed. Afterwards, in *April* 1729, the appellant *Henry* put in a plea and anſwer to this bill, (which having abated, they claimed a right to revive,) inſiſting on the title as before ſet forth; and farther pleading the leaſe and releaſe executed, in 1681, by Sir *John Euſtace*, the declaration of truſt executed by *Charles Taſburgh*, the decree of foreclоſure, and the proceedings had in that cauſe, and the great length of time and acquieſcence under that decree. And *George M'Namara* denied notice of the reſpondent's title, and inſiſted, that he was a purchaſer, for a valuable conſideration, of his ſaid term without any notice. But it was decreed, that upon the reſpondents paying the appellant *Henry* the principal, intereſt, and coſts due to him, he ſhould reconvey the ſame; and as to *M'Namara*, an iſſue was directed to be tried, whether he, at any time, and when, had notice that the coheireſſes of Sir *John Euſtace* had or claimed any and what right to the lands in queſtion, after the leaſe to *King* and *Bingley* ſhould expire? From this decree an appeal was brought, when it was ordered and adjudged, that the proceedings, orders, and decrees complained of by the appellant ſhould be reverſed, and the reſpondents' bill diſmiſſed.

But where, on a bill to foreclоſe a mortgage, the intereſt, by the deed, was to be 5 *per cent. per ann.*, payable half-yearly, and if not paid by the ſpace of two months after the time of payment, *then* to be raiſed to 5*l*. 10*s*. *per cent. per ann.* for increaſe of intereſt; the intereſt being run greatly in arrear, the queſtion was, After what rate it ſhould be computed on redemption of the mortgage? And it was decreed to be computed at the rate of 5 *per cent. per ann. only*: for, where the intereſt was to be increaſed, if not paid at the day, that was but in the nature of a penalty, and relievable in equity. Strode v. Parker, 2 Vern 316. Holles v. Wyſe, 2 Vern 289. Nicholas v. Maynard, 3 Atk. 520.

But it ſeems, that if there be a covenant for payment of the additional 1 *per cent.*, the court will not relieve againſt it. Thus, where money was ent on mortgage at 5 *per cent.*, and the mortgagor covenanted to pay 6 *per ent.* if he made default in payment of intereſt for the ſpace of ſixty days, fter the time of payment; the court decreed, that, from default made, he mortgagor ſhould pay 6 *per cent.*; for that this covenant was the agreeient of the parties, and to be relieved againſt as a penalty. Marquis of Halifax v. Higgens, 2 Vern. 134. Pre. Ch. 161.

And, if an indulgence be given by the mortgagee, ſuch agreement will e good to raiſe the intereſt, upon the ground of forbearance; ſuch additional intereſt not being conſidered, in that caſe, as a penalty, but as a liquidated ſatisfaction fixed and agreed upon by the parties. So, where a mortgage was given, in *Ireland*, to truſtees, by way of ſecuring debts to creditors, nd no money actually paſſed, but the ſum nominally lent was to be paid by inſtalments; an agreement that the intereſt of thoſe ſums ſhould riſe, on nonayment at the time appointed, or within three weeks after, from 5 to 8 er *cent.*, was held good, upon an appeal to the Houſe of Lords. Burton et al. v. Slattery, 3 Brown's Parl. Ca. 68.

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Brown v. Barkham, 1 P. Wms. 652.

And, in a ſimilar caſe, where a long arrear of intereſt had accrued, and the mortgagee had ſent an account thereof to the mortgagor, who returned an anſwer, admitting the account, *deſiring forbearance*, and promiſing to make ſatisfaction for the ſame; Lord Chancellour *Parker* allowed the additional 1 *per cent.* reſerved, as a ſatisfaction; ſaying, that though the proviſo, obliging the party to pay 6 *per cent.*, was generally looked upon as a penalty, and *in terrorem*, and therefore to be relieved againſt, if only a very ſhort lapſe had happened; yet it might not be relieveable againſt, in caſe of a long arrear of intereſt: and that if no reſervation of 6 *per cent.* had been made, and a great arrear of intereſt had incurred, the court, on ſuch a promiſe, in writing, to make a ſatisfaction for forbearance, would have given the mortgagee ſome allowance in that reſpect.

(C) Of the Nature of a Mortgage, as to the diſtinct Intereſts of the Mortgagor and Mortgagee.

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(*The Mortgagor*) The mortgagor being conſidered in the nature of a tenant at will, it follows, that if he makes a leaſe ſubſequent to the mortgage, the mortgagee may treat the leſſee as a wrong-doer, or not, at his election. Cro. Ja. 660. Cro. Car. 303. If the mortgagee permits the leſſee to enjoy his leaſe, the mortgagor may, thenceforth, be conſidered as a receiver of the rent, or, in ſome ſort, a truſtee for the mortgagee, who may at any time countermand the implied authority, by giving notice to the tenant not to pay the rent to the mortgagor any longer. 1 Atk. 606. But if the mortgagor elects the other alternative, the leſſee may be turned out by an ejectment, he being in under a perſon who had no power to under-let, but ſubject to eviction by the mortgage. Keech v. Hall, Dougl. 21. But if there is tenant from year to year, and the landlord mortgages pending the year, the tenant is entitled to ſix months notice from the mortgagee. Birch v. Wright, 1 Term Rep. 378.——Though the tenant be in poſſeſſion under a leaſe prior to the mortgage, yet the mortgagee, after giving notice, is entitled to the rent in arrear at the time of the notice, as well as to what ſhall accrue afterwards. and he may diſtrain for it after ſuch notice. Moſs v. Gallimore, Dougl. 279.

A. being ſeiſed of the lands in queſtion in fee, mortgaged the ſame for two ſeveral terms of 1000 years each, and afterwards made his will by which he deviſed thoſe lands to *L. L*, his heir at law, and to the heirs male of his body, remainder to *B.* for life, with contingent remainders to his firſt and other ſons in tail, remainder to *G. D.* for life, with remainder to his firſt and other ſons in tail, remainder to his own right heirs, and died: Afterwards *L. L.* being ſeiſed of the lands in queſtion under the will, and alſo of other lands in fee of a very conſiderable yearly value, made his will, by which he bequeathed to his mother the ſum of 2000*l.*, and then directed and appointed, that his executor ſhould pay off and diſcharge all mortgages and incumbrances laid and charged upon his eſtate in Suſſex, being the lands in queſtion, and particularly mentioned the two aforeſaid mortgages for years, and then directed and appointed that the ſaid ſeveral mortgage leaſes ſhould be kept on foot; and upon payment of the ſeveral ſums of money due upon the ſame, ſhould be aſſigned by the mortgagees to his mother dame *M. S.*, for her ſole uſe and benefit, during the remainder of the ſeveral terms, in the ſaid ſeveral mortgages contained; and farther deviſed a yearly rent charge of 100*l.* to his mother for life, to be iſſuing out of all his manors, &c. in the ſeveral counties of Hertford and Bedford. Then the will went on—"and as for and concerning all and "every my manors, meſſuages, lands, tenements, and hereditaments, which I the ſaid *L. L.* am "now ſeiſed of in law or equity, or which I have a power to give or charge, I do give and diſ"poſe the ſame in manner following"—and then he appointed, that if his wife proved with child, and ſuch child ſhould be a ſon, that his ſon ſhould have all his aforeſaid manors, &c., in tail, remainder to his couſin *W. L.*, the defendant in the original cauſe, and to his heirs: And if the ſaid after-born child ſhould prove a daughter, he appointed that 5000*l.* ſhould be raiſed out of the profits of his ſaid eſtate for ſuch daughter; and if his wife were not with child at the time of his death, then he deviſed all his ſaid manors, &c to his ſaid couſin *W. L.*, and his heirs for ever. The teſtator died, his wife not having been with child. *S. B.* and *G. D.* both died without iſſue. Then the plaintiff, as repreſentative to dame *M. S*, brought a bill, praying an aſſignment of thoſe terms; and the defendant brought a croſs bill, praying to be let in to redeem as deviſee of the reverſion by the will of *L. L.* And the queſtion was, Whether the equity of redemption, which the teſtator had

had, incident to the reverſion in fee, as heir at law of the mortgagor, was ſevered from the reverſion by the deviſe, and given to dame *M S.*; and ſo thoſe terms veſted in her irredeemable by the deviſee of the reverſion? or whether thoſe terms were deviſed to her only as ſecurities for the original mortgage-money, and ſo ſubject to be redeemed by him, that ſhould have the inheritance? And it was decreed by the Lord Chancellour, King, aſſiſted by Lord Chief Juſtice Raymond, and Mr Juſtice Denton, that the deviſee of the reverſion under the will of *L. S.*, ſhould be let in to redeem: for that the teſtator did not otherwiſe intend theſe mortgages for his mother than as ſecurities for ſo much money. Amhurſt v. Litton, Fitzg. 99.

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(*And as the*) That the mortgagor ſhall preſent, ſee Gally v. Selby, 1 Str 403. Kenſey v. Langham, Ca temp Talb. 144. Robinſon v. Jago, Bunb. 130. (*a*) Qu. How is the preſentation to be revoked?

In the caſe of *Gardiner* v. *Griffith*, the mortgage was of a long term in a naked advowſon, and therefore a diſtinction was attempted; becauſe the mortgagee could have no other ſatisfaction than by providing for a child, relation, or friend, on the advowſon becoming void; and the rather, for that it was expreſsly ſo agreed in the mortgage deed; but the court gave no opinion thereupon. And in the caſe of *Mackenzie* v. *Robinſon*, which was the caſe of a mortgage of a naked advowſon, Lord *Hardwicke* doubted the legality of ſuch a covenant, *that the mortgagee ſhould preſent*, it being a ſtipulation for ſomething more than principal and intereſt; and the mortgagee, not being able to find any precedent in his favour, gave up the point of preſenting; in conſequence whereof, an order was made, that the mortgagor ſhould have liberty to preſent, and the mortgagee was obliged to accept of his nominee.

Gardiner v. Griffith, 2 P. Wms. 404.

Mackenzie v. Robinſon, 3 Atk. 560.

But, if the mortgagee preſent to an advowſon, a bill by the mortgagor, to compel the incumbent to reſign and to deprive him of his living, will be diſmiſſed, unleſs brought within ſix months after the death of the laſt incumbent. In ſuch caſe the mortgagee, inſtead of bringing a foreclosure, ſhould pray a ſale of the advowſon

Gardiner v. Griffith, 2 Wil. 405. 3 Atk. 458.

A mortgagee takes the eſtate mortgaged in the ſame plight that it is in, in the hands of the mortgagor. If the mortgagor therefore has done any act that amounts to a forfeiture, the mortgagee will loſe his ſecurity. Thus, tenant for life, with remainder to his wife for life, remainder to his ſons in ſtrict ſettlement, remainder over, having occaſion for money, together with his wife, mortgaged the eſtate ſettled by way of leaſe or releaſe and fine, *come ceo*, &c. which mortgage was afterwards aſſigned to the plaintiff, and another leaſe and releaſe and fine levied and executed by the huſband and wife for making good the aſſignment. The huſband died, and a bill was brought againſt the widow and eldeſt ſon to compel them to redeem or to foreclose them, and to be relieved againſt the forfeiture. The defendant, the ſon, pleaded the marriage ſettlement of his father and mother, who were but tenants for life, and inſiſted on the forfeiture; and the court allowed the plea; the Lord Chancellour ſaying, that this was a contrivance to deſtroy the ſettlement and diſinherit the ſon; and his Lordſhip ſaid, he had ſo decided in many caſes, particularly in the caſe of Sir *Harry Peachy* and the Duke of *Somerſet*.

Lady Whetſtone v. Sainſbury, Pre. Ch. 591. See Willis v. Fineux, *Id.* 108.

A mortgagee, before foreclosure, cannot exerciſe any act of ownerſhip over the property which may incumber the mortgagor. He can make no leaſe of the lands for years to an undertenant. Thus, in the caſe of *Hungerford* v. *Clay*, the bill was for redemption on payment of principal and intereſt. The ſubſtance of the anſwer was, that the defendant, the mortgagee, had made a leaſe of the houſe for five years at a rent reſerved with a covenant, that the leſſee ſhould have the option of a farther leaſe for four

Hungerford v. Clay, 9 Mod 1. 2 Eq. Ca. 610.

years after the expiration of the ſaid term; that the term for five years was now expired, and the leſſee deſired to take the premiſes for four years longer; that, if the plaintiff would grant ſuch leaſe, the defendant would reconvey on payment of principal and intereſt. On hearing this caſe at the Rolls, the defendant had a decree; but, on appeal to the Chancellour, his Lordſhip was of opinion, that the mortgagee, before foreclоſure of the equity of redemption, could not leaſe the premiſes for years to bind the mortgagor, unleſs, to avoid an apparent loſs, and merely in neceſſity: and the decree at the Rolls was reverſed.

And as a mortgagee cannot, before foreclоſure, exerciſe any act of ownerſhip that will attach on the eſtate, but ought to reconvey the premiſes free from all incumbrances; ſo neither can he juſtify, in equity, the commiſſion of any act which may injure the eſtate; therefore, though at law, a mortgagee in fee may commit waſte, yet he will be reſtrained in equity. Thus, on a bill to redeem a mortgage, wherein an account was decreed, and 250*l.* reported as due, and exceptions taken to the report; it being, on motion and reading affidavits, ſhewn, that the defendant had burnt ſome wainſcot and committed waſte, the defendant was ordered to deliver up poſſeſſion to the plaintiff, who was a pauper, he giving ſecurity to abide by the event of the account.

Hanſon v. Derby, 2 Vern. 392.

So, where the mortgagee of an eſtate in fee had cut down trees, on application to the court it was decreed, that an account ſhould be taken of what was cut down, and the produce applied in the firſt place to the payment of the intereſt, and then to the ſinking of the mortgage; and an injunction was granted to ſtay felling any more.

But a diſtinction is made where the ſecurity is defective; for, in that caſe, the court will not reſtrain a juſt creditor from his legal privileges; but then the timber, when cut down, muſt be applied to eaſe the eſtate, and not to the mortgagee's benefit.

Withrington v. Banks, Sel. Ca. Ch. 31.

However, although the mortgagee cannot, to better his ſecurity, do any act to incumber the eſtate mortgaged, which will be valid againſt the mortgagor after redemption, nor will be juſtified in committing waſte; yet he will be entitled to ſuch expences as he ſhall incur in neceſſary repairs, or other acts for the preſervation of the eſtate mortgaged, and may, certainly, add this to the principal of his debt, and it will carry intereſt.

3 Atk. 518.

Thus, if a leaſehold eſtate be mortgaged, and there is no covenant on the part of the mortgagor, that he ſhould procure the lives to be filled up, the mortgagee cannot compel him to do it; but muſt pay the expence of renewing, and reimburſe himſelf by adding it to the principal of the mortgage, and it ſhall carry intereſt. So it was determined in the caſe of *Manlove* v. *Ball* and *Bruton*, which was a mortgage of a church leaſe for three lives, two of which died during the time the eſtate was in mortgage, and were renewed on fines paid by the mortgagee.

3 Atk. 4. Lucam v. Martins, 1 Wilſ. 34. Manlove v. Ball et al. 2 Vern. 84 *Supra.*

A term aſſigned in truſt to attend the inheritance will, in equity, follow all the eſtates created thereout, and all the incumbrances ſubſiſting upon ſuch inheritance, and is ſo connected with it, that equity will not ſuffer it to be ſevered to the detriment of a *bonâ fide* purchaſer. Therefore, a mortgagee ſhall have the benefit of all the intereſts which the mortgagor had at the time the mortgage was made, unleſs againſt an intermediate purchaſer without notice, and, conſequently, if there be a term in a mortgaged eſtate held in truſt for the mortgagor, when the mortgage of the inheritance is made, the concealment of it will be a fraud upon the mortgagee, and the truſtees

Vide 3 Atk. 476, 477. Charlton et al. v. Low et al. 3 P. Wms 328.

truſtees of ſuch a term aſſigned to attend the inheritance, will, in equity, become truſtees for the mortgagee of the inheritance.

If a mortgage be made of an eſtate to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor, or his repreſentatives, with a good title; the mortgagee will be entitled, in equity, to the benefit of it; for it will be conſidered there as a graft upon the old ſtock, and as ariſing in conſideration of the former title.

As, where houſes and lands were demiſed for a long term, and an aſſignee of the leaſe, believing he had a good title, mortgaged it for 100*l.* afterwards the title turned out to be bad, the eſtate belonging to another perſon. Then the real owner of the eſtate, out of compaſſion to the aſſignee, who had built upon it, leaſed the premiſes for a long term to truſtees for his wife, he being run away. And on a bill filed, the truſtees were decreed to make a new mortgage to the mortgagees; the Maſter of the Rolls ſaying, that this was a graft on the old ſtock, all the benefit of it, except the rent reſerved, ariſing in conſideration of the former title. Seabourne v. Seabourne 2. Vern. 12

If a mortgagee procures a grant of a new term after the old one be actually expired, yet this will be a truſt for the mortgagor, and redeemed with the principal; for it is ſuppoſed to have proceeded from having had the original term: and, although there be nothing in fact in having a tenant-right, yet, as ſuch regard is had to it, in the eſtimation of the world, it will be looked on as the occaſion of the leaſe. Rakeſtraw v. Brewer, Sel. Ca. in Ch. 35. Lee v. Lord Vernon, 7 Brown's Par. Ca. 432

On the aſſignment of a term by way of mortgage, the mortgagee, before actual poſſeſſion, is not liable to the reverſion and arrears of rent, and other covenants in the original demiſe. Eaton v. Jaques, Dougl. 455. Walker v. Reeves, *Id.* 461. note.

But, if the mortgagee enters into poſſeſſion, he becomes liable to all covenants that run with the land, for he takes it *cum onere*, and, enjoying the profits, he muſt ſubmit to the loſſes. Traherne et al. v. Sadleir et al. 1 Brown's Par. Ca. 105

And if a mortgagor, by a mortgage of a term veſted in him, deveſts himſelf of all intereſt therein, in the conſideration of a court of law, he retains only the equity of redemption, which he muſt purſue in a court of equity; and therefore, if he join with his mortgagee in a leaſe, in which the leſſee is made to covenant with the mortgagor, for rent, repairs, *&c.* ſuch covenants will be merely collateral to the mortgagee's intereſt in the land, and the aſſignee of the mortgagee, cannot maintain an action for the breach of them on the ſtatute of 32 *H.* 8. *c.* 34. Webb v. Ruſſel, 3 Term Rep. 393.

Theſe covenants, therefore, muſt be conſidered as *covenants in groſs*, upon which, of courſe, the mortgagor may maintain an action. And ſo it was determined on the ſame inſtruments, and between ſome of the ſame parties, in the caſe of *Stokes* againſt *Ruſſel*, in the court of King's Bench. Stokes v. Ruſſel, 3 Term Rep. 678.

If a mortgagor commit waſte, whether it be a mortgage in fee or for a term of years, the court, on a bill by the mortgagee to ſtay waſte, will grant an injunction; for they will not ſuffer a mortgagor to prejudice the incumbrance. Farrant v. Lovel, 3 Atk. 723.

A mortgagor is never permitted to diſpute the title of his mortgagee; becauſe no man is permitted to diſpute his own ſolemn deed. Cowp. 601.

A mortgagor *in poſſeſſion* gains a ſettlement, becauſe the mortgagee, notwithſtanding the form, has but a chattel, the mortgage being only a pledge to him for ſecurity of his money, and the original ownerſhip of the land Doug. Rep. 610.

ſtill reſiding in the mortgagor, ſubject only to the legal title of the mortgagee, ſo far as ſuch title is requiſite to the end of his ſecurity.

Rex v. Catherington, 3 Term Rep. 771.

But. if the mortgagee evict the mortgagor and take poſſeſſion, the mortgagor, though afterwards occupying permiſſively for a particular purpoſe, will not thereby gain a ſettlement.

(E) Of the equity of Redemption and Foreclosure: And herein.

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(*And on this*) So, Pockley v. Pockley, 1 Vern. 36. King v. King, 3 P. Wms. 360. Galton v. Hancock, 2 Atk. 436. Robinſon v. Gee, 1 Ves. 251. Earl of Belvedere v. Rochfort, 6 Br. P. C. 520. Philips v. Philips, 2 Br. Ch. Rep. 273.

(*Alſo it is held*) In a later caſe a contrary determination was given. There, the defendant's teſtator having made a mortgage of his lands for a conſiderable ſum of money, by his will appointed them to be ſold for payment of his mortgage-money, and afterwards deviſed the lands ſo in mortgage, *as to one moiety* thereof to the plaintiff, &c. and made the defendant executor, and deviſed the perſonal eſtate to his executor *for the payment of his debts*: The ſingle queſtion was, Whether the perſonal eſtate ſhould be applied to diſcharge the mortgage for the benefit of the deviſee? And it was decided at the Rolls, that the perſonal eſtate ſhould be ſo applied for the advantage of the deviſee, and that the decree was confirmed by the Lords Commiſſioners. Johnſon v. Milkrop, 2 Vern. 112.—In the caſe of Pockley and Pockley, 1 Vern. 36. it was determined, that ſuch debt on mortgage would leſſen the widow's cuſtomary moiety in the province of York; for the cuſtom cannot take place until after the debts paid.—So, a mortgage ſhall be paid out of the perſonal eſtate, in preference to the cuſtomary or orphanage part of the cuſtom of London. Bail v. Bail, cited 1 P. Wms. 335.——And where lands are ſubject to, or deviſed for, payment of debts, ſuch lands ſhall be liable to diſcharge mortgaged lands either deſcended or deviſed. Bartholomew v. May, 1 Atk. 487. Marchioneſs of Tweedale v. Coventry, 1 Br. Ch. Rep. 240. Even though the mortgaged lands be deviſed, expreſsly *ſubject to the incumbrance*. Serle v. St. Eloy, 2 P. Wms. 366. So, lands deſcended ſhall exonerate mortgaged lands deviſed. Galton v. Hancock, 2 Atk. 424. So, *unincumbered* lands and *mortgaged* lands, both being ſpecifically deviſed, (but expreſsly "*after payment of all debts*,") ſhall contribute in diſcharge of ſuch mortgage. Carter v. Barnardiſton, 2 P. Wms. 505. 2 Br. P. C. 1. In all theſe caſes, the debt being conſidered as the *perſonal* debt of the *teſtator* himſelf, the charge on the real eſtate is merely collateral.

(*It has likewiſe*) This guarded ſtatement is no longer neceſſary: the law is now clearly ſettled as here laid down. For, by Lord Talbot, in King v. King, 3 P. Wms. 358. every mortgage implies a loan, and every loan implies a debt; and though there be no covenant or bond, yet the perſonal eſtate of the borrower of courſe remains liable to pay off the mortgage. Hence, a decree of Lord Harcourt in the caſe of the mortgage of a ſhip, where the ſhip was taken at ſea, and there was no covenant for payment of the money; and though the ſhip could not properly be ſaid to be in nature of a pawn or *depoſitum*, ſince the mortgagor had ſailed with the ſame to ſea; nevertheleſs the executors of the mortgagor were decreed to pay the money for which the ſhip was mortgaged. So, it is in the caſe of Welſh mortgages (Howel v. Price, *infra*), where no day is appointed for the payment, but the matter is left at large. And ſee Balſh v. Hynam, 2 P. Wms. 455. S. P.

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(*But where*) Howel v. Price, Pr. Ch. 425. Gilb. Eq. Rep. 106. S. C. *totidem verbis*. 2 Vern. 701. S. C. It appears from the report in Pr. in Ch. & Gilb. that there was no decree upon the argument of this caſe in 1715, to which period of time theſe hiſtories refer, but that precedents were ordered to be ſearched. The ſame caſe is reported by Peere Williams, but in a later ſtage of the cauſe, viz. in 1717, upon the equity reſerved after the trial of an iſſue that had been directed by the court. Upon that occaſion Lord Chancellour ſeemed to be ſtrongly of opinion, that the perſonal eſtate ſhould be applied in caſe of the real, the teſtator having ſaid in his will, that his executors ſhould, by his perſonal eſtate, pay and levy his debts; and this mortgage-money being a debt, his Lordſhip decreed accordingly. 1 P. Wms. 291. 1 Eq. Ca. Abr. tit. Heir and Anceſtor (E) pl. 7.

Where the real eſtate is originally, or afterwards become *primarily* liable, the real eſtate ſhall be firſt applied, though a *covenant* is added, or a *bond* given; for ſuch covenant or bond is only intended as a collateral ſecurity to

to the land, and cannot alter the fund. In *Bagot* v. *Oughton*, 1 *P. Wms.* 347. land deſcended to the wife ſubject to a mortgage made by her father; on an aſſignment of the mortgage, the huſband covenanted for the payment of the money to the aſſignee: it was decreed, that the huſband's perſonal eſtate was not liable to exonerate the mortgaged premiſes, for the debt was *originally* the father's, and *continuing* to be ſo, the covenant was an *additional* ſecurity for the ſatisfaction only of the lender, and not intended to alter the *nature* of the debt.

Evelyn v. Evelyn, 2 P. Wms. 591. Fitzg. 131. S. C. Sel. Ca. Ch. 80.

George Evelyn, the defendant's father, and grandfather to the plaintiffs, had three ſons, *John*, *George*, and the defendant *Edward Evelyn*; *George*, the father (being tenant for life, remainder to his eldeſt ſon *John*, in tail male of part of the premiſes) together with his eldeſt ſon *John*, on the 20th *October* 1698, by deed and recovery, ſettled certain eſtates in ſtrict ſettlement, with a power to *George*, the father, by deed or will, to charge by leaſe, mortgage, or otherwiſe, the premiſes limited to himſelf for life, with raiſing or paying any ſum not exceeding 6000*l.* *George*, the father, in purſuance of the power, mortgaged part of the ſaid land for 1000*l.* for the term of 1000 years. This mortgage afterwards, by meſne aſſignments, became veſted in Sir *Thomas Pope Blunt*, with a covenant, from *George Evelyn*, the ſon, for payment of the mortgage-money, and, on the ſame aſſignment, Sir *Thomas*, the mortgagee, covenanted to re-aſſign to *George Evelyn* the ſon. Afterwards *George Evelyn*, the father, died; then *John Evelyn*, the eldeſt ſon, died without iſſue, upon which *George*, the ſecond ſon, entered upon the premiſes compriſed in the ſettlement, and died inteſtate, leaving the defendant, *Mary*, his widow, and three daughters. Then *Edward Evelyn* and his ſon (the next remainder-man in tail) inſtituted a ſuit againſt Mrs. *Evelyn*, the mother (afterwards married to Governor *Baboun*) being the adminiſtratrix of her former huſband, *George Evelyn*, praying, that the perſonal eſtate of her late huſband ſhould be applied towards paying off the mortgage of 1500*l.* and in exoneration of the real eſtate. But it was held by the Lord Chancellour, aſſiſted by the Lord Chief Juſtice *Raymond*, and the Maſter of the Rolls, that the perſonal eſtate of the ſon ſhould not be applied to pay off this mortgage, made by the father; becauſe the charge was made by the father in purſuance of the power contained in the ſettlement; and as he had ſuch power, the defendant *Edward* muſt be contented to take ſuch land *cum onere*; and notwithſtanding that the ſon did afterwards, on the aſſignment of Sir *Thomas Blunt*, covenant to pay the mortgage-money, yet, ſince the land was the original debtor, this covenant from the ſon would be conſidered *only* as a ſecurity for the land.

Earl and Counteſs of Coventry, 2 Will. 222. Strange, 596. S. C.

Gilbert, the late Earl of *Coventry*, on his marriage with the daughter of Sir *Strenſham Maſters*, (the Earl being but tenant for life, with a power of making a jointure of lands, not exceeding 500*l. per annum*, on any wife he ſhould marry) covenanted, in conſideration of the intended marriage, that he, or his heirs, would, after the marriage, according to the power given him by his father's will or otherwiſe, ſettle 500*l. per annum* on his wife for her jointure; and it being in proof, that the late Earl directed his ſteward to look over the rent-rolls, for a fit part of the eſtate to make good the jointure, and that afterwards the jointure-deed was engroſſed, but not executed; though this depended only on a covenant, yet the jointure of *land* being the *chief thing* in view, the decree was, that the *land* ſhould be ſettled, and the covenant not made good out of the *perſonal eſtate*.

Freeman v. Edwards, 2 Will. 435.

And ſo in the caſe of *Edwards* and *Freeman*, though the wife's jointure, and the daughter's portion were ſecured by articles, which were never completed

pleted by a ſettlement, yet thoſe articles being to ſettle lands, and the covenantor leaving lands ſufficient to anſwer them, it was decreed, that the daughter's portion ſhould be raiſed out of the lands, and that the perſonal eſtate of Mr. *Freeman*, the covenantor, ſhould not be applied in exoneration thereof. But it is to be obſerved, that in the latter caſe, particular lands were agreed to be ſettled, and conſequently, that the covenant was a lien upon thoſe lands.

Leman v. Newnham, 1 Vez. 51. So, Lacam v. Mertins, *Id.* 312. Robinſon v. Gee, *Id.* 251.

The ſon, tenant in fee, on an aſſignment of the anceſtor's mortgage, covenanted with the aſſignee for payment: yet it was determined, that the perſonal ſecurity was only *auxiliary*, and both principal and intereſt were charged *primarily* on the land; for although the intereſt had accrued during the poſſeſſion of the ſon, the intereſt muſt follow the principal, and be charged on the ſame fund.

Parſons v. Freeman, before Lord Hardwicke, 25th Oct. 1751. *Vide* 2 P. Wms. 664. note 1.

A. purchaſed an eſtate for 90*l.* which was at that time mortgaged for 86*l.*, and he covenanted to pay 86*l.* to the mortgagee, and 4*l.* to the vendor; the court admitted the rule of law above mentioned, but, in this particular caſe, thought that, although the covenant was with the vendor only, and the vendee's perſonal eſtate not liable in that reſpect to the mortgagee, yet the words were ſufficiently ſtrong to ſhew an intention in the vendee to make it his perſonal debt.

Lewis v. Nangle, before Lord Hardwicke, 7th Nov. 1752. *Vide* 2 P. Wms. 664. note 1.

N was, before her marriage, indebted to ſundry perſons, and entitled to the inheritance of lands, charged with the payment of ſundry ſums; and before her marriage entered into articles, whereby the eſtates were to be ſettled to the huſband for life, *ſans* waſte, remainder in like manner to wife, remainder to the iſſue of the marriage, remainder to the wife in fee; the marriage took effect, and the huſband being preſſed for payment of the wife's debts, and having alſo occaſion for a farther ſum of money, they borrowed 1300*l.* of the wife's ſiſter (the original plaintiff in the cauſe), and ſecured it by mortgage of the wife's eſtate, and the huſband covenanted for payment of the whole money, and alſo executed a bond conditioned for payment of the money, according to the proviſos in the mortgage. Subject to this mortgage, the lands were ſettled on the huſband for life, remainder to the iſſue of the marriage, remainder to the wife's ſiſter (the mortgagee) in fee. *N.* died without iſſue; and the plaintiff was the deviſee of the ſiſter, who brought his bill againſt *N.*'s huſband for the payment of the mortgage-money. But the Lord Chancellour held, that although part of the money was raiſed for the huſband's uſe, yet the mortgage being a ſingle tranſaction, he muſt ſuppoſe the intention of the parties to be uniform, and that ſuch intention was to charge the wife's eſtate with the whole debt; and his Lordſhip diſmiſſed the bill, ſo far as it ſought to compel the huſband to exonerate the land, but directed him to keep down the intereſt during his life.

Forreſter v. Leigh, 23d, 25th June 1773. *Vide* 2 P. Wms. 664. note 1.

L. had purchaſed ſeveral eſtates, ſubject to mortgages, with regard to one of which, he entered into a covenant to pay the mortgage-money, for the purpoſe of indemnifying a truſtee; and as to another, which was only part of an eſtate ſubject to a mortgage, upon ſplitting the incumbrance, both parties covenanted to pay their reſpective ſhares, and indemnify each other; Lord *Hardwicke* thought, that theſe covenants would not have the effect of making the mortgages perſonal debts of the vendee, they having been entered into for particular purpoſes, and declared his opinion accordingly in the decree.

Sir

Sir *W. O.*, by his will of the 5th *February* 1739, taking notice, that his daughter *C.* was deaf and dumb, and that *B.* had taken care of her, deviſed certain real and perſonal eſtate to *J. B.*, her heirs, executors, and adminiſtrators, in truſt, by ſale, or felling timber to pay all his debts, and directed that *J. B.* ſhould receive the rents and produce of his real and perſonal eſtate without account, during his daughter's life, ſhe maintaining his daughter; and after the death of his daughter, he gave all his real and perſonal eſtate whatſoever to *J. B.* in fee, and appointed her ſole executrix; Sir *W. O.* died, *March* 1740, and *J. B.* proved the will; Sir *W. O.*, in his lifetime, mortgaged part of his eſtate, for ſecuring 1500*l.* and intereſt, which remained a charge at his death. *J. B.* paid off 500*l.*, part of this 1500*l.*, and afterwards borrowed a further ſum of 2500*l.* on mortgage of the eſtates, which money was, in the mortgage-deed, expreſsly recited to have been borrowed, to enable her to diſcharge Sir *W. O.*'s debts. *J. B.* afterwards died, and on the diſpoſition made by her, and thoſe claiming under her, of the property of Sir *W. O*, this cauſe was inſtituted. The cauſe was firſt heard before Lord *Bathurſt*, on the 19th *February* 1777, when the court declared, that the ſum of 1500*l.*, part of the 3500*l.* was not to be conſidered as a debt of the ſaid *J. B.*, but was to remain a charge on the real eſtate, and directed an account of her perſonal eſtate. By an order made on rehearing, on the 13th of *Auguſt* 1781, that part of the decree was reverſed, and, inſtead thereof, it was declared, that the ſaid ſum of 1500*l.* appearing to have been a charge made on the eſtate of the ſaid Sir *W. O.* in his lifetime, and remaining ſuch at his death, was to be conſidered as a continued lien thereon; and that the ſubſequent charge made on the eſtate by the ſaid *J. B.*, being expreſſed in the mortgage-deed to have been made for the purpoſe aforeſaid, the ſame together, with the 1500*l.*, amounting in the whole to the ſum of 3500*l.*, was to be conſidered as remaining a charge on the ſaid eſtates. Perkins v. Baynton, 2 P. Wms. 664, note 1.

G. D. mortgaged lands to *W. C.*, to ſecure payment of 5000*l.* with intereſt, at 5 *per cent* and by will, of 22d of *May* 1723, deviſed the lands to his nephew *G.*, in tail-male, remainder to the plaintiff in tail-male, remainder over, and died in the ſame month. In 1725, *G. S.* ſuffered a recovery to himſelf in fee. The mortgagee calling for his money, *W. G.* agreed to advance 5000*l.* at 4 *per cent.* on aſſignment of the mortgage, which accordingly, by indenture of 4th of *June* 1725, was aſſigned to him, with proviſo for redemption on payment of the principal and intereſt at 4 *per cent.*; and *G. S.*, for himſelf, his heirs, executors, and adminiſtrators, covenanted with *W. G.*, that he, his heirs, *&c.*, or ſome or one of them, would pay to *W. G.* the ſaid principal and intereſt, in manner therein mentioned. In 1779, *G. S.* agreed to raiſe the intereſt to 5 *per cent.*, and by deed covenanted with the mortgagees, that the eſtate ſhould remain a ſecurity for the 5000*l.*, with intereſt at 5 *per cent.*, and that he, his executors, *&c.* would pay ſuch intereſt for the ſame. In *January* 1782, *G. S.* died, the intereſt on the mortgage being in arrear for about 10 months; and the bill was brought (amongſt other things) to have the 5000*l.* and intereſt paid out of the perſonal eſtate of *G.*, or at leaſt the arrear of intereſt due at his death, and the additional 1 *per cent.* charged by the deed of 1779; but the Lord Chancellour was clearly of opinion, that the perſonal eſtate ought not to diſcharge the mortgage, the land being the primary fund. His Lordſhip alſo thought that the intereſt muſt follow the principal, and that the contract for the additional intereſt, turning upon the ſame ſubject, muſt be in the nature of a real charge. Shafto v. Shafto, before Lord Thurlowe, Feb. 1786. 2 P. Wms. 664. note 1. So, Earl of Tankerville v. Fawcet, 2 Br. Ch. Rep. 57.

A real

Wilſon v. Earl of Darlington at the Rolls, Feb. 1785.

A real eſtate charged with a ſum of 200*l.* as a bounty, was holden to be *primarily* liable, though the perſonal eſtate was alſo ſubjected by the covenant of the donor.

2 Cox's P. Wms 664, note.

Duke of Ancaſter v. Mayor, 1 Br. Ch. Rep. 454.

A leaſehold eſtate had been mortgaged by the teſtator's father to *N.*, for 6500*l.*, and had, ſubject to that mortgage, devolved upon him on the death of his father; afterwards the mortgage was aſſigned by the deſire of the teſtator to *H.*, who advanced him a farther ſum of 100*l.* upon it, and the teſtator conveyed other eſtates as an additional ſecurity to the mortgagee. The teſtator then made his will, and thereby deviſed as follows:—"I give and deviſe to *A.* and *B.*, their executors, adminiſtrators, and aſ-"ſigns, all thoſe my manors, lands, *&c.* in *L.*, to have and to hold to "them, from the time of my deceaſe, for the term of 99 years, upon the "truſts hereinafter mentioned." He then gave the real eſtate ſubject to the term, and, in default of iſſue of his own body, to the plaintiff for life, remainder to his firſt and other ſons, in ſtrict ſettlement, with remainders over, and afterwards declared as follows:—"I do hereby declare that "the term and eſtate, ſo as aforeſaid limited to them the ſaid *A.* and *B.*, "*&c.*, is upon the ſpecial truſt and confidence, and to the intents and "purpoſes following; that is to ſay, upon truſt, that they the ſaid *A.* and "*B.*, *&c.* ſhall, out of the rents and profits, or by mortgage, aſſignment, "or demiſe, of all or any part of my before-mentioned manors, *&c.*, or "any of them, for all or any part of the ſaid term of 99 years, or other-"wiſe as to their diſcretion ſhall ſeem meet, levy and raiſe ſo much "lawful money of *Great Britain* as will be ſufficient *to pay and ſatisfy all "the debts I ſhall owe at the time of my deceaſe*, my funeral charges, and all "the legacies and ſums of money given by me in and by this my will, and "pay and apply the ſame accordingly. And my will and mind is, that "after ſo much money ſhall be raiſed as ſhall anſwer the purpoſes afore-"ſaid, together with all coſts, *&c.*, the ſaid term ſhall ceaſe and deter-"mine." He then deviſed as follows:—"I give and deviſe to my bro-"ther *M. B.*, his executors and adminiſtrators, all that the manor of *Eaſt* "and *Weſt Deeping*, holden by leaſe from the crown, ſubject to the yearly "rent and covenants reſerved in the ſaid leaſe, and alſo ſubject to the "mortgage thereon to *N.*, for 6500*l.*; but in caſe my ſaid brother ſhall "not be living at the time of my deceaſe, then I give the ſaid eſtate and "premiſes, with the appurtenances, ſubject as aforeſaid, to ſuch perſons "as ſhall be entitled to the freehold of my real eſtate at the time of my "deceaſe, by virtue of the aforeſaid limitations of this my will." And towards the end of his will he deviſed as follows: "*Item*, I alſo give all "my houſehold goods, and all other my goods, chattels, effects, and per-"ſonal eſtate whatſoever, unto my ſaid brother *M. B.*, if he ſhall be liv-"ing at the time of my death; but in caſe he ſhall be then dead, I give "and deviſe the ſame to ſuch perſon as ſhall be entitled to the freehold of "my real eſtate, under and by virtue of the limitations in this my will." *&c.* *M. B.* died in the lifetime of the teſtator, and the plaintiff became entitled under the limitations in the will to the real eſtate. And one queſtion was, Whether the term bequeathed by the teſtator for payment of debts was liable to the mortgage-debt on the leaſehold eſtate? *Et per curiam*, with reſpect to the leaſehold eſtate, *the charge under which it came to the teſtator was prior to his purchaſing it, and inherent in the eſtate*, and the eſtate itſelf was left liable to anſwer it, and neither the perſonal eſtate, nor

real

real eſtate, ought to be charged with that debt; for when a man purchaſeth an equity of redemption, *ſubject* to incumbrances, that ſhould be a real incumbrance following the land, and *not a perſonal one*. And the difference between an eſtate deſcended and one purchaſed was nothing, unleſs the circumſtance of purchaſing created the difference, but *that* afforded *no* argument. The queſtion then was, Whether aſſigning the mortgage from *N.* to *H.*, and covenanting for payment of debts, altered the caſe, and made it the debt of the teſtator? and it was clear that it did not; for although where a man transferred a mortgage, and *covenanted* for the *payment* of the debt, according to the *rule of law*, he made it his *own* debt, and made *himſelf* liable to be ſued upon that covenant; yet the caſe of *Evelyn* v. *Evelyn* had decided, that though he might be at law liable, yet, *Infra.* while there were *real aſſets* ſufficient for the *payment* of the incumbrance, *they* ſhould be applied for *that purpoſe*; and it was to be underſtood, with reſpect to ſuch tranſaction, that the party did it by way of *accommodating the charge*, and not of making the debt *his own*.

Another queſtion in the preceding caſe was, Whether, when the teſtator mortgaged an eſtate *of his own* as an *ulterior* ſecurity, that circumſtance would create a difference? and it was held that it would not; for nothing made it his debt ſo effectually as the covenant to pay, for it did not create the debt, but only operated as collateral to the debt. A man mortgaged his eſtate without covenant, yet, becauſe the money was borrowed, the mortgagee became a ſimple contract creditor, and in that caſe the mortgage was a collateral ſecurity; and if there were a *bond* or a *covenant*, *then* there was a *collateral* ſecurity of a *higher ſpecies*, but no higher by means of the mortgage merely; therefore having ſecurity amounted to nothing.

Again, where *L.* being ſeiſed in fee by *deſcent* of an eſtate at *C.*, and other real eſtates both freehold and copyhold, by his will deviſed the eſtate at *C.*, which was ſubject to a mortgage for 1500*l.* contracted by his anceſtor, and alſo another eſtate, to be ſold; and charged the ſame, and alſo his perſonal eſtate (except 300*l.* due on bond, which was originally part of his wife's fortune, and ſpecifically bequeathed to her by the will) with his debts and legacies, and deviſed the reſidue of his real eſtate in truſt for his brother *B.* in ſtrict ſettlement, ſubject to a charge of 100*l.* a year to his wife upon the copyhold eſtate; and made his wife executrix: the queſtion was, Whether, under this will, the perſonal eſtate of the teſtator ſhould be applied in exoneration of the real, towards the diſcharge of the 1500*l.*? And it was held by Lord *Thurlowe* that it ſhould not; but that the ſame ſhould come out of the eſtate originally liable to it. And this decree was afterwards affirmed in the Houſe of Lords. Lawſon v. Hudſon, 1 Br. Ch. Rep. 58. *Vide* 7 Bro. Par. Ca. 511.

M. D., by will of 15th of *January* 1746, deviſed eſtates to truſtees for a term of 500 years, to raiſe money for payment of his debts and legacies, in aid of his perſonal eſtate; and ſubject to the term, he deviſed the eſtate in ſtrict ſettlement with the ultimate limitation to his own right heirs, and he gave the reſidue of his perſonal eſtate to his executrix *C. P.* The executrix applied the perſonal eſtate in payment of ſome of his debts, and all the legacies, except a legacy to herſelf of 1000*l.*, and then died; whilſt the limitations in ſtrict ſettlement ſubſiſted, and after the death of *C. P.*, her repreſentative filed a bill to have a debt due to *C. P.*, and her legacy, raiſed; and the only perſon then entitled under the limitation in ſtrict ſettlement dying, pending the ſuit, by which event the ultimate limitation to the teſtator's right heirs took place, a ſupplemental bill was filed againſt *M. D.* and *M. D. P.*, the coheirs of the teſtator. To ſtop this ſuit, the coheirs Baſſet v. Percival, 21ſt July 1786. Note (*a*) 2 P. Wms. 665.

coheirs liquidated the demands of the repreſentative of *C. P.*, at 207*l.*, and gave their joint and ſeveral bond for that ſum; this demand was afterwards aſſigned to *A. B.*, who alſo bought in debts to the amount of 327*l.* remaining due from the teſtator *M. D.*, and the coheirs gave another joint and ſeveral bond to *A. B.*, for this ſum alſo; ſo that *A. B.* became the ſole creditor on the eſtate. *M. D.* being dead, and a bill being filed by *A. B.* for payment of theſe ſums of money, the queſtion was, Whether a moiety thereof ſhould be raiſed in the firſt place out of the perſonal eſtate of *M. D.*, or out of the real? and his Honour was of opinion, that the real eſtate was the original debtor, and ought to bear the burden.

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(*If one deviſe*) Corniſh v. Mew, 1 Ch. Ca. 271. Rowell v. Walley, 1 Ch. Rep. 221. Ballet v. Spranger, Pr. Ch. 62. Verney v. Verney, 1 Vez. 428.

Hayes v. Hayes, 1 Ch. Ca. 223.

And if the mortgage-money is payable on a contingency not arrived, he in remainder or reverſion may exhibit his bill *quia timet*, againſt the tenant for life, and the tenant for life ſhall be decreed to contribute.

Newling v. Abbot, Eaſt. 1 Geo. 2 Eq. Ca. Abr. 596. 11. [refers to Vin. Abr. but the Editor finds no caſe of this name in that book.]

And if the tenant for life of the equity of redemption pays off the mortgage, and has the term aſſigned over in truſt for himſelf, and makes improvements, and dies; and afterwards the remainderman or reverſioner comes to redeem; the repreſentatives of tenant for life ſhall have the allowance of two-thirds of the laſting improvements, but nothing for the other third, becauſe he received the benefit thereof during his life; and no intereſt ſhall be allowed during the life of tenant for life for the money he paid, for he is bound to keep down the intereſt during his eſtate.

James v. Hailes, Prec. Ch. 44.

In the caſe of *James* and *Hailes*, it is laid down that, if an eſtate in mortgage be ſettled on *A.* for life, and then on *B.* in tail or in fee, the tenant for life ſhall bear two-fifths of the principal and intereſt, and the remainder-man three-fifths.

But where he who is poſſeſſed of the equity of redemption hath ſuch an intereſt in the eſtate, as he can *ſecure* the money laid out by him to redeem upon, the remainder-man ſhall pay him, or his repreſentatives, all he hath advanced. As, where a *tenant in tail* of a mortgaged eſtate, under the will of his father, upon the death of his two brothers, paid off a debt originally on the eſtate by mortgage term for years, but neglected to have an aſſignment of the term to himſelf, and afterwards deviſed the ſame lands; and the plaintiffs, the remainder-men under the will, claimed the eſtate, as not barred, diſcharged of the incumbrance: the Lord Chancellour held, that there being a term for years in the mortgagee, which ſtood in point of law as it did before, no aſſignment in law being made thereof, none of the parties before the court had the legal eſtate, for a conveyance of which the plaintiff came; and therefore *that* conveyance muſt be upon equitable grounds. That, ſo far as it appeared, tenant in tail paid it off with his own money; that he might have taken an aſſignment of the term, either in truſt, to attend the inheritance, which would have ended this queſtion, or in truſt for himſelf, his executors, or adminiſtrators, which would, notwithſtanding the remainder over, have kept this incumbrance on foot for the benefit of his perſonal eſtate and thoſe entitled thereto; or, that he might have called for an aſſignment of it in his life, if he had found out this limitation in remainder, that it might have been made for the benefit of his executors, *not* of the remainder; but his not doing any

Kirkham v. Smith, 1 Vez. 258.

of theſe, clearly proved, that he took himſelf to have had the abſolute ownerſhip and diſpoſal of it. And the court could not decree, to perſons claiming this, in contradiction to his apprehenſion and intent, a conveyance of the inheritance, and likewiſe of this term, without making a ſatisfaction to the perſonal eſtate of the tenant in tail; as that would be contrary to the maxim, *that he who would have equity, muſt do equity*; and the plaintiffs were decreed to have the eſtate, ſubject to the money paid by the tenant in tail in diſcharge of the mortgage.

If one purchaſe an eſtate ſubject to a mortgage, his perſonal eſtate will not be liable to exonerate the real eſtate from payment of the mortgage-debt, although he covenant with the vendor to pay the mortgage, and indemnify him from all coſts and charges in reſpect of it. Thus, *A.* agreed to purchaſe an eſtate of *B.*, which was then ſubject to a mortgage of 2000*l.* to *D.*, and accordingly by indenture of leaſe and releaſe between *A.* of the one part, and *B.* of the other part, reciting the mortgage, and that *B.* had contracted with *A.* for the purchaſe of the inheritance of the ſaid eſtate, and had agreed to pay the ſum of 3500*l.* for the ſame in manner therein mentioned, that was to ſay, to the mortgagee all ſuch ſums as ſhould be due to him upon the ſaid mortgage, on the firſt of *May* next enſuing, as alſo to pay ſuch ſums of money as ſhould remain after deducting the money due to the mortgage of *D.*; it was witneſſed that the ſaid *A.*, in conſideration thereof, did grant, *&c.* to the ſaid *B.*, his heirs and aſſigns for ever, all the ſaid premiſes, *&c.*; and in the covenant againſt incumbrances, the mortgages and ſecurities were excepted. And the ſaid *B.* did covenant, that he, *&c.* would well and truly pay, or cauſe to be paid, to the ſaid *D.*, the ſaid ſum due in manner aforeſaid, and would indemnify the ſaid *A.*, his heirs, *&c.*, and his goods and chattels, lands and tenements, from all coſts and charges, *&c.* in reſpect of the ſaid mortgage. *A.*, after completing the purchaſe of *B.*, made his will, and died, and then a queſtion aroſe between his perſonal repreſentatives, and the deviſees of this eſtate under the will, Whether, from the nature of the contract, the perſonal eſtate of *A.* (reſpecting which he had made no diſpoſition in his will) was liable to be applied in diſcharge of the mortgage? *Et per curiam*, it is a clear rule that the perſonal eſtate is never charged *in equity* where it is not a law; and if not chargeable at law, there is no principle or caſe in this court to warrant its being chargeable in equity, contrary to the order of the law. Where it is a debt payable by executors *at law*, this court will relieve the heir, by turning the charge upon the executors, provided it does not interfere with other debts and legacies, or any more ſubſtantial claims. In reſpect of the rule of marſhalling aſſets, it is that it muſt be a debt affecting both the real and perſonal eſtate; ſo in caſe the perſonal fund proves deficient, to enable the court to marſhal the aſſets, you muſt prove that the executors are accountable at law, and not in equity. In this caſe, the perſonal eſtate never was liable, either by action againſt the party himſelf, or againſt his executors.

Tweddel v. Tweddel, 2 Br. Ch. Rep. 101,

Sir *John Napper*'s eſtate was in mortgage, and he died, leaving Sir *Thebilus* his heir, who, upon his intermarriage with Lady *Effingham*, ſettled a jointure upon her, and covenanted to pay his father's debts, and then died, poſſeſſed of a conſiderable perſonal eſtate, which came to his wife, having diſpoſed of a real eſtate, which was ſettled by an act of parliament, in truſt to pay his father's debt; the heir at law brought his bill againſt the wife, to have the perſonal eſtate of the huſband, upon his covenant, applied to diſcharge the father's mortgages, and it was ſo decreed. But the reaſon

Napper v. Lady Effingham, Fitz. 142, 144.

ſon was, becauſe the heir had diſpoſed of the eſtate ſo ſettled in truſt, and then it was but juſt and equitable, that his perſonal eſtate ſhould be applied to exonerate the mortgaged eſtate, deſcended to the heir at law, becauſe he was anſwerable for the truſt eſtate, ſettled for that purpoſe.

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(*If a man marries*) In this caſe, as reported by the name of Brond v. Brond, 2 Ch. Ca. 98, it is ſtated, that there was an agreement, that the wife ſhould not be prejudiced, but ſhould redeem, paying the intereſt of the money borrowed, and that the court reſolved, that the wife having ſuffered the repreſentatives of the huſband to remain in poſſeſſion, and pay off his debts, without exhibiting her claim for a long period of time, ſhould not be allowed any profits received by the huſband's repreſentatives, but from the time of filing the bill, which was the firſt notice to them of ſuch agreement.

Tate v. Auſtin, 1 P. Wms. 264. 2 Vern. 689. S. C.

Again, a huſband, ſeiſed in right of his wife, borrowed 500*l.* to ſupply *his* occaſions; for ſecuring which, he and his wife levied a fine of her inheritance, and raiſed a term of 500 years, which was limited to the perſon lending the money, with remainder to the wife in fee, to be void nevertheleſs upon payment of the money borrowed, with intereſt; and in the deed, the huſband covenanted to pay it off. Afterwards, the huſband made his will, by which he gave ſeveral charities out of his perſonal eſtate, and then died, without having diſcharged the mortgage, indebted by ſimple contract. The aſſets not being ſufficient to pay the mortgage-money, and alſo the charities given by the will, the widow exhibited her bill to have the former diſcharged out of her huſband's perſonal eſtate. And ſo it was decreed; for his perſonal eſtate would be liable to pay debts, before legacies, though left to a charity, they being ſtill but legacies.

Ran v. Cartwright 1 Ch. Ca. 59 1 Vern 193. Nelſon 101. E Ca. Abr. 315. 1. Barthrop v. Weſt, 2 Rep. Ch. 62.

Where a man made a voluntary deed, and afterwards mortgaged the ſame lands, and the *firſt deed*, on trial at law, was found fraudulent againſt the mortgagee; yet, on a bill exhibited by the perſon to whom the deed was made to redeem the mortgage, it was held, that, though the firſt deed was fraudulent, becauſe voluntary, as to the mortgage, yet it was good as to the equity of redemption, and would paſs that; for a voluntary deed would bind the party that made it, and his heirs.

1 Ch. Ca. 71.

Aſſignees of a bankrupt may redeum, or aſſign an equity of redemption.

Dougl Rep 22. Keech v. Hall.

So, likewiſe, a tenant may put himſelf in the place of the mortgagor, and either redeem himſelf, or get a friend to do it.

Howard v. Harris, 1 Vern. 33.

The aſſignee, in equity, may redeem a mortgage.

Anonymous, 3 Atk. 314.

And an aſſignee of the equity of redemption, which has been deſerted for a time, but not for that period which is a bar to a redemption, will, if there are circumſtances which would induce the court to decree a redemption in favour of the mortgagor or his repreſentative, be entitled to the benefit of it. Therefore, Lord *Hardwicke*, in a caſe, where a prowling aſſignee had bought an equity of redemption, which had been abandoned for fifteen years, for a very inconſiderable ſum, imagining, that from ſome knowledge of the law, he might be able to unravel a great number of circumſtances, and by that means entitle himſelf to a redemption, was of opinion, that he was entitled to a decree to redeem. But his Lordſhip held him entitled only upon theſe terms, *viz.* that the aſſignee, in taking the account before the Maſter, ſhould be confined to ſurcharge, and falſify only, and the intereſt upon the mortgage be computed at five *per cent.* though at that period money bore a higher rate of intereſt.

A mortgage

A mortgage by a popiſh heir may be redeemed by the next proteſtant heir. Jones v. Meredith et al. Bunb. 346. Com. Rep. 661.

An equity of redemption will follow the cuſtom as to the legal eſtate. In borough-engliſh lands, if mortgaged, the equity of redemption will deſcend to the youngeſt ſon to whom the lands deſcend 2 Vez. 304.

So, in mortgages of gavelkind, lands which deſcend to all the children equally, the equity of redemption deſcends to all likewiſe *Ibid.*

And it may be deviſed. Thus, where one, ſeiſed in fee-ſimple, mortgaged his lands, with a proviſo for repayment by him, his heirs, or aſſigns, and then deviſed the ſame premiſes, the court decreed, on a bill by the deviſee to redeem, that the equity of redemption belonged to him and not to the heir. Philips v. Hele, 1 Ch. Rep. 190. *et vide.* 2 Burr. 978.

But, if a mortgagor, before the condition broken, deviſe, it will be void; for a condition is not deviſable. 2 Chan. Ca. 8.

Every deviſee of a mortgaged eſtate, that brings a bill to redeem, need not make the heir at law party; if the deviſee claims to have the will eſtabliſhed, it is neceſſary: if only a title under the will, it is not. 2 Vez. 431.

A judgment creditor may redeem againſt a mortgagee of a leaſehold eſtate, who is likewiſe a bond creditor: but, before the bill is brought to redeem, *a writ of execution* muſt be ſued out; for until that be done, the judgment creditor had no *lien* on the leaſehold eſtate, and, for want of its being taken out, the bill in the principal caſe was diſmiſſed. Shirley v. Watts, 3 Atk. Rep. 200. Angel v. Draper, 1 Vern. 399. King v. Mariſſal, cited in the principal caſe.

Tenant by *elegit*, ſtatute merchant, or ſtaple, may redeem. Bunb. 347. 2 B. C. Abr. 594. note.

And the law is the ſame as to a judgment creditor, though the judgment be with ſtay of execution. Thus, *H.* in 1693, confeſſed a judgment, with a defeaſance, by which it was not to take effect until after the death of a woman, who lived until 1726. The eſtate, ſubject to this judgment, deſcended in the mean time from *H.* to his heir, who mortgaged it to *T.* The mortgagee had no notice of the judgment at the time: the heir afterwards, in 1721, about five years before the woman died, became bankrupt; and the mortgagee was appointed aſſignee. After her death, the repreſentative of the judgment creditor brought his bill againſt the aſſignee to redeem the mortgage, upon payment of principal, intereſt, and coſts. The queſtion was, Whether, as there was no actual *elegit* taken out by the judgment creditor before the commiſſion of bankruptcy iſſued, the aſſignee under the commiſſion, *qua* ſuch, or the judgment creditor, ſhould redeem? And it was contended on the ſide of the aſſignee, that the heir was chargeable *only* as *terre-tenant*; and therefore the perſon *who* claimed under the judgment was *not* a creditor of *the bankrupt*. *Sed per cur.*—The judgment creditor is entitled to redeem the whole (for it muſt be entire) and to have the eſtate of *H.* exonerated out of that of his heir, if the heir's is ſufficient. As to the point which had been laboured, in order to make this perſon come in as a creditor under the commiſſion of bankruptcy, there was nothing in it. If it had been merely a bond creditor from the anceſtor, there might have been ſome colour to inſiſt upon this under the ſtatute of fraudulent deviſes; becauſe that act made it a debt againſt the heir himſelf, Stonehewer v. Thompſon, 2 Atk. 440.

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as well as the anceſtor. But it was entirely different here, as this was a *judgment* which was a *lien* upon the land, *a fortiori* a *lien* upon the lands in the hands of the aſſignee under the commiſſion, who ſtood only in the place of the bankrupt.

Attorney General v. Croſts et al. 1 Brown's Par. Ca. 22.

The crown may redeen eſtates mortgaged, forfeited by the mortgagor by his being indicted and outlawed for high treaſon.

Palmer v. Danby, Pre. Ch. 137.

If an eſtate deſcend to an infant ſubject to incumbrances, the guardian may, without the direction of a court of equity, apply the profits to diſcharge the incumbrances, *viz.* to pay the intereſt of any real incumbrance, and the *principal* of *a mortgage*; becauſe that is *a direct and immediate* charge upon the land; but *not* the principal of any other real incumbrance.

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(*But afterwards*) If the mortgage be in fee, conditioned, that the mortgagor ſhall pay the money to the mortgagee, his heirs, executors, adminiſtrators, or aſſigns; and the mortgagee die before the mortgage forfeited, though the mortgagor has in this caſe his election to pay the money to either; yet it will belong to the executor. 2 Ventr. 351.

Ellis v. Gwavas, 2 Ch. Ca. 50.

And, if the mortgagor doth not redeem, the adminiſtrator ſhall have the land. Thus, where the mortgage was forfeited, the heir in poſſeſſion by deſcent, no want of aſſets, and the mortgagor did not offer to redeem; the heir of the mortgagee was decreed to convey the lands to his adminiſtrator; for as the money, being part of the perſonal eſtate, would have gone to him, ſo would the land, which was in lieu thereof.

2 Vern. 193.

Although a mortgagor, the mortgage being forfeited, releaſes to the heir of the mortgagee in fee, yet the adminiſtrator ſhall have the benefit of that eſtate, even though there be no debts. And ſo it is in caſe a mortgagor be forecloſed, or that the mortgage be of ſo ancient a date, as in the ordinary courſe of the court, it be not redeemable; *for, in caſe the mortgagee be not actually in poſſeſſion, it will be looked upon* to be perſonal eſtate.

Turner v. Crane, 1 Vern. 170.

And, where there was huſband and wife, and the wife, having a mortgage in fee of a copyhold, died leaving iſſue, which iſſue was admitted, and died, and then the huſband, as adminiſtrator to his wife, claimed title to the copyhold, being a mortgage, and ſo part of his wife's perſonal eſtate: it was decreed to him againſt the heir at law, although the latter had been admitted.

1 Ch. Ca. 285. 1 Vern. 4.

So, a mortgage of an inheritance, to a citizen of *London*, hath been held to be part of his perſonal eſtate, and divided according to the cuſtom.

Garrett v. Evers, Moſel. 364.

But where a mortgage was deviſed as real eſtate, after a decree of forecloſure *niſi*, it was held to be perſonal eſtate for payment of debts, if aſſets fell ſhort, though conſidered as real eſtate between deviſor and deviſee.

Martin v. Moulin, 2 Burr. 969.

But a mortgage will not paſs *as land* under a general deſcription, applicable to it in point of locality, if there be other circumſtances ſufficient to ſhew, that the owner conſidered it as perſonal property.

Laurence v. Beverley, cited 3 Will. 217.

Where money ſecured by a mortgage (to which the executor was legally entitled) was articled to be laid out in land, and ſettled on the iſſue of the marriage, it was by *Hale*, Chief Juſtice, on a ſpecial verdict, adjudged to be bound by the articles.

2 Vez. 258.

If two perſons advance a ſum of money on mortgage, and take the mortgage to themſelves *jointly*, without inſerting in the deed the words, *to be equally*

equally divided between them, and one of them dies; when the money comes to be paid, the ſurvivor ſhall not have the whole, but the repreſentative of him that is dead ſhall have a proportion, becauſe, from the nature of the tranſaction, the court preſumes this to be the intention of the parties. Thus, *N.* and *S.* lent 2000*l.* to *G.* on mortgage, 1450*l.* whereof was the money of *S.*, and 550*l.* the reſidue, the money of *N.*, and it appeared, by a note under both their ſignatures, that the 1450*l.* was delivered by *S.* to *N.*, and that, if the mortgage was paid off then the 1450*l.*, with intereſt thereon, was to be redelivered into the hands of *S.*, for the uſes of his will. Afterwards, and before the day of redemption, *S.* made his will, reciting the above memorandum, and diſpoſed of his ſhare thereby. The lands were redeemed on the day, and the whole money and intereſt paid to *N.*, *S.* being dead, and he claiming it by ſurvivorſhip. But, on a bill exhibited by his executor, the court was clearly of opinion, that by equity, there ought to be no ſurvivorſhip in a caſe of this nature; and that the note, under the hands of both the parties, and the will of *S.*, ſhewed plainly that there was a truſt between them, *that*, on repayment, each of them was to have his money, with intereſt. Petty v. Styward, 1 Ch. Rep. 58.

And if two perſons, being mortgagees, foreclose the mortgagor, the mortgaged eſtate ſhall be divided *between* them becauſe their *intent* is *preſumed* to have been, that it ſhould be ſo divided. 2 Vez. 258.

H. being ſeiſed in fee, mortgaged for years, and afterwards, in 1734, made his will, and deviſed his eſtate to his ſon and his heirs, ſubject to an annuity to his wife for life, and to the incumbrances upon the eſtate; and in caſe his ſon ſhould die without iſſue, to be divided amongſt his three daughters, or ſuch of them as ſhould be living at the death of his ſon; and if his ſon and daughter ſhould all die without iſſue, then to his wife for life, remainder to his own right heirs. A bill was brought by *P.*, as aſſignee of the original mortgagee, againſt the widow of the mortgagor, and her ſon, who was then an infant, to foreclose the equity of redemption; but the daughters were not made parties. In 1746, the cauſe was heard, and a decree made for an account and foreclosure, unleſs redeemed by the mother or ſon. The account was taken before the Maſter, and the time for redemption ſeveral times enlarged, and at laſt elapſed, the ſon, having attained 21, releaſed the equity of redemption; ſo that the foreclosure was not made abſolute againſt him, but was made abſolute againſt the wife. The ſon afterwards died without iſſue, and *R.* having bought the daughters' intereſt for a trifle, in 1765, filed a bill to redeem. But the Lord Chancellour was clear of opinion, that *P.* was not entitled to redemption. That the firſt tenant in tail being a party to the foreclosure was ſufficient. That he ſuſtained the intereſt of every body, and thoſe in remainder were conſidered as cyphers. That it would be very inconvenient if the remaindermen were neceſſarily to be parties. There might never be an abſolute foreclosure. The account would be endleſs, and the foreclosure would be open to every contingent remainder-man. That nobody would lend money upon ſuch terms. That the releaſe in this caſe was equal to an abſolute foreclosure by order. That the accounts were taken, and the time for redemption elapſed; and that this caſe was not ſo ſtrong as that of *Roſcarrick* and *Barton*. Reynoldſon v. Perkins, Amb. Rep. 364.

A ſecond mortgagee may redeem the firſt, after a decree obtained by him to foreclose, although the firſt mortgagee had no notice of the ſecond mortgage, before the decree. 2 Vern. 601. *Et vide* Morret v. Weſterne, But *ſupra*.

But the firſt mortgagee ſhall be allowed all his expences out of pocket.

Lomax v. Hide, 2 Vern. 115.

Thus, where *L.* a ſecond mortgagee, came to redeem *H.* who had been at great expences in law-ſuits to foreclose the mortgagor, and otherwiſe, in relation to the eſtate; the court ordered, that his coſts ſhould not be taxed, as in an adverſe ſuit, but that he ſhould be allowed all his coſts and e pences, as was done in the caſe of a ſolicitor, who laid out and diſburſed money for his client; and farther, that the profits of the eſtate in queſtion ſhould be applied, in the firſt place, to pay and ſatisfy what was due for ſuch coſts, charges, and diſburſements, before it was applied to ſink the principal; for that it was not reaſonable he ſhould wait for it, and be allowed it only on the foot of the account (as had been uſually done) whereby he might loſe the intereſt thereof, for ten or more years together.

Lloyd v. Manſell 2 P. Wms. 74.

And a decree to foreclose, though made abſolute, ſigned, and enrolled, is no plea to redeem, if ſurreptitiouſly procured.

Berrysford v. Millward Barnard. Rep. 101. 2 Atk. 49. S. C. *Vide* Sheph. Prac Counſ. 482. pl. 9. 2 *qua.* if ſuch caſes do not avoid prior claim at law as fraudulent.

On a treaty of marriage between *A.* and *B.* his wife, *C.* the father of *A.*, and *D.* the father of *B.*, had a meeting together; at which meeting *M.*, who had a mortgage upon *C.*'s eſtate, was accidentally preſent; *C.* and *D.* diſcourſed together on the ſubject, and talked of making a ſettlement upon the eſtate on which the mortgage to *M.* was ſecured: *M.* never mentioned to the father of *B.* that he had ſuch mortgage, but called out *C.* and reminded him thereof. *M.* then agreed with *C.* that he would take his perſonal ſecurity for the money, and they returned into the room together, when an agreement was entered into between *C.* and *D.*, in the preſence of *M.*, to ſettle the eſtate in ſtrict ſettlement. Afterwards, the marriage took effect, and *M.* brought an ejectment to recover the poſſeſſion of this eſtate as mortgagee; whereupon *A.* and *B.* his wife brought a bill againſt *M.* and *C.*, in order to have a perpetual injunction: *M.* admitted all the facts, but pretended not to remember any thing of the agreement to accept *C.*'s perſonal ſecurity for the money lent. *C.* was examined as a witneſs in the cauſe for both parties, and ſwore to the fact of that agreement: and the Lord Chancellour was of opinion, that the plaintiffs were well entitled to a perpetual injunction, and ought to be relieved under the *head of fraud*; for that *M.* having voluntarily concealed his mortgage at the time of the treaty of marriage, was not entitled to have any benefit from it againſt the plaintiff.

Draper et al v. Borlace et al. 2 Vern. 370.

D., *N.*, and *H.*, having lent *B.* 8000*l.* upon a mortgage in fee of the manor of *F.*, and on a ſtatute in 1600*l.* penalty as a farther ſecurity; and *H.* being a counſellour, and afterwards conſulted by *J.* as to a loan of 200*l.* to *B.* on a mortgage of the manor of *G.*, encouraged him to lend his money, drew the mortgage-deed, and inſerted therein a covenant that the eſtate was free from incumbrances, making no mention of the ſtatute which was taken, becauſe *F.* was ſuppoſed to be deficient. The queſtion was, Whether *H.* ſhould be admitted to take advantage of the ſtatute to leſſen *J.*'s ſecurity apon the manor of *G.*? And it was held he ſhould not; for if he, who only concealed his incumbrance, ſhould be poſtponed, much more ought *H.*, who was intruſted as counſel by the mortgagee, promoted the loan, and drew the conveyance with covenants that the eſtate was free from incumbrances.

Mocatta et al. v. Murgatroyd. 1 Will. Rep 393.

And if a firſt mortgagee be a witneſs to a ſecond mortgage-deed, and, knowing the contents thereof, do not acquaint ſuch ſecond mortgagee with his former mortgage, this will give the latter a preference. It is likewiſe ſaid, that it will make no difference, although it be not in proof that the

witneſs

witneſs knew the contents of the ſecond mortgage; for, ſince it does not appear but that he might have known them, the law will preſume that every witneſs, who can write or read, is acquainted with the ſubſtance of a deed or inſtrument which he, having atteſted, undertakes to ſupport by his evidence.

Cox, the editor of Peere Williams's Reports, in a note added to the above obſervation, doubts the truth of the propoſition, and queſtions whether the bare atteſting a ſubſequent incumbrance, without other circumſtances of preſumptive notice, will poſtpone a prior incumbrancer, ſince, at that rate, a prior mortgagee or incumbrancer may, without any fraud, or ill intention on his ſide, be liable to be cheated of his ſecurity.—And ſo (he obſerves) he found it ſaid by Lord King in the author's (Peer Williams) report of an anonymous caſe, in Mich. term, 1732. and Lord Hardwicke, before whom this point was agitated, in the caſe of Wilford and Berzly, 1 Ver. 6. ſaid "that he did not think that the bare atteſting a deed as a witneſs would "create ſuch a preſumption of his knowledge of the contents, as to affect him with any fraud "therein; for a witneſs is only to authenticate it, and not to be privy to the contents."—And Lord Thurlowe, in the caſe of Becket and Cordley, 1 Br. Ch. Rep. 357. ſeems to have been of a ſimilar opinion with Lord Hardwicke upon this ſubject; for ſpeaking therein of the caſe of Mocatta and Murgatroyd, his Lordſhip ſays, "the firſt mortgagee was a witneſs to the ſecond mortgage, "and was therefore poſtponed. I do not leave this as a caſe, which I ſhould determine in the "ſame manner; for a witneſs in practice is not privy to the contents of the deed. The book refers to a caſe where Lord King denies the law to be ſo."

Hobbs v. Norton, 1 Vern. 136. *Vide* 2 Eq. Ca. Abr. 515 pl. 3. 9 Vin. Abr. 415. pl. 24. Watts v. Creſwell.

N.'s younger brother, having an annuity of 100*l.* *per annum* charged on lands by his father's will, contracted with *H.* for ſale thereof; *H.* went to *N.* and informed him of his intended purchaſe, deſiring to know of him if his younger brother had a good title to it, and whether his father was ſeiſed in fee at the time of making the will, and if it had ever been revoked. *N.* told him he believed his brother had a good title, and that he had paid him the annuity for twenty years; but at the ſame time informed him, that he heard there was a ſettlement made of his father's lands before the will, which was in the hands of *T.*, but that he had never ſeen it, and therefore could not tell what were its contents; and encouraged the purchaſe, telling *H.* he had not only paid his brother the annuity to that time, but had alſo paid his ſiſters 3000*l.* under the ſame will. The purchaſe was completed, and afterwards *N.* got the ſettlement into his hands, and would have avoided the annuity, the lands being thereby entailed. *H.*'s bill was to have the annuity decreed or repayment of his purchaſe-money; and though, on the hearing, there was no proof that *N.* had any notice of the contents of this ſettlement at the time he promoted the purchaſe, yet the Lord Keeper decreed the payment of the annuity merely on the encouragement *N.* gave *H.* to proceed in completing the contract; for that it was a negligent thing in him not to have made himſelf acquainted with his own title, that he might have informed the purchaſer of it, when he came to enquire of him.

Pearſon v. Morgan, 1 Bro. Ch. Rep. 63. 2 Bro. Ch. Rep. 381.

And ſuch conſtructive fraud not only binds the party himſelf perſonally, from whoſe negligence it ariſes, but alſo binds the lands, *&c.* charged. Thus, *B.*, the elder brother of *I. B.*, was under ſettlement entitled to a real eſtate, charged with 8000*l* for one younger child of the marriage, but ſubject to a proviſo, that, if the father ſhould give to any of his daughters or younger ſons, any money or lands, for or in advancement in marriage or *otherwiſe*, the value thereof ſhould be deducted from the portion, unleſs he ſhould by writing declare to the contrary. The father deviſed to *I. B.* 4000*l.* after the death of his (the ſon's) mother, and the reſidue of his perſonal eſtate, and died. Then the elder ſon ſuffered a recovery by which he obtained the fee-ſimple in the lands. Afterwards *I. B.* applied to *P.* to lend him 3000*l.* on the ſecurity of the 8000*l.* portion, for which

he aſſigned 5000*l.* part of the 8000*l.* as a ſecurity, and alſo entered into a bond in a penalty for the ſame. *P.*, previous to lending the 3000*l.*, applied by his ſolicitor to *B.*, informing him of *I. B*'s application, and deſired to be informed by him, whether the 8000*l.* was a ſubſiſting charge upon the eſtate, when *B.* declared that it was, and that *P.* might ſafely advance his money upon the ſecurity. *B.* alſo afterwards applied for. and obtained a ſum of money to pay off the 8000*l.* portion; and gave *P.*'s ſolicitor notice that he would pay off the 3000*l.* at the end of ſix months after the notice: *B.* dying ſoon after, the money was not paid, but from the death of his father, and down to his own death, he paid the intereſt of the 8000*l.* Upon his death the eſtate deſcended to his two daughters. *B.* had poſſeſſion of the ſettlement, and knew of the advancements of the father to *I. B.*; but, ſuppoſing them not to affect the portion, did not reveal them to *P.* A bill was filed by the mortgagee againſt the daughters to have the 3000*l.* raiſed and paid out of the ſettled eſtate. They ſet up as a defence, that the bequeſt of the 4000*l.* and of the reſidue, was a ſatisfaction for the portion under the proviſo inſerted in the ſettlement. And it being held that the bequeſt was a ſatisfaction, it then became a queſtion, Whether *B.* had not bound himſelf and the land notwithſtanding, by his declaration "that "the portion was a ſubſiſting charge?" It was agreed on behalf of the daughters, that if *B.* knowingly miſrepreſented the caſe to *P.*'s attorney, it certainly muſt bind him. All the caſes were that the perſon miſrepreſenting was bound by his own miſrepreſentation; but this went ſomething farther, namely, to bind the lands. If a man was guilty of a fraud, by which the land was affected, the miſrepreſentation would bind the land; but if there was no fraud, the land could not be affected. It was the duty of *P.*'s ſolicitor to make every inquiry; he ought to have made the truſtees parties. It was great negligence on his part not to take a legal ſecurity. He ought to have inquired what *I. B.* took under the will. The principle the court went upon, was by acting upon the conſcience of the defendant in ſuch caſes; if the defendant was acting againſt conſcience, the court would apply a remedy, but there was in this caſe nothing againſt conſcience. *B.* was ignorant of the legal effect of the legacies If then there was no fraud, there was nothing for the court to relieve againſt, and the land could not be bound. But by *Buller*, Juſt. (who ſat for the Chancellour), the only queſtion is, Whether *P.* has a right to have 3000*l.* raiſed for payment of his debt, out of the eſtate of *James?* It is argued, that this is not to be done unleſs there is ſuch a fraud as to affect land, and that here was no fraud, but *B.* acted innocently. It brings to my mind a caſe tried before me at *Guildhall*, by one merchant againſt another, for giving a falſe character of a third perſon, by which the plaintiff was induced to give him a credit, and loſt his money; my direction to the jury was, that, if one man tells another a falſehood by which he is injured, the deceived perſon has his remedy by an action. Thoſe who wiſh to maintain the daughter's caſe, argue, that *B.* the father was a total ſtranger to the caſe, which argument admits the principle, that if he had been intereſted, the declaration would bind. Here, the perſon of whom the queſtion was aſked, certainly had no intereſt. Fraud is a queſtion of law, and of fact. It is always conſidered as a conſtructive fraud where the party knows the truth and conceals it, and ſuch conſtructive fraud always makes the party liable. I think that, here, *B.* knew of the proviſo and advancements, and that in this court he was obliged to take notice of them. In fact he had expreſs notice. It is not like the caſe of a latter deed referring to a former one. The inquiry

quiry was a very proper one on the part of *P.*, and completely repelled any imputation of negligence in his agent, and the inquiry was properly made of the party immediately intereſted. *B.*, at the time of the inquiry, had the equitable intereſt in the eſtate, and, upon the application, aſſured *P.*, that he might ſafely lend his money. The inquiry was the moſt material *P.* could make. If *B.* admitted the term to be in exiſtence, he muſt be bound by his admiſſion. He had full notice, and induced *P.* to lend his money, which was a fraud that would affect the daughter's eſtate. The term muſt, therefore, be held to be in force to ſecure the 3000*l.*, and the truſtees muſt raiſe that ſum.

S. made a mortgage of land to *H.* who, placing a great confidence in him, lent the money, taking his word that he would deliver him the title-deeds, the mortgage being executed in *London*, and *S.* pretending the title-deeds were in the country. Afterwards, *S.* borrowed 2000*l.* of *E.* on a mortgage of the ſame lands, at the ſame time producing and delivering to him all his title-deeds, which were peruſed, and approved by his counſel. Then *H.* exhibited a bill to foreclose *E.* and to compel him to diſcover the title-deeds relating to the premiſes, and to have them delivered up to him, inſiſting upon them, as owner of the land. *E.* pleaded the mortgage made to him, and that he had no notice of the prior mortgage to *H.*, and inſiſted, that the court ought not to aid *H.* and take the title-deeds from him, without ordering him to be paid his mortgage-money; and ſo it was decreed by the Chancellour. Head v. Egerton, 3 P. Wms. 280.

S. being ſeiſed in fee of certain eſtates, ſubject to an outſtanding term of years in *R.* and *E.*, by indenture of leaſe and releaſe, dated the 4th and 5th days of *June* 1732, conveyed them to *D.* and her heirs, for ſecuring the payment of 1000*l.* and intereſt, and covenanted to produce the deeds reſpecting the terms for years. Afterwards, *R.* and *E.* aſſigned the term to other truſtees, in truſt for *S.*, his heirs and aſſigns; and then, *S.* by indenture, dated the 19th of *December* 1732, conveyed the ſame eſtates to *N.* byway of mortgage, for ſecuring to her 3000*l.* and intereſt, with a declaration that the truſtees of the term ſhould ſtand poſſeſſed of the term in truſt for her, and the deeds reſpecting it were delivered to her, and neither ſhe nor the truſtees had notice of the mortgage to *D.* Afterwards, *D.* brought an ejectment; *V.*, who claimed under *N.*, defended it, and ſet up the term with a declaration of the truſt of it in favour of *N*; upon this, *D.* brought her bill in equity. The queſtion was, Which ſhould be preferred; *D.* who had the firſt declaration of the truſt of the term, or *V.* who had the *ſubſequent* declaration of the truſt, but had the cuſtody of the deed? Lord *Northington* held, that a declaration of truſt in favour of an incumbrancer was tantamount to an actual aſſignment, unleſs a *ſubſequent* incumbrancer, *bonâ fide*, and without notice, procured an aſſignment; and that the cuſtody of the deeds reſpecting the term, with a declaration of the truſt of it, in favour of a ſecond incumbrancer, was *equivalent* (*a*) to an actual aſſignment; and *therefore* gave him an advantage over the firſt incumbrancer, which equity would not take from him. Stanhope v. Verney, vide Co Lit. Laſt edit. 293. b. in note.

(*a*) That is in equity.

If the mortgage be of a reverſion, there is no reaſon to poſtpone the mortgagee upon the mere abſtract fact of his not having required or procured the title-deeds and writings; becauſe in ſuch caſes, the title-deeds and writings do not properly belong to the reverſioner, nor has he, generally ſpeaking, any means by which he can procure them, if refuſed by the tenant for life, or poſſeſſor of the particular eſtate.

Tourle v. Rand, 2 Ch. Rep. 650.

This queſtion was agitated in equity, before Lord *Thurlowe*, in the caſe of *Tourle* againſt *Rand*, which was as follows: *R.* being, as ſuppoſed, entitled under the will of his father to a remainder in fee (but in fact only to a remainder in tail) *expectant on the death of his mother*, in certain freehold eſtates, conveyed his reverſion and remainder, expectant on the death of his mother, to *A.* in fee by way of mortgage. At the time of making the mortgage, the deeds and writings were in the hands of a collateral relation, but *A*'s attorney was informed by the mortgagor, that they were in the poſſeſſion of the mother, who would not conſent to part with them, ſhe being then in poſſeſſion of the eſtate as tenant for life, which ſhe continued until the time of her death. Immediately after her deceaſe, *A*'s attorney applied to *R.* for the poſſeſſion of the title-deeds, to which *R*'s general anſwer was, that he would ſend them in a day or two, or to that effect. Shortly afterwards, *R.*, being then tenant in tail in poſſeſſion, (but ſuppoſing himſelf tenant in fee of the above eſtate, and being alſo poſſeſſed of a leaſehold eſtate,) mortgaged both eſtates to *T.* At the time when the latter mortgage was made, all the title-deeds, relating to the eſtates, were delivered to *T.*'s attorney, and continued in *T.*'s poſſeſſion. Some time afterwards, *T.* filed his bill to foreclоſe the mortgaged premiſes, and among other things, charged that *A.* ought not to have permitted the title-deeds and writings to have remained in the hands of *R.*, that he left them in his hands for the purpoſe of enabling him to raiſe more money on the ſecurity of the premiſes, and that the ſame was a fraud on *T.*, and that therefore *A.* ought to be compelled to redeem *T.*'s mortgage, or ought to be debarred of any intereſt, which he might have in the premiſes, till *T.*'s mortgage ſhould be ſatisfied, It was contended on the part of *T.* that, where a prior mortgagee leaves the title-deeds in the poſſeſſion of the mortgagor, it is a fraud upon the ſecond mortgagee, as he is induced, by the title appearing on the deeds, to lend his money; that the ſecond mortgagee therefore having the deeds, ſhould be preferred. But Lord *Thurlowe*, Chan. ſaid, that he did not conceive that a firſt mortgagee, not taking the deeds, was *alone* ſufficient to poſtpone him; if it were ſo, there could be no ſuch thing as a mortgage of a reverſion. *In that caſe*, the deed being in the hands of tenant for life, is not ſufficient to turn him round. The firſt caſes where the prior mortgage was poſtponed, were caſes of fraud, then the ſame was done in caſes of groſs negligence (*a*). Here was no *laches*; the mortgagee could not compel the tenant for life to give up the deeds: though a dowreſs, upon a confirmation of her title, might be compelled, the tenant for life could not, although, after her deceaſe, he might have filed a bill. But that was not ſufficient to charge the mortgagee.

(*a*) "I find "no caſe," ſaith Eyre, C. B. "that "goes the "length of "ſaying, "that a "failure of "the ut- "moſt cir- "cumſpec- "tion ſhall "have the "ſame ef- "fect of "poſtpon- "ing a "mort- "gagee, as "if he were "guilty of "fraud or "wilful ne- "glect." 2 Anſtr. 440.

In the caſe of *Goodtitle* againſt *Morgan*, Mr. Juſtice *Buller* conſiders it "as an eſtabliſhed rule, in a court of equity (*b*), that a ſecond mortgagee "who has the title-deeds, without notice of any prior incumbrance, ſhall "be preferred; becauſe, if a mortgagee lends money upon mortgage, with- "out taking the title-deeds, he enables the mortgagor to commit a fraud. "If this has become a rule of property in a court of equity, (ſays the learn- "ed Judge,) it ought to be adopted in a courſe of law." *Quære.*

(*b*) 1 Term Rep. 762.

Although a depoſit of title deeds for the ſecurity of a debt amount to an equitable mortgage, yet, if a creditor of the mortgagor, fearing his immediate inſolvency, take a conveyance of the ſame eſtate, without notice (*c*) of the incumbrance, equity will not prevent him from availing himſelf of his legal eſtate.

Plumb. v. Fluitt, 2 Anſtr. 432.

(*c*) *Sed vide*, where there is notice either actual or conſtructive. Birch v. Ellames, 2 Anſtr. 427.

Again

Again, *R.* being ſeiſed in fee, acknowledged a ſtatute of 1000*l.* to *I. S.* in 1663, and on the 20th of *June* 1665, mortgaged the manor of *A.* to the plaintiffs *W.* and *K.* for 2000*l.*, and two days afterwards mortgaged part of the ſame to the defendant *B.*, and then died, leaving the defendant *H.* his heir; *B.*, the ſecond mortgagee, agreed with *M.*, another defendant, executor of *I. S.*, to put the ſtatute in execution at his coſts, and to pay *M.* the debt due on the ſtatute, after ſuch time as the ſtatute ſhould be extended, and an aſſignment made thereof by *M.* to *B.* The ſtatute was extended in *Auguſt* 1672. The plaintiffs' bill was, that on paying the debt on the ſtatute, it might be ſet aſide and aſſigned to them, and for a decree againſt *H.* to pay or be foreclоſed of redemption. One queſtion was, Whether the plaintiffs ſhould be admitted to ſet aſide the extent on payment of what was due on the ſtatute without paying off the 2000*l.* due on the ſecond mortgage to *B*, until the ſtatute was ſatisfied, not according to the juſtice of the debt in equity, but according to the extended value? It was objected, that the defendant *B.* had not, in his mortgage made after the plaintiffs' mortgage, all the lands mortgaged before to the plaintiffs, but only part thereof, and that the ſtatute covered the whole; and that, although the defendant *B.* might, by the purchaſe of the ſtatute, defend himſelf againſt the plaintiff, as to what was in his mortgage, yet he could not, as to ſuch lands as were not therein. But the Chancellour was ſtrongly againſt the plaintiffs on this point, and a queſtion of fact ariſing, the caſe went off upon propoſitions. Wyndham et al. v. Lord Richardſon et al. 2 Cha. Ca. 212.

And if a puiſne incumbrancer or purchaſer get in a ſatisfied judgment, or a prior ſtatute, or judgment, or recognizance, although it be paid off, yet, if he can make *uſe of it at law*, equity will not interfere to hinder him. Edmunds v. Povey, 1 Vern. 187. 2 Ch. Ca. 218 Hard. 318. *Sed vide* Hard. 172. *cont.*

So, where the plaintiff was a jointreſs, and the defendant a mortgagee ſubſequent, who had gotten an aſſignment of a ſtatute that was precedent to the jointure, but was ſatisfied, and extended it on the lands mortgaged; the bill was to ſet aſide the extent: but the Maſter of the Rolls decreed, that it ſhould not be ſet aſide, but upon payment of principal, intereſt, and coſts. Sadler v. Buſh, 2 Vern. 30.

Where a judgment creditor, or creditor by ſtatute or recognizance, buys in a firſt mortgage, he cannot tack or unite this to his judgment, ſo as to gain a preference thereby; becauſe ſuch creditor cannot be called a purchaſer, nor hath he any right to the land; he hath neither *jus in re*, nor *jus ad rem*; and therefore though he releaſe all his right to the land, he may extend it afterwards. All that he hath by the judgment, is a lien upon the land; but it is not certain whether he ever will make uſe thereof; for he may recover the debt out of the goods of the conuſor by *ſcire facias*, or may take the body, and then, during the defendant's life, he can have no other execution. Beſides, the judgment creditor doth not lend his money upon the immediate view or contemplation of the conuſor's real eſtate; for lands afterwards purchaſed, may be extended upon the judgment; nor is he deceived or defrauded, although the conuſor of the judgment hath before mortgaged his real eſtate, as in the caſe of a mortgagee, if the mortgagor hath before mortgaged his land to another. Brace v. Dutcheſs of Marlborough, 2 P. Wms 491. Anon. 2 Vez. 662. *Sed vide* Wright v. Pelling, Gilb. Eq. Rep. 151. & Pr. Ch. 494.

But where *A.*, the plaintiff, had lent money on ſeveral notes of different dates, each of them in words to this effect; "Received of *A.*—*l.*, to be ſecured on mortgage of my *Stokehall* eſtate; and the drawer had, previouſly to his drawing theſe notes, made a mortgage of his eſtate to the defendant; Matthew v. Cartwright, 2 Atk. 347.

fendant; and *A.*, to cover the ſums lent on the notes, bought in a mortgage which was made prior to the defendant's: Lord *Hardwicke* was of opinion, that *A.* ſhould thereby protect himſelf againſt the defendant's mortgage; and ſhould be paid the money lent upon the notes, as well as what was due to him upon the aſſignment of the firſt mortgage.

Hitchcock et al. v. Sedgwick et al 2 Vern. 155.

A prior mortgage purchaſed in will be no protection to a *puiſne* mortgagee, unleſs it be forfeited; for, until then, the eſtate remains, as it was at common law, redeemable upon performance of the condition ſtipulated.

Darcy v. Hale, 1 Vern. 49.

And a *puiſne* mortgagee, who purchaſeth in a prior ſecurity to protect his own, ſhall not only hold it until he be paid his debt, and reimburſed the money advanced by him to purchaſe it; but until he has received all the money, and arrears of intereſt, due on the ſecurity bought in, as well as upon his own.

Goddard v. Camplin, 1 Ch. Ca. 119.

And, as a *puiſne* mortgagee may tack a prior incumbrance, that brings with it the legal eſtate, to his own, and thereby protect himſelf againſt intervening charges thereon; ſo, a mortgagee *eigne*, having the legal eſtate, may tack a ſubſequent ſum advanced by him upon the former ſecurity, to his prior mortgage, and thereby protect himſelf againſt *meſne* incumbrances.

Blackſtone v. Moreland, 2 Ch. Ca. 20.

Thus, where *A.* had an annuity charged on the manor of *S.*, and *B.* an eſtate therein liable to the annuity, and *C.* an intereſt ſubſequent to both by mortgage; *B.* having no notice of *C.*'s intereſt, treated with him in the reverſion in fee, who deſired to borrow money of him, and thereupon purchaſed *A.*'s intereſt, and for that, and by way of money lent to the reverſioner, paid 900*l.*, but there was no more than 500*l.* due to *A.*; *C.* exhibited his bill againſt *A.* and *B.*, to redeem them on payment of their debts; the queſtion was, Whether *C.* ſhould pay *B.* any more than the mortgage-money he had originally lent, and the 500*l.* paid by him, which was due to *A.*? And it was decreed, that he ſhould pay the whole 900*l.* advanced.

Shepperd v. Titley, 2 Atk. 352. 4th reſolution in Brace v. Ducheſs of Marlborough, 2 P. Wms. 494. 2 Vez. 662.

So, if there be firſt and ſecond mortgagee, and the firſt lend money after the laſt mortgage made, taking a *judgment* as ſecurity, he may tack this to his mortgage to protect himſelf againſt the ſecond mortgagee, for he hath the legal eſtate and the judgment *which*, though it paſſeth no intereſt, preſently, in the land, operates as a *lien*.

Cooper v. Cooper, Nelſon's Rep. 153.

But the farther ſum advanced muſt be to one who has a right to charge the eſtate in queſtion. Thus, *J. C.*, the grandfather of *C.*, made a mortgage of lands in fee to *H.*, and then having two ſons *A.* and *B.*, deviſed the equity of redemption to his youngeſt ſon *B.*, and his heirs, and died; *B.* entered into the mortgaged lands, and enjoyed the ſame two years, and then died, leaving a ſon an infant. After *B.*'s death, his elder brother *A.* entered on theſe lands, and having occaſion for money, joined with the mortgagee in an aſſignment of the mortgage to another perſon, of whom he borrowed a farther ſum, which the aſſignee anvanced, having no notice of the will of *John Cooper*. Then the heir of *B.* came of age, and exhibited a bill to be let into the equity of redemption upon the foot of the firſt mortgage. And on his part it was inſiſted, that the aſſignee could be in no better condition than the mortgagee, and that, if there had been twenty aſſignments for more money, if the mortgagor or he who legally repreſented him had not joined, he ſhould not be barred, but ought to be relieved. On the other ſide it was contended, that the aſſignee was a purchaſer for a valuable conſideration without notice of this incumbrance by the will, and

that

that he had a good title, having taken an aſſignment from the mortgagee, wherein the viſible heir of the mortgagor was a party, and therefore, that if the heir would redeem, he ought to pay the whole principal ſum and intereſt. But the court was of opinion, and decreed that the heir ſhould be let into the equity of redemption upon the foot of the firſt mortgage.

And where *A.* had a prior judgment, and a mortgage likewiſe on the eſtate of *B.*; and a ſubſequent judgment creditor, but prior in time to the mortgage, brought a bill in Chancery, praying a ſale of the mortgagor's eſtate, who was likewiſe willing and deſirous to ſell; *per curiam*, here, *A.* is not a ſubſequent incumbrancer buying in a prior, but is the firſt of the incumbrancers, who has advanced more money on a ſecond incumbrance. Where the *firſt incumbrancer* by judgment has likewiſe a mortgage upon the eſtate, notwithſtanding there is another judgment, prior in time to the mortgage, yet, if the mortgagee had no notice of ſuch judgment, the creditor upon the ſecond judgment ſhall not come into a court of equity, and pray a ſale of the eſtate ſo mortgaged, without paying off the principal and intereſt, both of the firſt judgment and the mortgage; for it would be very hard, if the defendant ſhould be in a worſe condition, with a prior incumbrance in his favour, than a mortgagee without notice of a prior judgment would be.

Smithſon v. Thompſon, 1 Atk. 520.

The law is the ſame, although the incumbrance, ſet up as a protection, be obtained by fraudulent means; as, where one, being a purchaſer, came into a man's ſtudy, and there laid hand on a ſtatute that would have fallen on his eſtate and put it in his pocket; in that caſe, he having obtained an advantage at law, the court would not take it from him, though procured ſo unfairly, and by ſo ill a practice: *ſed quære.*

2 Vern. 159. Siddon v. Charnell, Bunb. 298. Sherley v. Pag, caſe cited, 1 Vern. 52.

53. 2 Vern. 58. reported 1 Ch. Ca. 68. *ſed contra* Gilb. *lex prætoria*, 248.

But, where the prior incumbrance taken in is deficient in thoſe requiſites which are neceſſary to give it legal efficacy, no protection can be derived from it. As, if a recognizance, bought in, hath not been enrolled in proper time. And though the court may, on application, interpoſe, and, by their ſpecial order, ſupply the defect as to perſons who come *ſubſequent* to ſuch interpoſition, yet it will not over-reach an intermediate incumbrancer.

Fothergill v Kendrick, 2 Vern. 334. Bothomley, v. Lord Fairfax, 1 P. Wms. 340.

So, if a judgment be not docketed within the time limited by the ſtatute 4 & 5 *W.* & *M. c.* 20., it will not protect a *puiſne* incumbrancer, although the *eigne* incumbrancer hath actually notice of it at the time of making the mortgage. Thus, where judgment was ſigned in *June* 1725, and a mortgage made to the plaintiff, who had notice of the judgment in 1728, but the judgment was not docketed, as appeared by an entry on the margin of the docket, until *January* 1730; the Maſter of the Rolls held, that the docket was not good, being made after the time limited by the ſtatute, and that the mortgage had got the preference of the judgment by defect of the docket; and, as to the notice, it was not material, the ſtatute being expreſs, that judgments, not docketed, ſhall loſe their preference as to *purchaſers* and *mortgagees*.

Forſhall v. Coles, 7 Vin. Abr. 54. P. C. 6. S. C. 2 E. Ca. Abr. 592. 8.

But this exception, as to judgments not docketed, is confined to caſes where they are ſet up againſt purchaſers or mortgagees, or heirs, or executors, or adminiſtrators in the adminiſtration of the effects of thoſe of whom they are repreſentatives.

Robinſon v. Harrington, 1 Pow. Mortg. 415.

The plaintiff (after a decree had been made in a cauſe in which he had been a party with other creditors, and the Maſter had been directed to inquire into the priority of their demands,) bought in a judgment given in 1694,

Wortley v. Birkhead, 2 Vez. 571. 3 Atk. 809. S. C.

1694, and made claim before the Maſter, to have it tacked to his mortgage and thereby to be paid before the defendants; as to which the Maſter refuſed to make any report: whereupon the plaintiff filed his bill, and one queſtion was, Whether he could tack the incumbrance bought in after the decree to his mortgage? Lord Chancellour *Hardwicke*, as to this part of the caſe, ſaid, that there was no caſe wherein it had been determined that a *puiſne* incumbrancer, a party in a cauſe, and *a decree made* in that cauſe, for ſatisfaction of incumbrancers *according to their reſpective priorities*, having taken in a prior to tack to his *puiſne* incumbrance, ſhould be allowed to make uſe of it in any other ſhape, than that in which the original incumbrancer might uſe it, had no ſuch purchaſe been made. He thought it would be moſt miſchievous and pernicious, if the court ſhould allow the doctrine of tacking to be carried to that extent. Firſt, taking it upon the terms of the decree; all thoſe decrees, where there were ſeveral incumbrances before the court, a ſale directed, and every thing neceſſary to clear the eſtate, in order to that ſale, proceeded on the foundation, *that the rights of the parties* were to be taken as they ſtood at the time of the decree; and therefore they directed an inquiry into the priorities. What, then, were thoſe priorities? Why, ſuch as they ſtood at the time of the decree: not that afterwards, the priority ſhould be varied. The ſenſe, reaſon, and juſtice of the caſe required it ſhould be ſo; for otherwiſe, if where an incumbrancer on an eſtate which was affected with ſeveral charges, brought a bill for ſatisfaction thereof, and there were all proper parties and a decree for it, as between himſelf and the owner of the equity of redemption, (ſome of the incumbrances being prior, others poſterior to his), one of thoſe defendants, who happened to be prior to him, was allowed to convey to another defendant, who was *puiſne* to him, it would ſhut out the plaintiff after the decree made, at which time the rights were conſidered. What would be the conſequence? Nothing could lay a foundation for greater colluſion and contrivance, between the parties, to exclude each other, than ſuch a liberty would, and that to the great deceit of the plaintiff; for then a man would loſe his coſts by ſuch a proceeding although he had a right to his debt, principal, intereſt, and coſts, according to the reſpective priorities; that was the direction of this decree: and there was a ſufficient fund according to the then right of the plaintiff, to pay all that was due; but if this were permitted, after a decree was made, two of theſe defendants might, by a colluſion, give a third incumbrancer more than his debt, and it would be worth while to do ſo, in order to exclude another, who happened to be a ſecond incumbrancer. It would be carrying ſecurities to market in that manner, whereby the purchaſer of them ſhould not only ſtand in the place of the party ſelling, but would acquire a new equity, which it would be miſchievous to allow; and therefore, his Lordſhip ſaid, he never was clearer in opinion than upon this part of the caſe, as to the general right.

Briſtol et al. v. Hungerford et al. 2 Vern. 524-5.

So, where *S.* a *puiſne* incumbrancer, after the bill brought, and after the firſt decree made, and, in truth, after the report, got an aſſignment of an old judgment and mortgage, expecting thereby to gain a preference to his debt; the court held, that the aſſignment obtained by him being after the decree made, he ſhould not profit by it or change the order of payment, but ſhould come in according to the time of his own incumbrance, without regard to the old judgment and mortgage.

2 Vez. 557.

And the law is the ſame as to purchaſers, incumbrancers who are not parties in the ſuit, *but who could come in under the decree*; for they muſt come in upon, and ſubmit to, the terms of that decree, though no parties.

But

But a third mortgagee may purchaſe in a firſt mortgage, and defend himſelf thereby, notwithſtanding a ſuit be depending between the reſpective mortgagees.

Thus, where the ſecond mortgagee filed his bill againſt the mortgagor, firſt and third mortgagees to be let in to pay off the firſt mortgage, and that then the eſtate ſhould be ſold, his own mortgage paid, and the third be ſatisfied out of the remainder; and pending the ſuit the third mortgagee bought in the firſt mortgage: it was determined by this he had gained a priority, and ſhould be paid his whole money before the ſecond mortgage. Robinſon v. Daviſon et al. 1 Br. Ch. Rep. 63.

However, in many caſes a ſuit pending in equity againſt land, is a bar to alienation; for *pendente lite nihil innovetur:* therefore the vendor of lands, pending a ſuit in equity againſt them, can give no title but what will be ſubject to its iſſue; but it is the pendency of the ſuit that creates the notice, for as it is a tranſaction in a ſovereign court of juſtice, it is ſuppoſed all people are attentive to what paſſes there; and to prevent a greater miſchief that would ariſe by people's purchaſing a right under litigation and then in conteſt. *J. F.* having only one daughter, and deſiring to keep part of his eſtate in his name, by will, made in 1684, deviſed a meſſuage to *F.* his near kinſman, in tail male, with remainder over, and gave his lands in *Suſſex* to his daughter, who married *E.*; they, with *C.* were ſuppoſed to have deſtroyed the will after the death of the teſtator. *F.* brought his bill againſt *D.* and his wife; and, in 1687, obtained a decree to hold and enjoy the lands according to the will againſt them, and all claiming under them. The eſtate deviſed to *F.* having been mortgaged by the teſtator, prior to his will to *B.* for 100*l.*, *N.* pending the ſuit, bought in *B.*'s mortgage, and purchaſed the equity of redemption from *D.* and his wife. *N.* was ſerved with the former decree, and appeared, and was examined, and ſet out his title under this mortgage, whereupon *F.* was put to bring his bill to redeem. *N.*, by anſwer, alleged, that although he had been informed before his purchaſe that it was pretended there had been ſuch will made, yet, upon inquiry, he had been aſſured and ſatisfied that it was deſtroyed by the teſtator in his lifetime, and therefore he proceeded in his purchaſe, and inſiſted, that the former decree, to which he was no party, was unjuſt in decreeing the lands to be enjoyed according to the will; but, in regard he purchaſed *pendente lite*, and with notice that there was a will, the court would not admit him to examine the juſtice of the former decree, or to try at law whether ſuch will was cancelled or deſtroyed by the teſtator, but declared he ſhould be bound by the former proceedings, and decreed the redemption of the mortgage to the plaintiff. *Vide* Worſley v. Earl of Scarborough, 3 Atk. 392. Finch v. Newnham, 2 Vern. 217 *& vide* Fleming v. Page, Finch, 320. *& vide* Herbert's caſe, 3 P. Wms. 116. this doctrine of notice extended to a criminal caſe.

A. and *B.* were partners; *A.* died having made his will, and deviſed to his executors and their heirs, "all his real and perſonal eſtate, not by his "will otherwiſe diſpoſed of, in truſt that they ſhould, by charging, leaſ- "ing or ſelling his eſtates, or any of them, raiſe money for the payment of "all his debts; and what ſhould remain, he directed to be divided into "equal portions, ſhare and ſhare alike, between his five children, and left "it to his executors to make proper allowances for their maintenance, un- "til there ſhould be a diſtribution made of his eſtates." *A.* amongſt other things had a mortgage of 3500*l.* In a cauſe between the executor of *B.* and *A*'s executors, the mortgage deed was directed to be left in the hands of a Maſter in Chancery, till the partnerſhip account ſhould be finally adjuſted. Afterwards *A*'s executors conveyed the mortgage to Maſter *Bennet*, as ſecurity for one of the executors on his appointment to be receiver of another perſon's eſtate. And one argument uſed by the children of *A.* in a ſuit againſt the Mead v. Ld. Orrery, 3 Atk. 236. *Id.* 392. S. P.

the holders of the mortgage, by way of ſecurity for the due diſcharge of the receiverſhip, was, that there was a ſuit at the time of the aſſignment about the mortgage, who was entitled to it, and that therefore it was void, as being made *lite pendente*. But Lord *Hardwicke* ſaid, that he did not ſee how this *lis pendens* could affect this aſſignment, unleſs it had been determined that this was the mortgage of *B.* the partner of *A.* and belonged to his creditors, who were the plaintiffs in that cauſe. But that as it was therein determined to be *A.*'s eſtate, there was an end of that objection.

Sorrel v. Carpenter, 2 P. Wms. 482.

But, in caſe of a real purchaſer for a valuable conſideration, *pendente lite*, the plaintiff will be held to ſtrict proof of his own title. Thus, a bill was brought by *S.* againſt *C.* to have the benefit of a decree, obtained againſt *L.*, for the recovery of a leaſehold eſtate held of the dean and chapter of *Saint Paul*'s; *C.* being a purchaſer of this eſtate from *L. pendente lite*, but as was proved, for the full value, and without any notice of *S.*'s claim, or any actual notice of the ſuit. For the plaintiff it was inſiſted, that this purchaſe, made *pendente lite*, was to be conſidered as made under an implied and conſtructive notice. But the court ſaid, that although, where there was a conveyance made *pendente lite*, without any valuable conſideration, and to avoid and elude a decree, it ought to be highly diſcountenanced; and, though the alienation were for ever ſo good a conſideration, the purchaſe, if made *pendente lite*, was nevertheleſs to be ſet aſide, yet, where there was a real and fair purchaſer, without notice, it was a very hard caſe, eſpecially in a court of equity; and, there being ſome defect in part of the proof in deraigning the title of *S.*, leave to amend, or make any new proof after publication was refuſed, and the bill diſmiſſed (*a*).

(*a*) There appears to have been an order to amend the bill in Trin. term 1728. (the term of which the reporter makes the deciſion to have been); Reg. Lib. B. 1727. fol. 453.; and an order of diſmiſſal in the Mich. term following Reg. Lib. B. 1728. fo. 18. In this caſe, the Chancellour obſerved, that it was a difficult matter to ſearch for bills in equity, or to get notice of them; many ſuch being, after filing, kept in the ſix clerks' deſk; and that though the court would oblige all perſons to take notice of its decrees as much as of judgments at law, yet there did not ſeem to be the ſame reaſon for obliging people to take notice of the filing of a bill. *Vide* 3 Atk. 392.

Garth v. Crawford. Barnard. Ch. Rep. 450. 2 Atk. 175.

And if a purchaſe or mortgage be made, pending a bill, to perpetuate the teſtimony of witneſſes to a will of land, the proceedings may be read againſt a purchaſer or mortgagee, during the ſuit, although he hath not notice either expreſs or implied.

S. C. by the name of Garth v. Ward.

Barnard. Rep. 454. 2 E. Ca. Abr. 687. 13. Scaife v. Lund. 2 Vern. 88. 1 Eq. Abr. 332. 4. 2 Ch. Ca. 48. & *vide* 3 P. Wms. 401. et Ca. temp. Talb. 217. 2 P. Wms. 622.

But, in general, a bill that cannot be brought to a hearing, cannot properly create a *lis pendens*, ſo as to affect a purchaſer, claiming under one of the parties, after filing the bill.

And it ſeems, that a decree in a court of equity, for money, does not bind a purchaſer for a valuable conſideration, without notice thereof, any more than a judgment at law; for a decree is not of ſuperior force to a judgment; nay, its effect is inferior; and where it is ſaid a decree is equal to a judgment, or to be paid equally therewith, this muſt be intended only out of the perſonal eſtate; for a decree for a debt does not bind the real eſtate, it acting only in *perſonam*, not in *rem*; and the remedy upon a decree to affect the land, is only for a contempt, whereupon the party proceeds to a ſequeſtration, and that is but a perſonal proceſs, as appears by its falling and abating by the death of the party.

Even

Even a fine levied by a purchaſer, for full conſideration, *with notice of a truſt*, to ſtrengthen his eſtate, will not bind the *ceſtui que truſt*, although there be five years non-claim; for he, having purchaſed with notice, is but a truſtee, notwithſtanding any conſideration paid by him; and the eſtate not being diſplaced, the fine cannot bar; but a fine and non-claim will be a bar in equity, if a purchaſer hath not notice. Cited, Bovey v. Smith 1 Vern. 149 2 Ch. Ca. 125. 2 Vern. 194 1 Atk. 475.

And where the plaintiff's bill was to be relieved upon a truſt, and charged the defendant with notice thereof, and that he had procured a conveyance of the lands upon which the truſt was had, *and that at or before his taking the ſaid conveyance*, he had notice of the ſaid truſt for the plaintiff; the defendant, by way of anſwer, denied that he had any notice of the truſt *at the time of his purchaſe or contract*, and pleaded that he was a purchaſer for a valuable conſideration; it was inſiſted that the point of notice was not well anſwered, in that the defendant denied notice *at the time of the purchaſe only*; for, the word *purchaſe* might be underſtood to mean the time when the contract for the purchaſe was made, and it might be, he had no notice then, and might have notice after, before, or at the ſealing of the conveyance; and if there was any notice before the conveyance to him was executed, that would charge the defendant; upon which objection the plea was overuled. More v. Mayhow, 1 Ch. Ca. 34 Attorney General v. Gower *et al.* 2 E. Ca. Abr 685. 11. *et* Wigg v. Wigg, 1 Atk. 384.

But if *ceſtui que truſt*, tenant in tail, be the mortgagor, and join with the truſtees in making the conveyance, it will be good and valid; they being conſidered as truſtees purely for the tenant in tail to preſerve his eſtate *only*, and not to ſtand in oppoſition to him, for the ſake of thoſe who are to come after him. Elie v. Oſborne, 2 Vern. 754. 1 Eq. Ca. Abr. 385. 3.

Previous to the caſe of *Willoughby* and *Willoughby*, a notion generally prevailed, that although a ſatisfied term reſulting by operation of law, might, if got in, be made uſe of to protect a purchaſer, a term once aſſigned to attend the inheritance, could not be ſo applied; for it could not enure to any other purpoſe than that preſcribed, unleſs ſevered again by the owner of that inheritance; but in that caſe Lord *Hardwicke* explained this diſtinction, obſerving that its applicability to ſuch purpoſe was an unavoidable conſequence of the rule, that "*a purchaſer for a valuable conſideration, and without notice, ſhall not be hurt in equity.*" The facts of the caſe were as follow; *George Willoughby*, being ſeiſed in fee of an eſtate in *W.* (ſubject to a mortgage-term for 500 years) by articles dated 12th *November* 1717, made upon his marriage, agrees to ſettle this eſtate to the uſe of himſelf for life, and afterwards to the intent that his wife ſhould, out of the rents, *&c.* of part, take an annuity of 250*l.* by way of jointure, with remainder, as to the whole eſtate, to the uſe of the firſt and other ſons of the marriage in tail male, with remainder to *George Willoughby* in fee, with a power for the ſaid *George* to charge the eſtate by will or deed, with the payment of 3000*l.* for the portions of his younger children. At this time the eſtate was ſubject to a mortgage for a term of years, as mentioned above. which being ſatisfied, the ſaid term was by indenture, dated 17th *Auguſt* 1718, aſſigned to *Shelling* and *Popham* and their executors, *upon truſt* for *G. W.*, his heirs and aſſigns, *to attend the inheritance.* A ſettlement was made of the eſtate 14th *March* 1718, purſuant to the articles: 14th *March* 1750, *George Willoughby* made his will, and thereby executed the power reſerved to him, by charging the eſtate with 3000*l.* for the portions of his younger children, and afterwards died, leaving *Jane* his widow, *Henry* his eldeſt ſon, three daughters, and a younger ſon *George*. *Henry*, having attained his age of 21 years, and being tenant in tail, ſuffered a recovery, Willoughby v. Willough by, in Chan. June 19, 1756. Willoughby v. Willough by, in Chan June 19, 1756.

covery, and limited the eſtate to truſtees in fee, to the uſe of ſuch perſon and perſons, and for ſuch eſtate as he ſhould by deed appoint. *Henry*, in purſuance of his power, by indenture dated in *June* 1751, for ſecuring 870*l.* which he had borrowed of *Jane* his mother, declared the truſtees ſhould ſtand ſeiſed, and the eſtate be charged with the payment of this ſum and intereſt. The term of 500 years was ſtill ſtanding out in *Shelling* and *Popham*. Afterwards *Henry* borrowed 800*l.* of the defendant *Cripps*, and for ſecuring this with intereſt, by indentures of leaſe and releaſe, dated 14th and 15th *June* 1752, he conveyed the eſtate in mortgage to *Cripps* and his heirs. The ſame day *Shelling*, the ſurviving truſtee, aſſigns the term of 500 years to *Boot*, upon truſt, in the firſt place, to protect the eſtate limited to *Cripps* and his heirs from meſne incumbrances, and, *ſubject thereto*, to *attend* the inheritance. It appeared upon the evidence, that *Cripps* had full notice of the articles and ſettlement, and that, notwithſtanding in the releaſe above, he took a covenant from *Henry* that the eſtate was free from all incumbrances except the 500 years term and the ſeveral meſne aſſignments thereof; but it did not appear that he had notice of the mortgage to the mother. The bill was brought by *Jane* the mother, and the younger children, for payment (by ſale of the eſtate) of the arrears of her jointure, the 3000*l.* to younger children, and the 870*l.* to the mother, and that then the reſt of the incumbrances might be paid according to their order and priority. The defendant *Cripps* inſiſted that, as the legal eſtate was in *Boot*, his truſtee, and as he was a purchaſer for a valuable conſideration and without notice of the firſt mortgage, he was entitled to be preferred in payment of his mortgage upon this principle, that he had both *law* and *equity* on his ſide, and the mother *only* equity.

Lord *Hardwicke* was of opinion, that ſuppoſing *Cripps* to have no notice of the jointure, portions, or other incumbrances, he would *in equity be entitled* to the *benefit* of this term.

Goodtit'e on dem. of ſeveral v. Morgan *et al.* 1 Term Rep. 755.

Jones, ſeiſed in fee of ſeveral eſtates, demiſed the ſame in 1761, to *Aubrey*, for nine hundred and ninety-nine years, by way of mortgage. Afterwards, in 1768, this term was aſſigned to *Lockwood* in truſt for *Jones* as to part of the lands, and in the mean time to attend the inheritance; in 1767, *Jones* mortgaged to *Morgan*, and in *July* 1769, to *David*. Both theſe mortgages were in fee. In *December* 1769, *Jones* and *Lockwood* aſſigned the laſt-mentioned lands to *Moreland*, his executors, *&c.*, for the remainder of the term of nine hundred and ninety-nine years, in truſt for *Sprigg*, for ſecuring 10,000*l.* lent by *Sprigg* to *Jones*. Afterwards, *Jones* by indentures of leaſe and releaſe, mortgaged the ſame eſtates in fee to *Sprigg*, for ſecuring the 10,000*l.* On the mortgage to *Sprigg*, all proper ſearches were made on his part for incumbrances, and he had all the title-deeds that could be found delivered to him at the time he advanced his money, except the demiſe of the term for nine hundred and ninety-nine years, and the aſſignments of it, which were kept in the hands of *Lockwood*, on account only of containing other premiſes in mortgage to *Lockwood*, and which were not included in the mortgage to *Sprigg*, nor aſſigned to *Moreland*, his truſtee, but counterparts of them were then delivered to *Sprigg*. On theſe facts the queſtion on an ejectment was, Whether *Morgan* and *David*, or *Sprigg*, ſhould be preferred?

On the part of *Morgan* and *David* it was contended, that this term muſt be conſidered as attendant on the inheritance, and, conſequently, at the times of the reſpective mortgages to them, the truſtee of the term became their truſtee, and the term could not be ſeparated from the inheritance but by

by their conſent. That if, previous to the conveyance to *Sprigg*, in 1769, *Morgan* and *David* had brought ejectments upon their mortgages, neither *Jones* nor *Lockwood*, his truſtee, could have ſet up his term as a bar to their ejectments; then if *Jones* himſelf could not ſet up the term it was abſurd to ſay, that thoſe who claimed under him might, for they could not claim a greater eſtate than he had. Then *Jones*, having parted with the inheritance, had no power afterwards to make any appointment of it differently. His power was gone, though it were collateral, by the conveyance of the land. *Sed per Aſhhurſt*, Juſtice, no man ought to be ſo abſurd as to make a purchaſe without looking at the title-deeds; if he is, he muſt take the conſequence of his own negligence. If the firſt mortgagee had an ordinary precaution, he muſt have known that this term was then outſtanding. And if he did know of it, and neglected to take a aſſignment of it, it was enabling the mortgagor to commit a fraud, by mortgaging the ſame eſtate again. By this therefore, he became *particeps criminis*, and he muſt ſuffer the conſequences of the fraud; and *Sprigg*, who has got the legal eſtate, muſt be preferred.

Where *A.*, a copyholder in fee, mortgaged to *J. S.* who was admitted by *B.*, the ſteward of the manor; and afterwards *A.* made a ſecond mortgage to *C.*, who was alſo admitted by *B.*, and then *a mortgage to B.*, who bought in *J. S.*'s ſecurity; it was decreed, that *B.* ſhould not poſtpone *C.*; becauſe it is preſumed, from the mere act of admiſſion, that a man of ordinary diligence and underſtanding, being ſteward of the manor, when *C.* was admitted, muſt know, or have notice of the *meſne* mortgage to *C.* Brothers v. Bence, Fitzgib. Rep. 118. 2 Eq. Ca. Abr. 615. 11.

Where a purchaſer *cannot make out a title*, but by a *deed*, which leads him to a fact material to it; he will not be deemed a purchaſer without notice of that fact, but will be preſumed cognizant thereof; for it is deemed groſs neglect, that he ſought not after it. 2 Ch. Ca. 246. Gilb. Rep. Eq. 8. 1 Ch. Ca. 129. Dunch v. Kent, 1 V. 391.

Thus, where *B.* deviſed to *J.* in tail male, and if he died without iſſue male, to *Y.* in tail male, but ſubject to two legacies of 500*l.* and 1000*l.* to the Drapers' Company; and *Y.* afterwards levied a fine to his uſe of him and his heirs (on which was five years non-claim), and then granted a rent charge of 100*l.* *per annum* to *S*, and mortgaged the premiſes to *L.*; the court held the fine and non-claim was no bar to the legatees; for *Y.* having no title, but under the will, it was implied notice to all purchaſers under him. Drapers' Company v. Yardley *et al.* 2 Vern. 206.

So where an annuity was granted to *A.* by the crown, by patent iſſuable out of the exciſe upon ſpecial truſt, that all ſuch of the creditors of *B.*, as would come in *within a twelvemonth*, and accept a ſhare of this annual ſum proportionate to their debts, ſhould have the ſame aſſigned to them; and *A.*, after the year, aſſigned part thereof by inſtruments which purported to be in conſideration of debts due and owing from *B*, but were in truth for *A.*'s own debts, and the aſſignees had afterwards aſſigned the ſame over to others, who claimed, as purchaſers, without notice, for full and valuable conſideration; it was held, that although all the creditors of *A.* did not come in within the year, yet this patent was in truſt for them, and not convertible to other purpoſes; and that thoſe who purchaſed of the aſſignees of *A.* came in under the letters patent, in which the truſt was mentioned, and ought to have taken notice of it at their peril. Dunch v. Kent, 1 Vern. 260. 319.

And ſubſequent purchaſers alſo are taken to have notice of the contents of a deed or will, if they muſt claim under it. As, if *A.* makes a conveyance to *B.*, with power of revocation by will, and, afterwards, limits other uſes; Moore v. Bennet, 2 Ch. Ca. 246.

uſes; if *B.* diſpoſes thereof to a purchaſer, a ſubſequent purchaſer is intended to have notice of the will, as well as of the power to revoke; for no title can be made to a purchaſer, but by the conveyance which contains the power of revocation.

Bovey v. Smith, 1 Vern. 84. 144. 2 Ch. Ca. 124. S. C.

But in the caſe of *Bovey* v. *Smith*, a will was not ſuffered to be ſet up, as preſumptive notice to defeat a tranſaction, by a truſt therein contained, that had lain dormant for many years, after a fine, and where there was *room to preſume*, that other truſts were appointed. In that caſe *B.*, the mother of *A.*, being in *Holland*, and having a ſeparate eſtate, about forty years previous to the time of filing the bill, made her will in *Dutch*, and thereby deviſed houſes to *W.*, her huſband's ſon by a former wife, and to other truſtees, in truſt *for her four daughters and their children, and ſuch of their children as ſhould be alive at the laſt*, and, afterwards, declared the truſt of all her eſtate, thereby undiſpoſed of, to be for her and her heirs. The truſtees, apprehending that the deviſe carried the inheritance of the houſes to the daughters, ſold ſuch inheritance in 1652, for a good conſideration, and diſtributed the money, ariſing from the ſale, equally amongſt them. *A.* was privy to this conveyance, and made no claim, nor pretended any right to the houſes; a fine was levied of them, and five years afterwards *W.* the truſtee, for a full conſideration, purchaſed them back to himſelf and his heirs. Then *A.* having taken advice on the will, and conceiving the daughters took only an eſtate for life, exhibited his bill againſt *S.*, who now ſtood in the place of *W.*, the truſtee, to have an execution of the truſt, and the lands decreed to him. Two decrees had been for the plaintiff.—One point argued was, that it was impoſſible any one ſhould come at the land without having notice of the truſt, for they muſt purchaſe under the will; and all their title was by the will by which the truſt was created, and every man that had notice of the will muſt, at his peril, take notice of the operation and conſtruction of the law upon it. But the Lord Keeper ſaid, this was an application, after one-and-thirty years poſſeſſion, to affect an eſtate with a truſt, notwithſtanding a releaſe and fine, and *that*, upon a ſuppoſal that *B.* had made no other appointment (as ſhe had power to do by the deed), *and* which, after ſo long a poſſeſſion, it ought rather to be preſumed ſhe had done; and alſo upon a ſuppoſal, that this was a true copy of the will. This was only a tranſlation; the original was loſt; the difference in point of tranſlation between the children and iſſue was nice, and the queſtion was, Who ſhould ſuffer? For the defendant was a purchaſer, and had paid a full conſideration, and was here to be affected with a notional notice only; the plaintiff ſtood by all the while and was ſilent, and, at beſt, paſſive in the breach of truſt. That, therefore, though it was hard to diſmiſs the bill after two decrees for the plaintiff, yet his Lordſhip was not ſatisfied he could decree it for him, and the bill was diſmiſſed.

1 Vez. 173.

So, likewiſe, this rule admits of an exception, in the caſe of an aſſignee of the eſtate of a teſtator, under an aſſignment made by the executor; for he will not, in favour of creditors or reſiduary legatees, be preſumed to have notice of what is contained in the will of the deviſor; becauſe whoever takes any thing from an executor, muſt always do it with notice of a will; and therefore, if this doctrine of the will being notice to the aſſignee was to prevail, no perſon would dare to purchaſe, or take an aſſignment from an executor. Beſides, it would be unreaſonable that a purchaſer ſhould take upon him to make out the account, as to the *quantum* of the debts or aſſets, when he is not entitled to have the vouchers for that purpoſe. Thus, *M.* having a mortgage of 3500*l.* made his will in 1712, and deviſed

Mead v. L. Orrery,

deviſed all his real and perſonal eſtate, not by his will otherwiſe diſpoſed of, to his executors in truſt, in the firſt place by charging, leaſing, or ſelling thereof, or of any part thereof, to raiſe money to pay his debts; and then to divide what ſhould remain, after payment thereof, in equal proportions between his five children, and appointed his wife, his eldeſt ſon *I. M.*, and another perſon, executors, and died, leaving his widow and five children; and after payment of all *M.*'s debts, a large ſurplus remained to be divided. *I. M.*, having been appointed, in 1726, receiver of all the rents and profits of the real and perſonal eſtates of *E.*, procured a deed to be made, to which the other executors were parties, reciting, that there was due on the mortgage 9000*l.* and that the ſame was the proper money of *I. M.*, and aſſigning the mortgage and all due thereon to *B.*, his heirs and aſſigns, with a proviſo to be void, if *I. M.* faithfully accounted with *B.* for what he ſhould receive from the eſtate of *E. I. M.* afterwards died inteſtate, without accounting with *B.* and greatly indebted to the eſtate of *E.* A bill was then filed by the plaintiff, two of the children of *M.*, againſt the defendants, the repreſentatives of *E.*, to account for what they had received on the mortgage, and to deliver up the deeds and writings relative thereto; and one queſtion was, Whether the plaintiffs, as reſiduary legatees of *M.*, were entitled to be relieved againſt the aſſignment of the mortgage, and to have an account; or, whether the repreſentatives of *E.* were entitled to retain the aſſignment? And this turned upon the point, Whether the aſſignees of the mortgage were to be conſidered as having notice of the truſt for the benefit of younger children? And the court held, the bare point of notice of the will, in this caſe, was not ſufficient.

3 Atk. 236. July 19, 1745. *Et vid.* Ewer v. Corbett, 2 P. Wms. 148. Burting v. Stonard, *Id.* 150.

So, where an executor aſſigned over a mortgage term of his teſtator to *A.* as a ſatisfaction of a debt due to *A.* from himſelf; it was objected, in favour of the daughters of the teſtator, who were creditors under a marriage ſettlement, that the aſſignees took this aſſignment with notice that it was the teſtamentary aſſets of the teſtator. But the court held the alienation to be good.

Nugent v. Gifford, 1 Atk. 463. 1738. S C. 2 Vez. 269. Ewer v. Corbett, 2 P. Will. 149 Buſting v. Stonard. 2 P. Will. 150.

But where *H.*, being indebted to *C.* on bond, died poſſeſſed of a great perſonal eſtate, and made *W.* executor and deviſee, who waſted the eſtate; *D. having notice of C.*'s debt, bought a leaſehold eſtate of *W.* by diſcounting 200*l.* due from *H.*, 550*l.* due from *W.*, and by payment of 150*l.* in money; on a bill filed by *C.* to have ſatisfaction for his debt of the leaſehold eſtate, being part of *H.*'s aſſets, the queſtion was, Whether this was a good ſale to bind a creditor? And it was held it was not, for *D.* was a party conſenting to and contriving a *devaſtavit*

Crane v. Drake, 2 Vern. 616 Note, Lord Hardwicke admitted the principle of this caſe, but doubted whether the facts warranted the application of it. *Vide* 2 Vez. 469.

So, where the deviſee of an eſtate, in truſt for payment of debts, mortgaged the eſtates to one of the creditors, with notice; and the queſtion was, Whether ſuch creditor ſhould retain it by way of ſecurity for his own debt, as well for the old debt, as for the money lately advanced? The Chancellour was of opinion, that though the general rule was, that though a purchaſer or mortgagee need not ſee to the application of the money, where there was no ſchedule of the debts, yet this rule was never carried ſo far, as to put it in the power of the deviſee in truſt, or of the heir at law, who in equity was conſidered as a truſtee, to favour one creditor, which would be

Ithell v. Beane, 1 Vez. 215.

be the conſequence if this was allowed. Such creditor as to his old debt, could not be put into a better condition by taking the mortgage, but muſt muſt come in *tari paſſu*, with the reſt of the creditors; for the eſtate was a ſecurity in the hands of the truſtee before, and ſuch mortgage only operated to change the courſe, which the court would not ſuffer the truſtee to do, conſidering the giving preference to one creditor, as a fraud, which the court would not allow.

If a deed, by which a prior charge is made upon an eſtate, be delivered among other papers, relating to the title thereof, to an intended purchaſer, he will be taken to have notice of the prior incumbrance; it being neceſſarily preſumed, that ſo material a circumſtance could not eſcape his notice, or, if it did, it muſt be through groſs neglect.

Ferrers v. Cheiry *et al* 2 Vern 384.

Thus the plaintiff's father and mother ſold an eſtate to *C.* and his heirs, which, purſuant to an agreement made on their marriage, had been ſettled on the plaintiff's father for life, part on the mother for her jointure, remainder of the whole on the firſt and other ſons in tail male; and the conveyance was made by deed and fine. *C.*, upon his purchaſe, took in a mortgage-term, which was prior to the ſettlement, entered and afterwards ſold the eſtate to *H.* and *I.* It appearing, by the proofs in the cauſe, that *C.* the firſt purchaſer, *had notice of the ſettlement*, and that the ſame, amongſt other writings, were delivered to him, the court decreed, that *C.* ſhould account for the conſideration-money, for which he ſold the eſtate, with intereſt from the deceaſe of the plaintiff's father and mother, diſcounting what was due on the mortgage made prior to the ſettlement.

And if it do not appear, upon the face of ſuch ſettlement, whether it be voluntary, or on articles before marriage, and, in conſequence, whether to be conſidered as binding againſt creditors or not, that will not alter the caſe; for the purchaſer, having notice of the deed, muſt, at his peril, purchaſe, and be bound by the effect of it. But, in the laſt caſe, the bill was diſmiſſed as to *H.* and *I.*, who were made defendants, they having pleaded that they were purchaſers without notice, and the plaintiff not being able to prove any notice againſt them, there was no foundation to preſume knowledge of the ſettlement, *C.* being able to make a good title without it.

Morrett v. Paſke, 2 Atk. 54 *Vide* 1 Atk. 490, 491.

A creditor by judgment, in 1698, for 600*l.* came to an account with the conuſor in the year 1707, and ſettled the remainder due upon the judgment at 420*l.*, and took a mortgage in fee for that ſum, as a collateral ſecurity to the judgment; and one *S.* an attorney, in 1716, took an aſſignment of this mortgage, in which there was a recital, *that* 90*l. of the conſideration of the aſſignment was then the full worth of the eſtate*. *S.* was likewiſe in poſſeſſion of another mortgage made in 1688, upon the ſame eſtate which was ſubject to the judgment in 1698, andthe mortgage in 1707. It was reſolved *S.* ſhould not be allowed to tack the two mortgages together, ſo as to defeat intermediate incumbrances between the years 1688 and 1698; and yet the mortgage in 1707 ſhould have relation back to the judgment in 1698, and by conſolidating them together, ſhould entitle *S.* to receive the ſum due upon that judgment, prior to creditors after the year 1698; but, as to money reported due ſince the mortgage in 1707, it ſhould be paid only in priority to creditors ſubſequent to 1707. One ground of which deciſion was, that the words in the recital of the aſſignment of the mortgage in 1716, viz. "that 90*l.* the conſideration-money, was the full worth of the eſtate *at that time*," naturally implied, that there were intermediate incumbrances, and therefore, to give *S.* the advantage of tacking both mortgages, would be contrary to his own intention; for, at the time he took the aſſignment of this

this *puiſne* incumbrance, he muſt know the eſtate was worth no more from the very words of the recital.

Again, *I. C.* being ſeiſed of ſeveral freehold eſtates had ſettled the ſame to certain uſes, and being poſſeſſed of a prebendal leaſe for twenty-one years, which was uſually renewed every ſeven years, and which he held at the time of making his will, after charging the ſame, together with other freehold eſtates, with an annuity, deviſed it to the ſame uſes, intents, and purpoſes, as were declared in the ſettlement of the freehold eſtates firſt mentioned. Then the teſtator died. The leaſehold eſtate was ſeveral times renewed by the ſeveral perſons in poſſeſſion, and in one of the renewals, the then leſſee was ſtyled deviſee of *I. C.* Afterwards there were ſeveral other renewals. Then the eſtate was mortgaged by one of the claimants, under the ſettlement and will as his own property. And the queſtion was, Whether the mortgagee, who had no other notice of any defect in his title, except that the leaſe, which was aſſigned to him, recited, among the conſiderations, the ſurrender of the former leaſe, which recited the ſurrender of the other, in which the leſſee for the time being was ſtyled deviſee of *I. C.*, had ſuch notice thereby, as would render the eſtate in his hands liable to the truſts of the ſettlement? And it was held, that the mortgagee was affected with notice of the ſettlement, and that he muſt convey the eſtate according to the uſes, *&c.* limited and declared therein. Coppin v. Fernyhough, 1 Bro. Ch Rep. 291.

Where there were father, mother, and ſon, and the father ſettled an eſtate on himſelf for life, then to his wife for her jointure, and on her death, to the ſons of the marriage; under which ſettlement, the wife and ſon inſiſted on being purchaſers for a valuable conſideration, without notice, and notice of a prior charge was proved againſt the father, by recitals on his own conveyances, and in part by his own admiſſion; but, as to the wife and ſon, there was no proof, but from theſe deeds being in the hands of the family; this was held not ſufficient to affect them with notice; becauſe ſuch ſettlement might have been made by an apparent owner without the deeds having been looked into. Whitfield v. Fauſſet, 1 Vez. 387.

If a deed, or other paper which is deemed conſtructive notice of a prior incumbrance, be found in the cuſtody of any one, it will be no objection to the charge of notice, that it does not appear when it came there; for if a perſon admits, or it be proved that a deed is in his cuſtody, whether as repreſentative of another or otherwiſe, it will be incumbent upon *him* to ſhew when it came there, for it is impoſſible for the other ſide to ſhew it. 2 Vez. 486.

Where tenant for life, remainder to his firſt ſon, mortgaged for 1500*l.*, and the deed of ſettlement was produced and ſeen by the purchaſer, who lent the money notwithſtanding, being adviſed that the tenant for life, not having then any ſon born, could deſtroy the contingent remainders, though, in truth, there was a ſon born five days before the lending of the money; yet the mortgagee having had no notice thereof, and having got the deed of ſettlement, the court would not relieve againſt him by compelling him to produce it. Brampton v. Barker, 2 Vern. 159. 1 E. Ca. Abr. 333. 3.

Notice to a man's ſcrivener, attorney, agent, or counſel, is ſufficient notice to the party himſelf. Merry v. Abney, 1 Ch. Ca. 38.

1 Vez 69. 2 Vez. 477. 3 Ch. Ca. 110. Aſhley v. Baile, 2 Vez. 368. Hothwall v. Abney, Nelſon Rep. 59.

Thus, *M.* ſuffered a recovery of an eſtate in *A.*. and then ſettled all his lands in *A.* upon his family; afterwards a tenement in *A.*, of which he had the reverſion after an eſtate for life, deſcending to him in tail by Maddox v. Maddox, 1 Vez. 61.

the death of the tenant for life, he ſuffered a recovery of it, and deviſed it to his younger ſon in fee. Then *M.* mortgaged it, together with 200*l.* that he had a power to charge on the ſettled eſtate, for ſecuring 200*l.* which he borrowed, and then he died. The mortgagee applied to the elder ſon for the money, who at firſt diſputed the payment, but afterwards ſubmitted thereto, upon the mortgagee's aſſigning to him the tenement ſo charged, that he might ſtand in the mortgagee's place; to which the mortgagee agreed, upon his covenanting to indemnify him for making this aſſignment, he having heard of the younger ſon's title. The eldeſt ſon then mortgaged the tenement to *B.* who had advanced the money to pay off the former mortgage. It was ſworn, that *B.*'s agent was preſent at the execution of the aſſignment when the indemnity was inſiſted upon; and the agent depoſed, that the deeds were laid before counſel, who made objections about the plaintiff's title. The aſſignment itſelf was ſtrong evidence of notice, for it had not the face of an aſſignment to a perſon having the equity of redemption, but was made ſubject to the equity of redemption; and was plainly meant to keep the mortgage on foot, if any other perſon had the equity of redemption, as the covenant to indemnify alſo ſuppoſed. One queſtion was, Whether the laſt mortgagee had not notice of the youngeſt ſon's title? And the court held, here was ſuch evidence of general notice, either to the party himſelf, *or to his agent*, to take care, as made it neceſſary for him to inquire into the title, which not having done, he muſt take the conſequence.

2 Vez. 485.

Brotherton v. Hatt *et al.* 2 Vern. 574.

Again, *E.* mortgaged his manor of *B.* to *M.* and his heirs, for ſecuring 3000*l.*; afterwards *G.*, the father of the plaintiff *B.*, lent *E.* 2800*l.*, and, by deed, reciting *M.*'s mortgage, he declared, that after the 3000*l.* and intereſt paid, the eſtate ſhould ſtand charged, and be a ſecurity for *G.*'s money. *M. was no party to this deed.* Afterwards *H.*, one of the defendants, lent *E.* 400*l.* and obtained a deed *from* E. *and* M., that after *M.* was paid, the eſtate ſhould, in the next place, ſtand charged with the 400*l.*, and in like manner for *C.*, and ſeveral other defendants. All the ſecurities were tranſacted at the ſhop of *W.* and *T.* ſcriveners, who were witneſſes, engroſſed the writings, and were in the nature of agents to all the ſeveral lenders. The queſtion was, Whether *B.* ſhould be paid next after *M.*, or whether *H* and the others ſhould be preferred, becauſe they had got a declaration both from *E.* and *M.*, who, by that means, became a truſtee for them, after his own money paid? And it was decreed, that *B.* ſhould be paid next to *M.*, and ſo on, as the mortgagees ſtood in order of time; for notice to the agent was good notice to the party, and conſequently, thoſe that lent laſt, muſt come laſt, having notice of what was before lent.

3 Atk. 37,

And although a country attorney acts by an agent in cauſes in *London*, yet he will be conſidered as the ſolicitor for his clients, though he reſides in the country, and what is known to him, will be conſtructive notice to them.

Sheldon v. Cox *et al* Amb. Rep. 62 *et vide* Doe on dem of Willis *et al.* v Martin, Mich. term 31 G. 3.

A. and *B.* were empowered by act of parliament, to purchaſe eſtates in a certain diſtrict to enable them to build a ſquare, *C.* (who was a barriſter at law, and who appeared to have taken the management of the affair upon himſelf) purchaſed a parcel of ground held on a church leaſe, and borrowed 3500*l.* of *D.*, and gave him a declaration of truſt of the leaſehold eſtates as a ſecurity, and delivered him the renewed leaſes: *C.* afterwards built ſeveral houſes, ſome of which were erected upon the ground on which *D.* had his ſecurity, and then *C.* granted a leaſe of theſe houſes

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to *H.*, reſerving a ground rent; which was done for the purpoſe of eſtabliſhing a rent; and *H.* declared himſelf in writing to be only a truſtee for *C.* Afterwards *H.* aſſigned ſome of the houſes in *D.*'s ſecurity to *M.*, for ſecuring a ſum of money by him lent, and then he aſſigned all the houſes to *E.* likewiſe, for ſecuring a farther loan. Neither *M.* nor *E.* had actual perſonal notice of the mortgage to *D.*, nor of each other's mortgage; but both *M.* and *E.* employed *C.* as their counſel and agent in theſe tranſactions, and nobody elſe. On a bill filed by *D.* for a ſale of the eſtates, and to be paid his mortgage-money in the firſt place, one queſtion was, Whether *M.* and *E.* were to be affected by the notice to *C.*, their agent, of *D*'s ſecurity? *Et per curiam*, It is a fixed and ſettled point, that notice to the agent is notice to the principal. *C*'s acting in different capacities makes no difference. It is the ſame as if they had been in different perſons.

If one purchaſes in the name of another perſon, without any authority from him ſo to do, or his having notice of his intention; yet, if he afterwards *agrees to it*, he makes the former his agent *ab initio*.

Thus, *G.*, in 1699, lent *W.* 200*l.* upon a ſurrender of copy-hold lands, but neglected to get the ſurrender preſented at the next court day as he ought to have done, for want of which the ſurrender was void, according to the cuſtom of the manor. In 1703, *B.* agreed with *W.* to purchaſe the mortgaged premiſes for 400*l.*, and took a ſurrender in the name of *M.*, who afterwards conſented to become the purchaſer, and paid the money. It was proved, that *B.*, whilſt he was treating with *W.*, had notice of the former incumbrance, and therefore declined to purchaſe in his own name, and took the ſurrender in the name of *M.*, and procured him to become a purchaſer, that *B.* might be paid a debt which *W.* owed him, out of the conſideration-money. On a bill filed by the executor of *G.*, *M.* pleaded himſelf to be a purchaſer without notice of the plaintiff's demand; and that his ſurrender was preſented, and he admitted tenant, without notice of *G.*'s ſurrender, which was kept in his pocket, and not preſented till long after his purchaſe, ſurrender, admittance, and payment of his conſideration-money. But it was adjudged at the Rolls, that notice to *B.* was ſufficient to affect *M.*; for, though he did not employ *B.* to purchaſe for him, or knew any thing of it until after *B.* had agreed and taken the ſurrender in his name, yet he, by approving of it afterwards, had made *B.* his agent *ab initio*; and *M.* was decreed to pay the 400*l.* and intereſt, or to ſurrender to the executor of *G.*

Jennings v. Moore *et al.* 2 Vern. 609. S. C. 1 Brown's Parl. Ca. 244. *Et vide* Merry v. Abney, 1 Ch. Ca. 38.

But, examining a title in *one* tranſaction, in the ordinary courſe of buſineſs, which cannot be ſuppoſed to make any impreſſion, as to any future event, will not operate as conſtructive notice to an agent in general, or counſel or attorney, to affect his client on a *ſubſequent* tranſaction, and in another buſineſs at a diſtant period; for, an agent or counſel cannot be ſuppoſed to remember every particular circumſtance, contained in deeds or papers that come under his peruſal.

Caſe of Ld. Falconbridge, cited 2 Vez. 369. Fitzg. 211. S. C. Worſley v. Earl of Scarborough, 3 Atk. 390.

And Lord *Hardwicke*, in the caſe of *Warwick* and *Warwick*, expreſſed his approbation of the rule laid down in the caſe of *Fitzgerald* and *Falconbridge* above mentioned, *that notice ſhould be in the ſame tranſaction*, and his Lordſhip ſaid, that it ſhould be adhered to, otherwiſe it would make purchaſers' and mortgagees' titles depend altogether on the memory of their counſellors and agents, and oblige them to apply to perſons of leſs eminence as counſel, as not being ſo likely to have notice of former tranſactions. And in the principal caſe, it was held that notice, ariſing from a caſe (ſtat-

Warwick v Warwick, 3 Atk. 294.

ed by one who was an agent for both parties in a ſubſequent mortgage) ſtated in order to do ſomething towards ſuffering a common recovery, a year and ſix months before the party was to be affected with this notice, was not ſufficient to affect a purchaſer. However, there were other circumſtances in the caſe favourable to the purchaſer.

Steed v. Whitaker, Barnard, 220.

So, where lands were ſettled by *F.* on his marriage in 1734, which he mortgaged among others, in 1736, to *W.*, who had no notice of the ſettlement, and *R.* was employed as agent in making both the ſettlement and the mortgage; one queſtion was, Whether *W.* ſhould be conſidered as having notice of the ſettlement, *R.* having acted as agent on both occaſions? And the court held, that affecting a perſon with notice of the title of another, by reaſon of his agent's having notice of it, had not been carried ſo far, as to affect the principal, unleſs where the agent had it, at the time of his tranſaction with him; and that, as the notice which the attorney had of the ſettlement, in this caſe, was two years before the mortgage, the mortgagee could not be affected by it.

Gilb. Eq. Rep. 7, 8.

It hath not been ſettled, whether, where one employs an attorney or counſel, and, for want of diſpatch, takes the matter afterwards out of his hands, and gives it to another agent to finiſh, and the firſt agent acknowledges notice, but no proof of notice of a prior incumbrance can be had againſt the ſubſequent agent, notice to the firſt agent ſhall bind the party himſelf.

Vide Whaley v. Whaley *et al.* 1 Vern. 484.

If one take a mortgage by aſſignment from a mortgagee, affected with notice of an outſtanding title, he will take ſubject to that title; for his aſſignor cannot transfer to him a better right than he has himſelf. And if ſuch original mortgagee, in a bill filed by the perſon ſetting up an *eigne* title againſt the mortgagee and his aſſignee, and praying to be let into poſſeſſion, charging notice, confeſs by his anſwer, that he had notice before the lending of the money; that confeſſion of notice will bind his aſſignee; for though the mortgagee's anſwer cannot be read againſt the aſſignee as evidence, yet he muſt ſtand in his aſſignor's place, and then his aſſignor's confeſſion of notice will bind him.

Collett v. Dorſels *et* Ward, Ca. temp. Talbot, 65.

T. having made mortgages of ſome parts of his eſtate, theſe mortgages afterwards by *meſne* aſſignment became veſted in *W.*, and carried with them the legal eſtate. *T.* then became a bankrupt, but, before the aſſignment of *T.*'s effects to the aſſignees, *W.* obtained a releaſe of the equity of redemption from *T.*, for a valuable conſideration; on a ſuit brought by the aſſignees againſt *W.* to ſet aſide theſe conveyances, it was held, that a purchaſer for a valuable conſideration, without notice of the bankruptcy, could not be relieved againſt within 21 *Jac.* 1.

Wilker v. Bobington Vern. 2399

H. B., on *May* 1ſt, 1710, was arreſted at the ſuit of one *S.*, for a juſt debt of 790*l.* ſecured by bond; he, for delay, pleaded it was for money won at play, and held out the plaintiff above ſix months, which, although he afterwards paid the debt and many thouſand pounds to others, and appeared publickly on the Exchange, was adjudged an act of bankruptcy by the ſtatute of *Jac.* 1. Afterwards, in 1717, *H. B.*, on the marriage of the defendant, his ſon, made a ſettlement, by which, after reciting, that he had on his own marriage ſettled land, on truſtees, in truſt, to ſecure 2000*l.* to his wife if ſhe ſurvived; *H. B. with the privity of the truſtees, who were parties to it*, aſſigned all his eſtate, right, title, and intereſt to the wife's relation for the benefit of *H. B.* for life; and of his wife for life, &c. The plaintiff *W.* was the aſſignee under a ſtatute of bankruptcy, taken out againſt *B.* ſubſequent to the ſettlement. The queſtion was, Whether a court of equity would decree the truſtees of the firſt ſettlement to aſſign the

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term to the plaintiff, or ſuffer it to reſt in them, to protect the ſettlement? For the defendants it was inſiſted, that they being purchaſers without notice of the bankruptcy, equity ought not to impeach their title, if they could defend themſelves at law; and that, although they had not the legal eſtate in them, yet the truſtees of the firſt ſettlement, in whom the legal eſtate was, being parties to the laſt ſettlement, were become their truſtees. And it was ſo held by the Chancellour, who ſaid, he took it to be the rule in equity, that where a man was a purchaſer without notice, he ſhould not be annoyed in equity, not only where he had a prior legal eſtate, but where he had a better title, or right, to call for the legal eſtate than another, and therefore diſmiſſed the bill.

A. lent money on lands, the mortgage being duly regiſtered, and afterwards *B.* lent money on mortgage on the ſame ſecurity, and his mortgage was alſo regiſtered, and then *A.* advanced a farther ſum on the ſame lands without notice of the ſecond mortgage: it was held, by Lord Chancellour *King*, that the regiſtering of the ſecond mortgage was not *conſtructive* notice to the firſt mortgagee before his advancement of the latter ſums; for though the ſtatute avoided deeds not regiſtered, as againſt purchaſers, yet it gave no greater efficacy to deeds that were regiſtered, than they had before. Bedford v. Backhouſe, 1 E. Ca. Abr. 615. 12.

So, in a later caſe, where *W.* advanced 800*l.* on a mortgage in *Yorkſhire*, and regiſtered it; afterwards *K.* lent a ſum of money, and took a judgment for it, which was alſo regiſtered; then *W.* advanced a farther ſum, but without any expreſs notice of the judgment; and it was argued, on a bill brought by *W.* to foreclose, that *K.* ought to redeem, on paying the firſt mortgage; for that, where ſuch regiſters prevailed, every incumbrancer ſhould be ſatisfied according to the priority of his regiſter; and that the regiſtering *K.*'s judgment was conſtructive notice to *W.* ſufficient to deprive him of the common benefit of a court of equity, whereby a firſt mortgagee, without notice, was to hold till all ſubſequent incumbrances due to him were diſcharged: it was reſolved, that theſe ſtatutes avoided only prior charges not regiſtered, but did not give *ſubſequent* conveyances, regiſtered, any farther force againſt *prior* conveyances regiſtered, than they had before; and that to have affected *W.*, *K.* ought to have given him notice when he advanced his money; for, though *W.* might have ſearched the regiſter, yet he was not bound ſo to do. Wrightſon *et al.* v. Hudſon *et al.* 2 E. Ca. Abr. 609. 7.

But a ſubſequent mortgagee, having notice of a prior mortgage not regiſtered, will not gain a priority by regiſtering, becauſe ſuch conduct is conſidered, in equity, as fraudulent, and the party hath that notice which the act of parliament intended he ſhould have. Cowper's Rep. 712.

Thus, *N.*, in 1718, married his firſt wife, and, on the marriage, a leaſehold eſtate, in the poſſeſſion of his father, was covenanted, in conſideration of the marriage, to be ſettled on truſtees, in truſt, for *N.* for life, then for his intended wife for life, remainder to the iſſue of the body of *N.* by his wife, in ſuch manner as he, by deed or will, ſhould appoint. The marriage was had, and a ſettlement made, in purſuance of the articles; the wife had iſſue, and died. In 1743, *N.* married a ſecond wife, but, previous thereto, entered into articles with her truſtees for ſettling the very ſame eſtate on himſelf for life, then on her for a jointure, remainder to the iſſue of that marriage; and a ſettlement was made purſuant thereto. The eſtate was ſubject to the ſtatute 7 Q. *Anne*, *c.* 20. which requires regiſtry. The firſt marriage articles and ſettlement were never regiſtered; the ſecond were. *N.* alſo mortgaged this eſtate, as abſolute owner thereof. Le Neve v. Le Neve, 1 Vez. 64. 3 Atk. 646. S. C. *Et vide* Cheval v. Nichols, Str. 664. *et* Sheldon v. Cox, Amb. Rep. 624.

of. The bill was brought by the children of the firſt marriage, to have the benefit of the ſettlement made on them, and, in order thereto, to have the ſubſequent articles and ſettlement poſtponed, though regiſtered. The ground of this application was, that the agent, who made the laſt ſettlement, had notice of the firſt. And, notice to the agent having been fully made out, the principal queſtion was, Whether it would affect the defendant's purchaſe, and oblige the court to poſtpone the ſecond articles, and ſettlement to the firſt, notwithſtanding the regiſtering act? And the court determined it would; for the intent of the act was to ſecure ſubſequent purchaſers and mortgagees againſt prior ſecret conveyances, by letting a ſubſequent purchaſer, having regiſtered, prevail againſt a prior ſecret conveyance, of which he had no notice; but if he had notice of a prior conveyance, which was veſted property, that was no ſecret conveyance. The ſtatute did not ſay, that the ſubſequent purchaſer ſhould not be affected by any equity whatſoever; therefore, though the manifeſt operation of it was to veſt the legal eſtate according to the prior regiſtering, yet it was left open to all equity; for there was no danger to the ſubſequent purchaſer, who might refuſe, if he had notice of the prior good conveyance.

Recited in laſt caſe. 1 Vez. 67. 2 Brown's Parl. Ca. 425.

And this doctrine was confirmed in the Houſe of Lords, upon an appeal, in the caſe of Lord *Forbes* v. *Deniſton*, which aroſe in *Ireland*.

But though apparent fraud, or *clear* and *undoubted* notice are held to be a proper ground of relief in caſes circumſtanced like the preceding ones, *ſuſpicion* of notice, though a *ſtrong ſuſpicion*, was held by Lord *Hardwicke not* to be ſufficient to juſtify the court of Chancery in breaking in upon this *act of Parliament*. And therefore, where a mortgagee of lands in *Middleſex* ſwore in his anſwer, that, to *his belief*, he did not know of a judgment which had not been regiſtered, until after his mortgage executed; this was contradicted by *one* witneſs *only*, who ſwore, that, on a converſation at which ſhe was preſent, the mortgagee admitted that it was true "he knew of the judgment, but that he knew, at the ſame time, that it was "not regiſtered; and what were acts of parliament for, unleſs they were "effectually obſerved?" Lord *Hardwicke* ſaid, that, undoubtedly, this was *material* evidence, but then it was only *one* witneſs againſt the anſwer of the defendant, and the evidence amounted merely to a defendant's *confeſſion* in contradiction to his *anſwer*, and was contrary to a poſitive act of parliament made to prevent any temptation to perjury from contrariety of evidence. His Lordſhip, therefore, diſmiſſed the plaintiff's bill as to this part of the caſe

Hine v. Dodd, 2 Atk. 275.

Senhouſe v. Earle, 2 Vez. 450. Perrat v. Ballard, 2 Ch. Ca. 73. *Ibid.* 135, 136. 1 Vern. 27. Hall v. Atkinſon, 1 Eq. Ca. Abr. 333.

It is an infallible rule, that a mortgagee may, in a court of equity, protect himſelf from diſcovery of his title-deeds if he denies notice. For, if a plaintiff brings his bill to redeem ever ſo ſtrongly, he is not entitled to ſee the mortgagee's title-deeds, becauſe a third perſon may find out a flaw in them. The rule appears to be the ſame on motion, where there is to be a ſale to raiſe the mortgage-money; this is a firſt principle, and not to be argued, and depends on the denial of notice.

Harriſon v. Forth, Prec. Ch. 51. *Et vide* alſo Lowther v. Carl-

If *A.* purchaſes an eſtate, with notice of an incumbrance, or that it is redeemable, and then ſells to *B.*, who has no notice, who afterwards ſells to *C.*, who has no notice; by this the notice to *A.*, the firſt purchaſer, will not be revived; for if it were ſo, an innocent purchaſer, without notice, might be forced to keep his eſtate; he could not ſell, and would be accoun-

accountable for all the profits received *ab initio*. But the intereſt muſt be the ſame in *every* reſpect, or the principle does not apply. ton, Ca. temp. Talb. 187. *Et vide* Brandlyn v. Ord, 1 Atk. 571.

Upon this ground, where *A.*, who was entitled to the equity of redemption in certain lands, had brought his bill againſt the repreſentatives of *B.*, who was the *meſne* purchaſer, and likewiſe againſt *C.*, who was the *puiſne* purchaſer; *A.* had not replied to the anſwer of the repreſentatives of *B.*, and the queſtion was, Whether they ſhould not have been brought before the court as proper parties? *Per* Lord *Hardwicke*, Chancellour.—The repreſentatives of *B.* deny he (*B.*) had any notice of *A.*'s title at the time he purchaſed, and it is admitted on all hands that *C.* who purchaſed of *B.*, had notice of the title; now, if I ſhould go on with this cauſe, I ſhould deprive *C.* of the benefit he would have from the defence which is ſet up by the repreſentatives of *B.* It is like the caſes at law by warranty, *&c.* where one defendant is allowed to pray in aid the evidence of another defendant, who has an intereſt in the thing conteſted, if it is of uſe or advantage to him in ſtrengthening his own caſe. And for this reaſon, his Lordſhip allowed the objection, for want of parties in not bringing the repreſentatives of *B.* before the court. Lowther v. Carlton, 2 Atk. 139.

Again, where a bill was brought to diſcover whether the defendant, who was aſſignee of a mortgage, had not notice that the original mortgagor was only tenant for life, ſtating that the title-deed, by which this appeared, was in the defendant's hands; the defendant pleaded that he was aſſignee of the mortgage, for valuable conſideration, and through many aſſignments from perſons who had no notice; it was argued, that this plea was not good; for it ſhould have ſtated, whether the defendant perſonally had notice: but the Maſter of the Rolls allowed the plea, holding that the plaintiff could not call upon the defendant to ſhew whether he had or had not notice; for whether he had, or had not, was immaterial, if thoſe through whom he claimed had not, he having a right to avail himſelf of their being purchaſers without notice. Sweet v. Southcote, 2 Bro. Rep. Chan. 66.

A mortgage made by *K.* in 1659, by divers *meſne* aſſignments veſted in *N.*; it was objected, that it did not appear that any money was paid upon the original mortgage, and therefore it was fraudulent; and being fraudulent in the creation, though *N.* paid a valuable conſideration, yet this would not purge the fraud, and make it good againſt one, who was a purchaſer *bona fide*, and for a valuable conſideration. *Sed non allocatur*: for *Holt*, Chief Juſtice, ſaid, that the firſt mortgage was good between the *parties*, and being ſo, when the firſt mortgagor aſſigns for a valuable conſideration, this was all one as if the firſt mortgage had been upon a valuable conſideration, for then the ſecond mortgagee ſtood in the firſt mortgagee's place, and therefore was within the proviſo of the ſtatute 27 *Eliz. c.* 4. "that no mortgage, *bona fide*, and upon good conſideration, ſhould be "impeached by force of this act, but it ſhould ſtand in ſuch force as before "the act made;" and if this proviſo did not extend to the caſe, to what caſe ſhould it extend? Andrew Newport's ca. Rep. T. Holt, 477. Skin. 423. S C. *Et vide* Shirk v. Clark *et al.* Pre. Chan. 275.

5. Of the Equity which muſt be done by him, who would redeem, to the Perſon againſt whom a Redemption is prayed.

Where a woman, being a bond creditor, married a mortgagee and died, and the huſband took out adminiſtration to his wife, he was allowed, on a bill brought by him to foreclоſe, to tack the bond to the mortgage, againſt the heir at law. Blackwell v. Symes, cited Ambl. Rep. 686.

So,

Price *et al.* v. Faſtnedge, Amb. Rep. 585.

So, where *F.*, ſeized in fee, mortgaged to *P.* for years, and *P.* died, having deviſed his real and perſonal eſtate to his daughter *S.*, and made her executrix; and *S.* afterwards lent *F.* 500*l.* upon bond; the queſtion was, Whether *S.* could tack the bond debt to the mortgage? which depended upon the queſtion, Whether *S.* was to be conſidered as entitled to the bond and mortgage in different rights, the one in her own right, and the other as executrix? And it was held by Sir *Thomas Sewel*, Maſter of the Rolls, upon the authority of the laſt-mentioned caſe, that *S.* might tack theſe debts.

2 P. Will. 777.

But if one be indebted to *A.* by mortgage of a term for years, and alſo indebted to him by bond; if on the death of the mortgagor, the executor aſſigns over the equity of redemption of the mortgaged term, and the aſſignee of the executor brings a bill to redeem, *he* ſhall only pay the mortgage-money.

Cannon and Pack, 2 Eq. Ca. Abr. 226. 6. 6 Vin. Abr. 222. 6.

Upon the ſame principle, where, on a bill by the heir of the mortgagor to redeem a mortgage of copyhold lands, upon payment of principal and intereſt, the defendant inſiſted to have a judgment, which had been aſſigned to him, firſt ſatisfied before he ſhould redeem, Lord *Harcourt* Chancellour, ſaid, *Copyhold lands are not liable to an execution upon a judgment; ergo*, the judgment ſhall not be tacked to the mortgage in this caſe, but the mortgagor ſhall redeem upon payment of the principal, *&c.* without ſatisfying the judgment.

Halliley v. Kirtland, 2 Ch. Rep. 361.

Where *A.* mortgaged lands to *B.* for 60*l.*, and was alſo indebted to *C.* 50*l.* on bond, and *B.*, aſſigned his mortgage to *C.*, the court determined that, as the eſtate veſted was a *chattel leaſe* liable to debts, and *C.* had an aſſignment of it, and the bond debt was juſt, *A.*, the plaintiff, ought not to be let into redemption of the mortgage, but upon payment of both debts; and it was decreed accordingly.

Wyndham v. Jennings 2 Rep. Ch. 247.

If the money due on the bond be lent firſt, and the mortgage made afterwards, yet there is the ſame equity for the mortgagee to have both ſums paid him. Thus, where *A.* borrowed of *B.* 300*l.* on bond, and afterwards mortgaged lands to *B.* for 2000*l.* lent, and then died, the plaintiff, the heir of *A.*, prayed a redemption; and the defendant inſiſted that the 300*l.* was agreed to be ſecured alſo by the mortgage: the plaintiff was decreed to pay the defendant both debts.

Barrett v. Wells, Prec. Ch. 131.

But, if the mortgagee or aſſignee, to whom money is due on bond, countenance a fraud upon a third perſon, by concealment thereof, he ſhall be redeemed upon payment of the principal money only: therefore, where the plaintiff, deviſee of an eſtate, ſubject to a mortgage term for 1000 years, let the intereſt run in arrear, and gave ſeveral bonds for ſecuring it, and then died; his ſon and heir being about to marry, the intended wife's father applied to the mortgagee to inquire what was due on the mortgage, who, being deſired to diſcover the bonds, ſaid, that there was only 500*l.* due, and that all intereſt was paid; and that, upon payment of the 500*l.*, he would deliver up the mortgage; the court held, on application to redeem, that the mortgagee, by concealing the bonds, had diſcharged the lands from being liable to more than what was then pretended to be upon them, and decreed a redemption, upon payment of the 500*l.* with intereſt from that time, and without coſts.

Morret v. V. Haſke, 2 Atk. 52. Gory's caſe 3 Salk. 240.

In reſpect of the heir, if there be ſeveral *incumbrances* upon an eſtate, and the prior incumbrancer claims a bond likewiſe, it will be poſtponed to all real incumbrances, whether by mortgage, judgment, or ſtatute; for the bond is no charge on the eſtate, and he hath not the ſame equity againſt a puiſne

puiſne incumbrancer, as againſt an heir at law, who is liable to the bond in reſpect of aſſets. Troughton v. Troughton, 1 Vez. 87 Powis v. Corbett, 3 Atk. 556 3 Salk. 84. 7

Upon the ſame principle, if the perſon, claiming the equity of redemption, is a purchaſer for a valuable conſideration, the mortgage may be redeemed by him without diſcharging the bond; becauſe the lands, in the hands of the alienee, can be charged with nothing but what is an immediate lien thereon, which the bond is not. Bayley v. Robſon, Prec. Ch. 89. Archer v. Snatt, 2 Str. 1107. Wood v. Mortimer, cited in the laſt caſe, 1 Eq Ca. Abr. 325. 10. 1 Vez. 87. Coleman v. Wynce, Prec. Ch. 511. *Vide* Troughton v. Troughton, 1 Vez. 87.

Nor ſhall a bond be diſcharged on redemption of a prior mortgage, againſt creditors under a deed of truſt of the equity of redemption; for it is only a charge upon the aſſets. Anon 2 Vez 662.

Therefore, where the queſtion was, Whether a mortgagee, who had lent a farther ſum afterwards upon a bond, ſhould be allowed to tack it to his mortgage, in preference to the other creditors of the mortgagor, under a truſt for payment of debts created by the will of the mortgagor, it was decided that the mortgagee ſhould not tack the bond to the mortgage; for there being a deviſe for the payment of debts, the deſcent was conſequently broke; therefore the mortgagee could have no priority with regard to his bond, but, as to that, muſt come in, *pro rata*, with the reſt of the creditors under the truſt. Hearns v. Bance, 3 Atk. 630.

And a mortgagee cannot tack a bond to his mortgage, even againſt other ſpecialty creditors. This point was ſo determined on reference to the principle upon which the rule, in reſpect of tacking a bond debt to a mortgage, is founded, and which furniſhes an obvious ſolution of all the caſes which we have ſtated as exceptions to the rule. For the only reaſon why the mortgagee can tack his bond to his mortgage, is to prevent a circuity of ſuits; it is ſolely matter of arrangement for that purpoſe; for the right has no foundation in natural juſtice. A creditor's having another ſpecifick ſecurity, cannot give him in juſtice any priority. It is not done in any caſe but that of the heir, and merely to prevent circuity. Lowthian v. Haſel, 3 Brow. Rep. Chan. 162.

A. purchaſed of *B.* the lands in queſtion, and re-mortgaged them for ſecuring part of the purchaſe-money, and for other part thereof gave a note payable on demand, on which 200*l.* remained unſatisfied, and *A.* deviſed his lands to be ſold for payment of his debts, and died, not leaving ſufficient aſſets: the queſtion was, Whether this 200*l.* remaining due on the note, being for part of the conſideration-money, ſhould have a preference to other debts, and be looked on in equity as a charge upon the land? And it was inſiſted upon, that it ſhould, becauſe *B.*, as mortgagee, had the real eſtate in him. But it was held, that *B.* could have no preference, but muſt accept ſatisfaction in proportion only with the other creditors. Bond v. Kent, 2 Vern. 281.

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(*The plaintiff*) In *Ex parte* King, 1 Atk. 300. Lord Hardwicke ſaid, he was not ſatisfied that this was the eſtabliſhed rule of the court; that this caſe was very imperfect, and that he would not have it cited for the future, till it had been compared with the entry in the regiſter's office. He ſaid farther, he was very apt to believe that the tenements were parcel, and holden of the manor of Dale; and that was the reaſon Lord Cowper ſo determined.—Search has ſince been made for it in the Editor's book, but no minute of it has been found there.—But the rule, as here ſtated, is recognized in other caſes, viz. Purefoy v. Purefoy, 1 Vern 29. Shuttleworth v. Lawick, *Id.* 245.

Cator v. Charlton, 21ſt June 1775. in the regiſtrar's book, 1774. cited in 2 Vez. jun. 377 In Collet v. Munden, May 31, 1786, in the regiſtrar's book, 1785, cited alſo *ibid.*

Stokes mortgaged to *Charlton* for 1400*l.* Money was afterwards at different times advanced by the mortgagee, and different premiſes were added and made redeemable on payment of 1900*l.* with intereſt These ſecurities were regiſtered; and afterwards the mortgagor aſſigned to the plaintiff the premiſes firſt mortgaged. The defendant admitted, that there was no agreement between *Stokes* in writing or otherwiſe, that the laſt-mentioned premiſes ſhould be a ſecurity for more than 1400*l.* and intereſt; but he inſiſted, that the plaintiff was not entitled to a redemption without paying the whole beyond the 1400*l.*, and that regiſtering the incumbrances was full notice of them. The decree was, that the aſſignee could not redeem without paying the whole.

Sir L. Kenyon, upon the above authority, in the ſame ſort of caſe of ſeparate mortgages, declared, that both muſt be redeemed. "Theſe caſes," ſaid the Maſter of the Rolls in Jones v. Smith 2 Vez. jun. 377. "amount to this; that if a man makes a mortgage, and afterwards makes another mortgage for a farther ſum, and then aſſigns the equity of redemption of one, both muſt be redeemed; and the caſe of the aſſignee is not better than that of the original mortgagor."

Vanderzee v. Willis, 3 Br. Ch. Ca. 21.

A bill was filed by the widow and executrix of *James Vanderzee* to redeem ſecurities pledged by the teſtator to the houſe of *Moorhouſe* and Co. bankers, of which the defendants were the preſent partners. The caſe was as follows: In the year 1778, the deceaſed kept an account with the houſe of *Moorhouſe* and Co. as bankers; and upon the 10th of *Auguſt* in that year, he borrowed of the then partnerſhip 1000*l.* (having then 400*l.* in the hands of the houſe,) and gave a promiſſory note, and depoſited ſeveral bonds and other ſecurities as a pledge for the repayment thereof. Theſe ſecurities he frequently changed, and as one was taken away, another of equal value was depoſited in its room. In 1784, *Vanderzee*, owing the above 1000*l.* and above 400*l.* on his banking account, the partnerſhip required an aſſignment of the ſecurities, and *Vanderzee*, being an attorney, prepared a bond and deed-poll for ſecuring 1000*l.*, although there were 400*l.* then due; and he overdrew his account, after the execution thereof, and was, at his death, in 1785, indebted to the partnerſhip in the ſum of 541*l.* over and above the 1000*l.*—The bill prayed, that the plaintiff might redeem, on payment of 1000*l.* and intereſt only, inſiſting, that the depoſit was made as a ſecurity for that ſum only, and the rather, as a larger ſum was then due, and that the defendants had no lien on the ſecurities for any further ſum; and alſo ſtated that the perſonal and fee-ſimple real eſtate of the teſtator, were not more, or little more, than ſufficient to pay his ſpecialty debts, and that a bill had been filed by creditors againſt the preſent plaintiff and the heir at law, in which ſuit there had been a decree for the creditors to come in.—The defendants inſiſted, by their anſwer, upon a right to retain the ſecurities to the amount of their whole demand, ſtating their practice to be, never to ſuffer a cuſtomer to overdraw his account more than 100*l.* without ſecurity, and that it was intended by the partnerſhip, that the aſſignment ſhould cover as well the balance due, and to become due from *Vanderzee*, on his caſh account, as the 100*l.* and intereſt; and that the partnerſhip always conſidered themſelves to have a lien upon the ſecurities for the whole debt. Lord Chancellour—All caſes agree, that if the executor aſſigned the equity of redemption, it would put an end to the tacking; ſo it would, if the ſpecialty creditor brought the bill. I am afraid, the rule has been laid down too broad, and that there being a decree for creditors to come in, they muſt redeem on payment of the 1000*l.* with intereſt.

Sir

Sir *James Cockburne* and *Henry Douglas*, carrying on buſineſs in partnerſhip as *Weſt India* merchants, borrowed from *Joſhua Smith* 5000*l.*, for which they gave their joint promiſſory note dated *April* 25, 1775; and as a farther ſecurity Sir *James Cockburne* transferred 2000*l. Scotch* mine ſtock to *Smith*, who ſigned a memorandum promiſing to transfer the ſame to the order of Sir *James* on payment of the note. By indentures of leaſe and releaſe *December* 11th and 12th, 1775, Sir *James Cockburne*, Sir *George Colebrook*, and *John Nelſon*, mortgaged an eſtate in the iſland of *Dominica* to *Thomas Rumbold*, *George Wilſon*, and *Joſhua Smith*; and by indentures of the ſame date it was declared, that 10,000*l.*, part of that ſum, was the property of *Smith*; and a truſt was declared for him as to that; and the mortgagors joined in a bond to him for that ſum; and Sir *James Cockburne* and *Douglas* joined in a bond to him for the intereſt. Sir *James Cockburne* and *Douglas* had various money tranſactions with *Smith* ſubſequent to 1775; and upon *May* 7th, 1788, *Smith* having then in his hands, beſides the *Scotch* mine ſtock, and the joint note of the partners, ſeveral bills of exchange and notes delivered by them to him, an account was ſettled, and a memorandum ſigned by all parties, that the balance to *Smith* was 9246*l.* 13*s.* 7*d.* and declaring, that that ſum ſhould carry intereſt from the 1ſt of the preceding *October*; and that the ſeveral bills and ſtock ſet forth in the account were paid to *Smith* at ſundry times by the partners, "which, when paid, "are to be paſſed to the credit of their joint or ſeparate notes and bills." Upon this occaſion no notice was taken of the mortgage of the *Weſt India* eſtate. In *October* 1788 *Douglas* died. By indentures of *March* 1, 1791 Sir *James Cockburne*, in conſideration of 500*l.* lent by *Jones*, transferred to him, his executors, and adminiſtrators, all the ſaid 2000*l. Scotch* mine ſtock, and the joint promiſſory note of *April* 25th, 1775, and a bill of exchange for 1575*l.*, dated *April* 6th 1775, payable three years and a half after date, all then in the poſſeſſion of *Smith*, upon truſt ſubject to the rights of *Smith*, for ſatisfaction of the ſaid 500*l.*, and all other ſums then due by Sir *James Cockburne* to *Jones*; and then to pay the ſurplus to Sir *James*, his executors, and adminiſtrators. *Smith* having obtained judgment againſt the drawer and indorſer upon two bills for 5000*l.* and 5250*l.* drawn by *Ninian Horne* upon Sir *James Cockburne* and *Douglas* indorſed by *Campbell*, and delivered by Sir *James Cockburne* and *Douglas*, to *Smith*, *Horne* gave *Smith* ten other bills and notes for 10,000*l.*, and by indentures of *September* 16th, 1778, *Smith* covenanted to ſtand poſſeſſed of the principal ſum of 10,000*l.* ſecured by the *Weſt India* mortgage, ſubject to the payment of the ſecurities ſo given to him by *Horne*, as to one moiety for *Horne*, his executors, and adminiſtrators; and as to the other, for ſuch perſons as ſhould be then entitled thereto. Upon theſe bills and notes *Smith* received 4200*l* only; and by indentures of *May* 26th, 1787, in conſideration of 4200*l.* paid him by *George Horne*, he agreed to give up the remaining ſecurities; and aſſigned the remaining 5000*l.* of the mortgage-money ſecured upon the *Weſt India* eſtate. The bill was brought by *Jones* againſt *Smith* for an account of the money remaining due to the defendant in reſpect of the balance of the account of *May* 7th, 1778; and that on payment of what ſhould be due on that account, the defendant ſhould tranſfer to the plaintiff the ſum of 2000*l. Scotch* mine ſtock, and deliver up the joint promiſſory note of Sir *James Cockburne* and *Douglas* for 5000*l*, dated *April* 25th, 1775, and the bill of exchange of *April* 6th, 1775, for 1575*l.* upon the truſts of the indentures of *March* 1791. It was admitted by the anſwer, that it was agreed, the defendant ſhould retain the ſeveral notes,

Jones v. Smith, 2 Vez. jun. 372.

notes, bills, and ſtock, ſet forth in the account of *May* 7th, 1778, by way of mortgage for payment of the balance of 9246*l.* 13*s.* 7*d.*, and apply the ſums he ſhould receive an account thereof, in diſcharge of that balance; and pay the ſurplus to Sir *James Cockburne;* and that purſuant to that agreement he ſubſcribed a memorandum dated *May* 7th, 1788, acknowledging payment of the ſaid bills and ſtock to him: but the defendant referred to the memorandum for certainty as to the date and contents. The anſwer ſtated, that the defendant had received intereſt upon the *Weſt India* mortgage only to *December* 12th, 1776; and he claimed intereſt of the whole 10,000*l.* from that day to *September* 16th, 1778; and from that day he claimed the intereſt of a moiety of that ſum, and of ſo much of the other moiety, as he was entitled to under the deeds of *September* 16th, 1778, to *May* 26th, 1787; and ſo much of the intereſt of the laſt moiety during that period, as he was not ſo entitled to, and the intereſt of the whole 10,000*l.* from *May* 26th, 1787, he claimed as truſtee for *Newton*, and *George Horne*, and *Campbell*; and he inſiſted, that the ſecurities, the redemption of which was ſought by the bill, could not be redeemed without paying thoſe arrears of intereſt upon the *Weſt India* mortgage; which was the only queſtion. The Maſter of the Rolls.—It is determined, that in the caſe of two mortgages, both muſt be redeemed; but as to ſums advanced on other ſecurities, a mortgagor cannot tack thoſe to his mortgage, and inſiſt on a redemption of the whole. Here is a mortgage, in which Sir *James Cockburne* is one of three mortgagors, and the defendant one of three mortgagees: afterwards, the former and his partner pledge with the defendant bills and notes for payment of an account current between them of which account the money due upon the mortgage makes no part. If they were depoſited expreſsly for one purpoſe, is there any pretence to ſay the money was advanced upon ſecurity of the mortgage; and that he would not have advanced any more money but on ſecurity of the mortgage? I could not permit him to ſay that. What confuſion would ariſe, if upon a bill of redemption by the mortgagors they were not to redeem without paying what was due upon the diſtinct tranſaction with Sir *James Cockburne* and *Douglas?* They are tranſactions totally diſtinct. Nothing has happened ſince to make any variation. This is not a caſe, in which the plaintiff comes to take out of a mortgagee the legal eſtate he has acquired; but he comes to have theſe perſonal ſecurities; the debt for which they were pledged, being diſcharged. The whole tranſaction proves, there was no intention of tacking at the time; and if the defendant ever could, he waived it in 1778. That tranſaction was an acknowledgment by him, that he had the legal poſſeſſion for one ſum; and then, according to *Green* v. *Farmer*, (*a*) he cannot ſet up another. Therefore, theſe ſecurities muſt be delivered over to the plaintiff on paying what is due upon that account in 1778. I rather think the defendant ought to have his coſts; for it is not a frivolous point; therefore, let the account be directed, and coſts reſerved.

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A mortgage being aſſignable, a purchaſer ſhall hold it againſt *the mortgagor or his heirs* for the ſum due on the mortgage, although he bought it for leſs than was due, or for leſs than it was worth; for he ſtands in the place of the mortgagee who aſſigned, and who might have given it to him *gratis*. And what was due will be the meaſure of allowance, not what was given, for that might be more than it was worth as well as leſs; and he that runs the hazard if a loſs happens, ought to have the benefit in caſe it turns to advantage.

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But where a man dies in debt and under ſeveral incumbrances, namely, judgments, ſtatutes, mortgages, *&c.* and the *heir at law* buys in any of them that are of the firſt date; if creditors, who have the latter ſecurities, prefer their bill, the incumbrances bought in, ſhall not ſtand in their way for more than the heir really paid for them. For a creditor has equal equity with a purchaſer, and the taking away the gain of the latter to ſupply the loſs of the former, is making both equal; and therefore the gain the heir would make, if the whole money due on the incumbrance were allowed him, ſhall be taken from him to make up the loſs of the other incumbrancers upon the eſtate. 2 Vent. 353. 1 Vern. 49. 479. 1 Eq. Ca. Abr. 330. 3. 1 Salk. 155.

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A., in

Yates v. Hambly, 2 Atk. 360.

A., in 1699, having borrowed 50*l.* of *B.*, conveyed ſeveral houſes to the uſe of *B.* and his heirs, until he ſhould have received by the rents and profits thereof the 50*l.* with intereſt, and all other ſums by him advanced to the mortgagor; and after payment by ſuch rent of the 50*l.*, and all ſuch ſums as ſhould be advanced then to the uſe of *A.* for life, with remainder over. No application was made to redeem until 1740; and it was held, on a queſtion, whether this mortgage might be then redeemed, that the eſtate was then a redeemable intereſt, and that no bar aroſe from length of time. For it was ſaid, that this differed from a common mortgage, this being a conveyance of the inheritance, for ſecuring the money lent, or any other ſum advanced by the mortgagee, in truſt that the mortgagee ſhould continue in poſſeſſion till, by perception of the rents and profits, he ſhould be ſatisfied, the principal and intereſt upon ſuch ſums as he had already lent, or ſhould lend, and ſubject thereto in truſt for the mortgagor, *&c.* Now there never could be a forfeiture under this deed, becauſe the mortgagee was only in the nature of a tenant by elegit; and as ſoon as his principal and intereſt was ſatisfied by being paid off, or by perception of rents and profits, the eſtate ceaſed in *B.*, and *A.*, or thoſe claiming through him, might have brought an ejectment; nor would any bar have ariſen from length of time, unleſs the ſtatute of limitation had run by the mortgagee's continuing in poſſeſſion twenty years after the money had been paid off. And the mortgagor in ſuch caſe may alſo come into a court of equity for an account of the profits received, as on an *elegit*, and to have the ſurplus, if any, after diſcharging the mortgage, paid over to him; and in ſuch caſes there is nothing for the ſtatute of limitations, or the rule adopted in equity by analogy to operate upon, for there is no forfeiture. But it was obſerved, in the preceding caſe, that if, after the account ſhould be taken in Chancery, it ſhould appear that the mortgage was ſatisfied by perception of profits twenty years before, and that the mortgagee had continued in poſſeſſion from that time, the ſtatute of limitations would run.

Hartpole v. Walſh, 4 Brown's Parl. Ca. 369.

But, in the caſe of *Hartpole* v. *Walſh*, where *H.*, in conſideration of 600*l.* lent him by *W.*, conveyed eſtates to him in fee, ſubject to a proviſo, that "the conveyance ſhould be void, whenever *H.*, his heirs, execu-"tors, adminiſtrators, or aſſigns, ſhould, on any laſt day of *June* or De-"*cember*, pay unto *W.*, or his heirs, the ſum of 600*l.*;" and it was agreed by the indenture, that *W.* and his heirs ſhould receive the yearly rent of the premiſes in lieu of his intereſt, with a view to which, poſſeſſion was delivered to him; and afterwards *H.*, in conſideration of 2300*l.* paid by *W.*, granted and conveyed the premiſes compriſed in the former mortgage, together with others, to him, his heirs and aſſigns, and covenanted that, whenever *W.* ſhould give to him, his heirs or aſſigns, eighteen months notice by letter in writing, requiring payment for the 2300*l.*, *H.*, his heirs or aſſigns, ſhould pay the ſame with intereſt within eighteen months after ſuch requeſt; and *W.* was in like manner let into poſſeſſion of the laſt-mentioned premiſes; a bill for redemption brought, after the lapſe of one hundred years, was diſmiſſed, and that decree for diſmiſſion affirmed in the Houſe of Lords.

Proctor v. Cowper, 2 Vern. 377.

Where a bill was to redeem a mortgage made in 1642, it appeared the mortgage entered in 1650, and there were three deſcents on the defendant's part, and four on the part of the plaintiff; but, the length of time being anſwered for the greateſt part by infancy or coverture, and an account having been made up by the mortgagee on a bill brought by him in 1686,

1686, to foreclose, the court decreed a redemption and an account from the foot of the account in 1686.

Where a mortgage was made in 1713, and the clerk to the solicitor for the mortgagor, in order to pay off the mortgage, settled an account, in 1730, of what was due for principal and interest, and no farther proceedings were had; yet that was held by Lord *Hardwicke*, on application in 1742, to save the right of redemption. Anon, 2 Atk. 333.

Any act of the mortgagee, by which he acknowledges the transaction to be a mortgage within twenty years, will take the case out of this rule; as, by devising the money in case the mortgage should be redeemed, or exhibiting a bill to foreclose. Orde v. Smith, Sel. Ca. Ch. 9. *supra*.

So, a man, taking notice by a will, or any other deliberate act, that he is a mortgagee, will take the case out of the rule that a mortgagor shall not redeem after forty years.

A surrender was made by *P.* to *M.*, the reconveyance to be to such uses as *P.* should direct, or to himself in fee. There was a subsequent surrender to the use of himself for life, remainder to his wife for life, remainder to *M.* in fee, subject to the trusts of the former conveyance. Under these conveyances *P.* enjoyed the estate without paying interest until the year 1751, when he died, and after his death his wife enjoyed in like manner during her life. In the year 1751, upon the decease of the husband, part of the premises were sold, and the wife joined in the conveyance. She dying soon after, *M.* took possession, and held the same without any account to 1765, and from thence to 1779 no act was before the court to shew under what title *M.* held. In 1776 a bill was filed to redeem. In the first answer put in 1780, *M.* denied that he held as a mortgagee, and claimed to hold by title under the second deed. In the same year the conversation passed, which was considered as a declaration, that *M.* held only as a mortgagee. It was a conversation between the son of *P.* and *M.*, in which *M.* asked the son, *why his father did not pay the money; to which he answered, because he was so poor that he could not pay it. The reply of* M. *to this was, he was ready to settle the matter without suit.* An amended bill was afterwards filed, and the cause was heard at the Rolls, and on the above evidence being read, a redemption was decreed. But, upon appeal to the Chancellour, the decree was reversed, on the ground that the second conveyance must have been in consequence of a new agreement, not a mode of keeping up the mortgage; as otherwise the mortgagee would have got the equity of redemption for nothing, and the *P.*'s would have estates for life, subject to the mortgage money, which was more than they were worth: the words "subject to the trusts" must therefore mean, "subject to the life estates of the mortgagor and his wife." Then if it was considered as matter of title, the rule did not apply. If *M.* had been the surrenderor, (which he ought to have been) it could not have been, that a conversation should defeat a clear act. Then there was evidence of a clear possession in *P.* and his wife. After her death the *M.*'s took the estate, and treated it as their own. On the whole the Chancellour was of opinion, that the surrender was an instrument of title; and the decree was reversed. Perry v. Marston, 2 Bro. Rep. Chan. 397.

So, where a bill was demurred to, because it was to be relieved against a mortgage after forty-one years, yet, on a promise being proved that the mortgagor should be at liberty to redeem after twenty-seven years, the demurrer was disallowed; because, though forty-one years had passed since the mortgage, White v. Pigeon, Tothill, 232.

mortgage, yet but fourteen had elapſed after the time agreed for redemption.

Conway v. Shrimpton, 1 Bro. Parl. Ca. 309. Vin. vol. 5. p. 505. Ca. 5. 2 Eq. Ca. Abr. 596. Ca. 10. 738. Ca. 2.

So, a mortgage was decreed to be redeemed upon the foot of an account ſtated previous to the mortgagee's entering upon the premiſes, notwithſtanding he had been in poſſeſſion forty years; the huſband of the heir of the mortgagee having entered into an agreement with the heir of the mortgagor, about ſeven years before the bill for redemption came to an hearing, for the purchaſe of the equity of redemption. For although, for reaſons ſufficiently evident in the caſe, the court refuſed to decree a ſpecifick performance of that agreement, yet it ſeems to have been conſidered, as an admiſſion by the mortgagee, that, at that time, he conceived the mortgagor had a right to redeem, which, occurring within ſeven years of the time of exhibiting the bill, brought this caſe within the reaſoning of that immediately preceding.

Palmer *et al.* v. Jackſon *et al.* 5 Bro. Parl. Ca. 194.

Upon the ſame principle, a redemption was decreed upon a bill filed fifty-five years, after the original mortgage, and forty-ſeven years after the mortgagee got into poſſeſſion, after five ejectments brought to defeat his eſtate by a title paramount, and after refuſal by four different anſwers to come to an account upon the foot of the mortgage, and to redeem. For, the non-redemption for thirty-eight years of the time elapſed, being accounted for, by having been occupied in different ſuits brought by the contending parties, a period of ſeventeen years only had run out between the time of ſettling that diſpute, and the exhibiting the bill to redeem.

Proctor v. Oates, 2 Atk. Rep. 140.

And if the mortgagee *ſubmit* to be redeemed, time will be no bar. Thus, where a bill was brought to redeem after the mortgagee had been in poſſeſſion from 1707 to 1732, the year in which the bill was filed; and the defendant (it being a family affair) ſubmitted by his anſwer to be redeemed, notwithſtanding the length of time; Lord *Hardwicke*, though he ſaid he ſaw no colour for the redemption, yet, on the defendant's ſubmiſſion, decreed an account of what was due for principal, intereſt, and coſts, and directed the plaintiff to pay the ſame in ſix months after the Maſter's report, or, in default, the bill to be diſmiſſed without coſts.

Rakeſtraw v. Brewer, Sel. Ca. Ch. 55. Moſely, 190.

There will be no bar, if the mortgagor remain in poſſeſſion. Thus, a perſon had chambers in *Gray's Inn*, and mortgaged them in 1687, but continued the poſſeſſion till 1700; at which time an order of the Bench was made to deliver poſſeſſion of the mortgaged premiſes to the mortgagee; upon part of which he entered; but, as to the other part, the mortgagor continued in poſſeſſion till 1708, when he died, leaving the plaintiff an infant, who came of age in 1714. From the death of the mortgagor, the mortgagee had poſſeſſion of the whole. A bill was brought to redeem in 1726, and it was ſo decreed at the Rolls, and the decree was affirmed by Lord Chancellour *King*, who ſaid nothing was more clear than that, if the mortgagor was in poſſeſſion of any part, he ſhould be admitted to redeem the whole; for part of the chambers he might redeem as being in poſſeſſion thereof, and part he could not, ſeparately from the whole; therefore he ſhould redeem the whole. If the mortgagee were in poſſeſſion for 20 years, and no intereſt paid, there ſhould be no redemption allowed. In this caſe the mortgagor was in poſſeſſion of part till 1708; from 1708 till 1714, the plaintiff was an infant, ſo that was accounted for, and from that time it did not amount to 20 years.

Yates v. Hambly, 2 Atk. 237.

On a bill brought to redeem a mortgage of long ſtanding, an objection was made for want of parties; namely, that as there had been an abſolute conveyance made of this eſtate by the mortgagee without any clauſe of redemption,

demption, with ſeveral limitations over, the perſons in remainder under this conveyance ought to have been parties. *Et per curiam*—When a mortgagee, who has a plain redeemable intereſt, makes ſeveral conveyances upon *truſt*, in order to entangle the affair, and to render it difficult for a mortgagor or his repreſentatives to redeem, then it is not neceſſary that the plaintiff ſhould trace out all the perſons who have an intereſt in ſuch truſts to make them parties. But, where the redemption depends upon equitable circumſtances, and the plaintiff is not in the common caſe of redemptions, and where the mortgagee in fee has made an abſolute conveyance with ſeveral limitations and remainders over, the decree cannot be complete without bringing at leaſt the firſt tenant in tail before the court.

Fell v Brown, 2 Bro. Rep. Chan. 276.

H. the elder, and *A.* the younger (his ſecond ſon) by ſurrender, conveyed the reverſion of copyhold eſtates (after the deceaſe of *H.* the elder) to *B.* in fee, ſubject to redemption on the payment of 30*l.* and intereſt, and *B.* was admitted tenant to the land. The eſtate was afterwards charged with a farther ſum lent to *H.* the elder, and *H.* the younger by *B.* Then *H.* the younger, who ſurvived his father, deviſed the eſtate to *S. H.*, ſubject to the mortgage, and died. Afterwards *S. H.* ſurrendered the ſame eſtate, ſubject to the firſt mortgages, to *F.* in fee, to ſecure the repayment of a ſum borrowed of *F.* by himſelf. And by a deed bearing even date with the laſt-mentioned ſurrender, the uſes thereof were declared to be in truſt to ſell the ſame, and in the firſt place to pay himſelf the money by him advanced, with intereſt, and to pay the ſurplus to *S. H.*, his heirs, executors, or adminiſtrators. *F.* was admitted tenant to the lord. Then *B.*, the firſt mortgagee, entered into poſſeſſion of the ſaid copyhold eſtates. *S. H.* died, leaving *R. H.* of *Baltimore*, in the province of *Maryland*, his heir at law. *F.* filed a bill againſt *B.* and *R. H.*, charging the latter to be abroad in *America*, and praying an account of what was due to *B.* for principal and intereſt, and that *B.* might account for the rents and profits, and pay to *F.* what ſhould appear to be due to him, after paying ſuch principal and intereſt; and in caſe that ſhould not be ſufficient to ſatisfy *F.*'s demand, that the eſtate might be ſold, and proper parties join for that purpoſe, and *F.* be paid out of the purchaſe-money, and the reſidue paid and applied as the court ſhould direct. *B.* by his anſwer acknowledged the poſſeſſion, and ſaid, that he was ready to account to ſuch perſon as ſhould appear to be entitled to the equity of redemption; but that he did not know who was ſo entitled, not knowing what was become of *T. H.*, whether he was living or dead, or whether he was ever married, or had left any child or children. One queſtion which aroſe in the cauſe was, Whether there were proper parties before the court, the ſuppoſed heir at law of *T. H.*, the mortgagor, being in *America*, and his perſonal repreſentative not being before the court? On the part of *F.* it was inſiſted that there were ſufficient parties; that *B.* had the real pledge in his hands, and although there might be a contract between the heir and the executor, that did not affect him. Between the firſt and ſecond mortgagees, it was not neceſſary to make the mortgagor a party. All the decree was redemption of the firſt mortgage, and a conveyance to the ſecond, not on account of rents and profits, unleſs the mortgagee was in poſſeſſion. That neither the mortgagor, nor the firſt mortgagee were hurt by its being unneceſſary to make the mortgagor a party to the bill between them; for the firſt mortgagee was liable to no farther account to the original mortgagor, the ſecond mortgagee being bound only to make him juſt allowances, and if he ſhould

do otherwiſe, being liable to all charges which might have been made againſt the firſt mortgagor in his account with the original mortgagee. *Sed per curiam*—It is impoſſible that a ſecond mortgagee ſhould come into this court againſt the firſt mortgagee, without making the mortgagor or his heir a party. The natural decree is, that the ſecond mortgagee ſhall redeem the firſt mortgagee, and that the mortgagor ſhall redeem him or ſtand foreclоſed. It therefore muſt be neceſſary to have the real repreſentative before the court, though it is not neceſſary to have his perſonal repreſentative.

Hill v. Adams, 2 Atk. 39.

Where a mortgagee aſſigns without the mortgagor's joining, the heir of the mortgagor, on preferring a bill to redeem, has no occaſion to bring the original mortgagee before the court, for the aſſignee as ſtanding in his place will be decreed to convey.

Lockwood v. Ewer, 2 Atk. 303. But, it is obſervable on the laſt-mentioned caſe, that the period of time had elapſed between the mortgage and the bill to redeem, after which, it will be ſhewn hereafter, a court of equity refuſes its aid to a mortgagor, unleſs under ſpecial circumſtances. 2 Pow. Mortg. 284.

Where the mortgage is of money in the ſtocks, or the like, no decree of foreclоſure is neceſſary; therefore, where a bill was brought in 1729 by the plaintiff, to redeem the ſum of 2500*l.* *Eaſt-India* ſtock, transferred to the defendant in 1708, for the ſecuring the ſum of 2000*l.* and intereſt; the defendant having executed a defeazance, whereby he obliged himſelf to transfer the ſtock on payment of the 2000*l.* and intereſt, on the 2d of *July* following the mortgage of it; the Lord Chancellour ſaid, this was a very plain caſe for the defendant. In a mortgage of land, a bill of foreclоſure ought to be brought, but on a mortgage of ſtock, it was not neceſſary, and therefore a ſtrong reaſon for the mortgagor's departing from the right. And the ſtock having increaſed in value, which is a mere accident, will be no inducement to a court of equity to decree a redemption.

Lowe v. Morgan, Brown's Rep. Ch. 368.

If there be ſeveral mortgagees of an entire thing mortgaged, they muſt all be made parties to the bill of foreclоſure. This was held to be neceſſary in the caſe of *Lowe* v. *Morgan*, where a ſhare of *Covent-Garden* theatre having been mortgaged, the mortgagee aſſigned the mortgage to a truſtee, in truſt for three perſons, who contributed equal proportions of the money. One of the three filed a bill to foreclоſe the equity of redemption. The cauſe was opened as a common bill of foreclоſure, and the ordinary decree pronounced; but the Regiſtrar finding ſome difficulty in drawing up the decree, applied to the Lord Chancellour, who ſaid, it was a new caſe in reſpect of their being joint-tenants, and that it would be impoſſible for one to foreclоſe, without making the other two parties. The cauſe therefore ſtood over for that purpoſe.

Hobart v. Abbot, 2 P Will. 643.

In a bill to foreclоſe, the caſe was:—*A.* made a mortgage for a term of five hundred years, for ſecuring three hundred and fifty pounds and intereſt to *B.*, who, ſo long before as 1705, aſſigned the term to *C.*, redeemable by himſelf, on the payment of 300*l.* *B.* died; *C.* brought a bill againſt *A.* to redeem, or be foreclоſed; and though but a derivative mortgagee, yet he did not make the repreſentatives of *B.*, the original mortgagee, parties. *Et per cur.* Here is plainly a want of proper parties; *B.* had a right to redeem *C.*; and to prevent another account, as to what is due upon the original mortgage, his repreſentatives ought to be before the court.

Bonham v. Newcomb, 2 Vent. 365. 1 Vern. 232. S. C. *ſupra.*

Courts of equity will never decree a foreclоſure, until the period limited for payment of the money be paſſed, and the eſtate, in conſequence thereof, forfeited to the mortgagee; for it cannot ſhorten the time given by expreſs covenant and agreement between the parties, as that would be to alter the nature of the contract, to the injury of the party affected thereby.

On

On a bill for foreclosure, the title of the mortgagee cannot be inveſtigated; but he will be left to purſue legal means to eſtabliſh it. And, therefore, where a mortgagee ſued to have his money, or that the defendant ſhould be barred of his equity of redemption; it happened that, by ſubſequent orders, poſſeſſion was directed to be given to the mortgagee, and contempt proſecuted for not delivering it accordingly; upon which, the heir of the mortgagor ſet forth a title in his examination, that the mortgagee would have debated, but he was not admitted; it being inſiſted, that the courſe of the court, upon ſuch a bill, was, and the court could go no farther than, to take away the equity of redemption, and leave the mortgagee to ſuch title as he had at law, but could not amend it; which the Lord Chancellour agreed to, and diſcharged the contempt. Anyonmous, 2 Ch. Ca. 244.

A mortgagee may bring an ejectment, at law, at the ſame time that he hath a bill of foreclosure depending; for he will not be prevented from purſuing *all* his remedies for the recovery of his debt. Booth v. Booth, 2 Atk. 344.

But ſpecial circumſtances may ariſe, which take the caſe out of the common rule, and induce the court to grant an injunction, to ſtay proceedings upon the ejectment. Thus, where a bill was brought by the plaintiff againſt the defendant, for an account of the rents and profits of an eſtate, during the time that he was guardian to the plaintiff's brother, and for an injunction to ſtay proceedings upon an ejectment for the poſſeſſion thereof, it being mortgaged to him; the court, becauſe he was proceeding to foreclose the equity of redemption, it being entangled with an account of the perſonal eſtate, agreed to grant an injunction, provided the plaintiff conſented to give ſecurity to redeem. Ibid.

Although a mortgagee be, of right, entitled to a decree for foreclosure, after the eſtate becomes forfeited, if he act fairly, yet, if there be any injuſtice in the caſe, the court may refuſe ſuch decree. Thus, where a mortgagee, having notice of a voluntary ſettlement, procured the truſtees of the eſtate to convey to him to protect his incumbrance; the court, on a bill filed by him to foreclose the children claiming under the ſettlement, refuſed to do ſo; ſaying, that if he might be ſuffered to protect himſelf by getting in the legal eſtate, they would not carry it on by a decree in equity to foreclose. Saunders v. Dehew, 2 Vern. 271.

A mortgagee of a copyhold eſtate, who is not in poſſeſſion, may exhibit his bill againſt a mortgagor, before admittance, for a decree of foreclosure; and, after he has obtained ſuch a decree, may bring his ejectment for the poſſeſſion of the mortgaged premiſes. Sutton v. Stone, 2 Atk. 101.

Where a mortgagee is made party to a bill, praying relief is the ſame thing as praying to redeem, for redemption is the proper relief; and if, upon a reference to a Maſter to ſee what is due for principal, intereſt, and coſts, the plaintiff does not redeem the mortgagee, the court will, on his application, diſmiſs the bill, as againſt him, which is equivalent to decreeing a foreclosure. Cholmley v. Countess Dowager of Oxford, 2 Atk. 267.

If the heir of the mortgagee exhibit a bill to have the mortgagor pay the money, or, to be decreed to make farther aſſurance, and be foreclosed of redemption; it is a good cauſe of demurrer, that the executor of the mortgagee, who may have title to the mortgage-money, is no party. Freak v. Hearſey, 1 Ch. Ca. 51.

And, ſince it has been determined that, in all mortgages, the money belongs to the executor or adminiſtrator, and not to the heir; if it comes out, upon the hearing, that the executor or adminiſtrator are not parties, the plaintiff in the cauſe cannot be permitted to proceed. Meeker v. Tanton, 2 Ch. Ca. 29.

Duncomb v. Hanſley, 3 P. Wms. 333 in notes

The executor of the mortgagor need not be party; for where, on a bill brought by a mortgagee againſt the mortgagor to foreclose, it was objected, that he ought to have been a party, as it did not appear, but that he might have paid the debt; it was held by the Maſter of the Rolls and the Regiſtrar, that there was no neceſſity to make him party; becauſe, the bill being *only* to foreclose the equity, the plaintiff need *only* make *him* a party that *had* the equity, *viz.* the heir; and the courſe was ſo; neither was the mortgagee any ways bound to intermeddle with the perſonal eſtate, or to run into an account thereof; and, if the heir would have the benefit of any payment made by the mortgagor or his executor, he muſt prove it.

Clarkſon v. Bowyer *et al.* 2 Vern 66.

But a foreclosure, obtained on a bill exhibited by the heir at law, will be binding, although the executor or adminiſtrator be not a party; for if the executor or adminiſtrator of the mortgagee ſhould afterwards come againſt the heir of the mortgagee, to have the benefit of the mortgage, the heir, in caſe the land be worth more than the money, may pay him the money, and take the benefit of foreclosure to himſelf.

Globe *et ux.* v. Earl of Carliſle, cited in the laſt caſe.

Where the heir of the mortgagee had foreclosed the mortgagor, the executor of the mortgagee being no party; upon a bill by the executor, againſt the heir of the mortgagee, and againſt the mortgagor, the land was decreed to the executor.

But it is obſervable that, in this caſe, the heir made no offer to pay the mortgage-money to the executor, which is the baſis of the reſolution in the former caſe.

Senhouſe v. Earl, 2 Vez. 450.

A plea of a decree for foreclosure in the common form, with an averment of non-payment of the money, &c., *but no final order for foreclosure*, on appeal from Lord *King*, was held not to be good; for, although ſuch plea, and length of time, might be a good defence, yet, as a plea, it could not ſtand for want of a final order.

Anonymous, Barnard. 324. 2 Eq. Ca. Abr. 605. p. 38. S. C.

On a decree to foreclose at a period certain, the computation of time muſt be according to calendar months, and not according to lunar ones.

2 Atk. 101.

Although where there is a clear tenancy in tail, there is no occaſion for the remainder-man's being a party to a bill of foreclosure, yet, if there be an expreſs eſtate for life, the remainder-man ought to be a party.

Draper *et al.* v. Jennings *et al.* 2 Vern 518

If there be many incumbrancers, ſome of whom are not made parties to a bill to foreclose, the plaintiff, in the bill, may notwithſtanding foreclose ſuch defendants as he has brought before the court.

Sherman v. Cox, 3 Rep. Ch. 84. S.C. Nelſon's Rep. 71.

But thoſe not parties to the ſuit, will not be bound by ſuch decree.

How v. Vigures, 1 Ch. Rep. 53 1 Eq. Ca. Abr. 318. 5.

If there be tenant for life, reverſion in fee, and he in reverſion mortgage his eſtate in fee, and the mortgagee deviſe it, the deviſee may bring his bill to foreclose againſt the mortgagor, and need not make the heir of the deviſor a party; becauſe he hath no intereſt in the land, it being all deviſed away from him; and therefore the deviſee need only foreclose the mortgagor.

Sutton v. Stone, 2 Atk. 101.

So, where there is a clear tenancy in tail, there is no occaſion for the remainder-man being a party to a bill of foreclosure; but, if there be an expreſs eſtate for life, the remainder-man ought to be a party.

On a motion to ſtay the proceedings in an ejectment brought by a mortgagee againſt a mortgagor, on the latter paying principal, intereſt, and coſts, it appeared that the mortgagor five years before, by agreement under ſeal, in conſideration of a certain ſum, had agreed to convey the eſtate to the mortgagee abſolutely, and that a ſum of money due from the mortgagor to the mortgagee ſhould be deducted out of the purchaſe-money ſo to be paid; and that ſeveral applications had been ſince made to the mortgagor to complete the purchaſe, which he had refuſed. It was contended therefore, that under the proviſo in the ſtat 7 *G.* 2. *c.* 20 § 3 (*a*). the mortgagee had no right to the benefit of the ſtatute; and ſo thought the court

Goodtitle v. Pope, 7 Term Rep. 185.

(*a*) Vol. 5. pag. 98.

But in a former caſe, where the like objection was made to ſuch a motion, the court permitted the redemption, and that after time taken to conſider of it, becauſe it appeared that the mortgagee had not tendered to the mortgagor a deed of conveyance for execution, and that no bill in equity was brought.

Skinner v. Stacy, 1 Wilſ. 80.

Huſband and wife, ſeiſed in fee in right of the wife, mortgaged for a term of years, and levied a fine to the uſe of the mortgagee, his heirs and aſſigns, ſubject to the proviſo for redemption. They afterward conveyed the equity of redemption by leaſe and releaſe to the mortgagee. The mortgagee remained in poſſeſſion as complete owner for more than twenty years, during the life of the huſband, tenant by the curteſy, from whom he had gotten the conveyance The heir of the wife was allowed to redeem notwithſtanding this lapſe of time. By attending to the different rights of the mortgagee it appears, that he ſtood in the place of the tenant by the curteſy of the equity of redemption; for he claimed to hold under him by the laſt conveyance, and immediately upon taking it he entered into poſſeſſion; in that character it was his duty to keep down the intereſt of the mortgage: uniting theſe two characters, he is to be conſidered as having ſupported the different rights and diſcharged the duties of each. In the general caſe, a preſumption ariſes from no payment of the ſurplus rents being made, nor account delivered for ſo long a period of time as twenty years: here, the preſumption cannot ariſe, becauſe it was the ſame perſon to pay and to receive: the caſe does not therefore fall within the general rule.

Corbett v. Barker, Anſtr. 138. 755.

Where a mortgagee who had gotten poſſeſſion by ejectment, ſued at law on the covenant for non-payment, and was proceeding in a ſuit in equity to foreclose; a motion was made to reſtrain him from proceeding at law: but the court ſaid, the plaintiff is regular in his proceedings; we cannot deprive him of the benefit of his action, unleſs the defendant will bring in the money.

Rees v. Parkinſon, Anſtr. 497.

To a bill againſt the deviſee of mortgaged premiſes by the heir of the mortgagor, charging acknowledgments that the eſtate was holden in mortgage, and that accounts had been kept; the defendant put in a plea of poſſeſſion for fifty years, under conveyances from the mortgagee. The plea was ordered to ſtand for an anſwer, and the benefit of it ſaved to the hearing.

Lake v. Thomas, 3 Vez. jun. 17. In this caſe Lord Chancellour referred to a caſe before Sir Thomas Sewell. The title of the eſtate in that caſe had come into two different hands: the part in the hands of one family was held irredeemable: as to the other, the mortgagee had kept accounts, and there was a deviſe of it as a mortgage: the redemption was opened as to that after a great number of years.

(F) Mortgages

(F) Mortgages and their Aſſignees, how to account, and what Allowances to make.

Blacklock v. Barnes, Sel. Ca. Ch. 53. If the mortgagor make proof that the eſtate was let at *ſuch a* price, whilſt in the hands of the mortgagee, that will be deemed the rate at which it was let the whole time, unleſs the mortgagee ſhew the contrary, which it is in his power to do, as being let by him.

Bonithon v. Hockmore, 1 Vern. 316 3 Atk. 518. Where mortgagees or truſtees manage the eſtate themſelves, there is no allowance to be made them for their care and pains; but if they employ a ſkilful bailiff, they will be allowed ſuch ſums as they have paid him; for a man is not bound to be his own bailiff.

French v. Baron, 2 Atk. 120. And though there be a private agreement between the mortgagee and the mortgagor, for an allowance for the mortgagee's trouble in receiving the rents and profits of the eſtate, yet the court will not carry it into execution, for equity will not allow him any more than his principal and intereſt.

3 Atk. 518. A mortgagee in poſſeſſion is not obliged to lay out money *any farther* than to keep the eſtate in neceſſary repair; but, if a mortgagee hath expended any ſum of money in ſupporting the right of the mortgagor to the eſtate, where his title hath been impeached, the mortgagee may certainly add this to the principal of his debt, and it will carry intereſt.

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(*It was decreed,*) This cauſe was firſt brought to a hearing before Lord Chancellour Nottingham, on the mortgagee's bill to foreclose, and he being of opinion, that the two *per cent.* ſhould go towards ſinking the principal, the then plaintiff diſmiſſed his bill. Afterwards, the mortgagor brought his bill to redeem, and that coming to a hearing before the Ld Chancellour Jeffries, he was of opinion, that the eight *per cent.* being paid, and received as intereſt, no part of it ought to be applied to ſink the principal; and that the ſtatute had no retroſpect beyond 1660, but looked forward to contracts and agreements then after to be made, and not to any contracts or agreements before that time, and decreed the account to be taken accordingly. 2 Vern. 78. But, upon a bill of review, Rawlinſon and Hutchins, Lords Commiſſioners, held, that the decree ſhould be reverſed, againſt Lord Trevor. 2 Vern. 145. It ſeems, however, to be now ſettled, that the ſtatute of 12 Ann. c. 16. which reduces the intereſt of money to 5*l. per cent.* has not a retroſpect to any debts contracted before, but that they ſhall carry intereſt according to the intereſt allowed, or agreement made at the time when the debt was contracted. 1 Eq Ca Abr. 288.

1 Chan. Ca. 68. But the account between the mortgagee and aſſignee will not conclude the mortgagor; but it will be referred to the Maſter to ſee what was really due, on making the aſſignment, and what money was *actually* paid thereon.

1 Vez. 164. An account on a bill to redeem or foreclose, taken in in a cauſe, in which tenant for life of the equity of redemption is party, and when no other perſon is entitled, will be binding on any contingent remainder-man, when his title afterwards veſts; non ſhall he open it, unleſs fraud or errors are ſhewn therein; for thereby accounts upon mortgages, to which all who can claim the equity of redemption are parties, would often be infinite. But, if a reaſonable objection be made againſt ſuch account, the court will ſo far open it But the court will only give leave to ſurcharge and falſify the account; which often happens upon ſettlements, where there is tenant for life with limitations in remainder, upon a bill for an account, when none but tenant for life is in being, a child afterwards coming *in eſſe*, ſhall, if no fraud, only have liberty to ſurcharge and falſify.

Knight v. Bamneld *et al*, 1 Vern. 179. And where a man made a mortgage, and, after a forfeiture for non payment of the mortgage-money, married, and conveyed the equity of redemption to truſtees, to the uſe of himſelf for life, remainder to his wife for her

her jointure; and afterwards became a bankrupt; and the commiſſioners aſſigned the equity of redemption in truſt for the creditors, and the aſſignees ſtated an account with the mortgagee: The jointreſs brought her bill to be relieved againſt this account, alleging, that it was not fairly ſtated, but that the aſſignees, by combination with the mortgagee, had allowed more money than was really due on the mortgage, and the defendant pleaded this ſtated account: *per* Lord Keeper, the aſſignees ſtand in the place of the huſband, and the account by them ſtated ought to be as concluſive as if it had been ſtated with the huſband; and the bill is not right in charging a general fraud in the ſtating of this account, but the plaintiff ought to have aſſigned particular errors in the account.

Where, upon the aſſignment of a mortgage, the debt was ſtated between the aſſignee, the mortgagee, and ſome of the coheirs that were looked upon to have a right to the redemption; it was inſiſted, that this ought to conclude the plaintiff, who claimed as deviſee under the will of the mortgagor, as a ſtated account: but he being no party thereto, that was over-ruled by the court. Earl of Macleſfield v. Fitton, 1 Vern. 168 *Infra*, 427.

An aſſignee, after ſeveral aſſignments, will not be obliged to account for profits before his own time. Thus, where on a bill to redeem a mortgage made in 1632, it was inſiſted by the defendant, that he came in as an aſſignee at the third hand, and therefore that it would be hard to put him to an account *then*; the Lord Keeper ſaid, that as there had been no ſtint put to the time at which a mortgage was to be redeemed, the defendant ſhould account; but, in regard he came in at an old hand, it ſhould not be taken, but ſo far only as went in diſcount of his money, *not* for the ſurpluſage. Pearſan v. Pulley, 1 Chan. Ca. 102.

So, where lands were extended in 1625, and held in extent, and then a bill was exhibited to redeem, and the lands not being redeemed, that bill was diſmiſſed in 1641; afterwards, he who had the extent, by virtue of the diſmiſſion, ſold the premiſes to the defendant, and the plaintiff having ſince bought the equity of redemption, came to redeem; the court, notwithſtanding the diſmiſſion, and length of time, ordered an account from the purchaſe, not from any time before, but till then the profits to go againſt the intereſt. Cloberry v. Symonds, 2 Ch. Rep. 392.

An account taken by a Maſter upon a decree in a bill of revivor, brought by an infant heir, will bind the heir, unleſs he can ſurcharge or falſify. Badham v. Odell. 4 Brown's Parl. Ca. 447. S. C. *infra*

Where the yearly rents and profits of an eſtate in mortgage greatly exceed the intereſt of the money lent, reſts are annually made on making up the account, and the ſurplus applied to ſink the principal. But as this is often attended with great hardſhips to mortgagees (eſpecially when the ſum is large, and the mortgagee forced to enter upon the eſtate. and then can only ſatisfy his debt by parcels, and is a bailiff to the mortgagor, without ſalary, ſubject to an account) the Maſter is not obliged, on every ſmall exceſs of intereſt, to apply it to ſink the principal; nor has the court ever laid it down as an invariable rule, that the Maſter muſt always, in taking ſuch account, make annual reſts. Gould v. Tancred, 2 Atk. 534.

It is the conſtant practice of the court of Chancery, in decrees againſt a mortgagee upon a bill for redemption, or againſt an executor to account, to direct it with future words, to wit, to account for what they have received, or might have, if it had not been for their own default; and yet if the perſon, Balſtrode v. Bradley, Atk. 582.

ſon, decreed to account, receive any thing ſubſequent to the decree, it is inquirable before the Maſter, and the defendants in ſuch caſe muſt bring ſuch ſums ſo received to account.

Baddam v. Odell an infant, and Fitzmaurice his guardian, 4 Brown's Parl. Ca. 447.

Thomas Odell, an infant, to whom the equity of redemption of a mortgage for years deſcended on the death of his father, (who had exhibited his bill in the court of Exchequer in *Ireland*, againſt the mortgagee and his aſſignee, to redeem the premiſes, and for an account of the money due on the mortgage,) filed his bill of revivor; the cauſe was heard, and the court decreed, that it ſhould be referred to the Remembrancer, to ſtate and ſettle an account: who made his report, that 1883*l.* 18*s.* was due for principal *and intereſt*, which, there being no objections made, or exceptions taken thereto, was abſolutely confirmed. And the cauſe coming on for farther hearing, it was decreed, that upon the mortgagor's paying the ſum of 1883*l.* 18*s.* ſo reported due, *with intereſt for the ſame*, from the time of the report being confirmed *abſolute*, the premiſes ſhould be reconveyed, and all bonds and ſecurities delivered up. Afterwards, *Odell* neglecting to pay the money reported due, or any intereſt for the ſame, the mortgagee, who had likewiſe had a ſuit depending, filed an amendment and ſupplemental bill, in order to have the benefit of the decree, by a ſale or abſolute foreclоſure; and therein, in regard the account of what was due on the ſaid mortgage had been ſtated in the former cauſe, prayed to have the benefit thereof, and that the account ſhould be taken, in his preſent ſuit, on the foot of the report or decree made in the former ſuit. To this bill *Odell* put in his anſwer, and thereby, amongſt other things, admitted the former report, decree, and proceedings; but inſiſted that, apprehending he was much aggrieved by thoſe proceedings, he choſe to have his bill, upon which the ſaid decrees were made, diſmiſſed, rather than ſubmt thereto. Afterwards, the cauſe came on to be heard, when the court declared, they were of opinion that the defendant, the minor, was not to be concluded by the account taken in the ſaid former cauſe; but, that the plaintiff was entitled to an account, as between mortgagor and mortgagee: and therefore decreed, that it ſhould be referred to the Chief Remembrancer, or his deputy, to audit, and ſtate an account between the plaintiff and defendant, on the foot of the mortgages and ſecurities in the pleadings mentioned, in which account both parties were to have all juſt allowances. From this decree, the mortgagee appealed, inſiſting, that the infant ought to be concluded by the account, taken in the former cauſe, on a bill originally brought by his father, revived, and carried on by himſelf, confirmed by ſubſequent orders of the court, and ſigned and enrolled; and that he ought not to be permitted to waive or vary the ſame, eſpecially when neither fraud nor error in the account were even ſuggeſted. And ſo it was adjudged, as to that point, and the decree reverſed; and it was farther ordered, that the account taken upon the former decree ſhould ſtand, with liberty for the infant to ſurcharge, or falſify the ſame; and that, in caſe of any ſurcharge, or falſification, the Remembrancer ſhould deduct ſo much as ought to be deducted on account thereof; and that the Remembrancer ſhould carry on the account of the *ſubſequent intereſt*, *from the time of the confirmation of the former report*, for the ſum thereby reported due, after ſuch deductions made thereout as aforeſaid.

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(*J. S. mortgaged*) On a bill, that an infant might redeem a mortgage, or be foreclоſed; it was decreed, upon the hearing, to an account, and that the infant ſhould pay what was reported due, unleſs he ſhewed cauſe to the contrary ſix months after he came of age. A report was made and confirmed, of 2600*l.* due; and upon a ſubſequent order being made to compute intereſt, the

Lord

Lord Keeper doubted, whether intereſt ought to be allowed for the intereſt. Bennet v. Edwards, 2 Vern. 392.

In general, intereſt ſhall not carry intereſt upon a mortgagor's ſigning an account, whereby he admits ſo much due for intereſt; becauſe that of itſelf does not ſhew any agreement, or intent to alter the intereſt or nature of that part of the debt, or to turn it into principal; nor does it appear to have ever been ſo determined; for it ſeems, that, to make intereſt on a mortgage principal, it is requiſite there ſhould be a *writing* ſigned by the parties. *the eſtate in the land being to be charged therewith.* Brown v. Barkham, 1 P. Wms. 652.

Lord Keeper *North* was of opinion, in the caſe of *Howard* v. *Harris*, that if there were a covenant in the mortgage-deed for payment of the intereſt, upon which an action of debt would lie, the court would allow intereſt on intereſt, though no account was taken before a maſter. In that caſe, a mortgage for 1000*l.* had been made upon a reverſion ten years, and in the deed there were covenants for payment of the principal and 60*l. per annum* intereſt, and 7*l. per annum* rent was *only* reſerved; and it was urged, that the mortgagee, againſt whom the bill was exhibited to redeem, ought, in this caſe, to have intereſt upon intereſt, otherwiſe he would be a great loſer. To which it was anſwered, that the bill had been filed ſix years, and that the mortgagee had, by anſwer, oppoſed the redemption, and therefore, from that time, he had no pretence for an allowance of intereſt for his damages; and that it was never known in the court that intereſt upon intereſt was at any time allowed in ſuch caſe. But the Lord Keeper was clearly of opinion, that as to ſo much intereſt as was reſerved in the body of the deed, that ſhould be reckoned principal; for it being aſcertained by the deed, an action of debt would lie for it, and therefore it was reaſonable that there ſhould be damages given for the non-payment of that money. As to what had been urged, that this had never been practiſed, and that there was not any ſuch precedent in the court, and that if this were to be eſtabliſhed for a rule, every ſcrivener would reſerve all his intereſt half-yearly, from time to time, as long as the money ſhould be continued out upon the ſecurity, which would be to change the law and practice of the court, and make all mortgagors pay intereſt upon intereſt; the Lord Keeper ſaid, that he was clear in the diſtinction between debt and damages, and he ſaw no inconvenience that could enſue; it would ſerve only to quicken men to pay their juſt debts. And it was decreed accordingly that after a deduction of yearly rents of the mortgaged premiſes out of the 60*l.* a-year, payable for the intereſt, the defendant ſhould be allowed intereſt for the reſidue of the ſaid 60*l.* a-year, *for which* the mortgagee might have *ſued at law*, and *recovered damages*. Howard v. Harris, 2 Ch. Ca. 147 to 150. S C 1 Vern 194. 1 Vent. 364.

A bill was to have the redemption of a mortgage of the manors of *B* and *S.*, in the county of *C.*, which mortgage had been aſſigned to *F.*; one point was, Whether, there being great arrears due at the time of the aſſignment, which were paid by *F.*, the money paid for intereſt, *then* in arrear, ſhould be reckoned principal as to him, and carry intereſt with it? And it was inſiſted for the mortgagor, that intereſt was never made principal, in ſuch caſe, unleſs the mortgagor had joined in the aſſignment; and the caſe of *Porter* and *Hubbart* was cited, where, in a like caſe, it was decreed, that intereſt ſhould be reckoned principal; but the decree was reverſed in the Houſe of Lords, becauſe the executor of the mortgagor was no party. But the Lord Keeper ſaid, *that* precedent could not weigh much with him; he was of counſel therein, and it was hard in all its circumſtances. Earl of Macclesfield v. Fitton, 1 Vern 168. Porter v. Hubbart, 2 Ch. Rep. 86.

cumſtances. For although he thought it reaſonable, that the intereſt paid upon the aſſignment ſhould be reckoned principal, yet he would not now make a new precedent. However, his Lordſhip directed the defendant's counſel to ſearch for precedents, and ſaid, that if they could find any one, he would follow it in this caſe; but no ſuch precedent could be found.

Aſhenhurſt v. James, 3 Atk. 271.

But, where creditors procure a decree for ſale of an eſtate before a Maſter, and one, (by conſent of all parties entitled to the eſtate, being confirmed the beſt bidder by authority of the court, all the incumbrancers agreeing he ſhall be purchaſer) takes an aſſignment of all incumbrances; in this caſe, he will be a creditor of the mortgagor for the whole ſum, as well what he paid for intereſt due, as for principal, together with intereſt upon the intereſt, their conſent being the ſame thing, as if they had been made parties to the aſſignment.

Proctor v. Cooper. Prec. Ch. 116. Trin. 1700.

But, where *G.*, in 1641, made a mortgage in fee of lands, worth about 30*l. per annum*, to *C.*, to ſecure 300*l.*; in 1652, the mortgagee took poſſeſſion, and in 1660 deviſed the lands to *A.*; in 1680 the deviſee brought a bill to foreclоſe: the wife of the mortgagor had recovered a third part, as dower, againſt the mortgagee, ſo that the profits did not anſwer the intereſt of the money, which was then 8*l. per cent.*, and there had been infancies on the plaintiff's part for ſeveral years: the Maſter of the Rolls decreed the plaintiff to redeem, and pay 8*l. per cent. only*, that being then legal intereſt; and ſaid, that, though the profits were not ſufficient to anſwer the intereſt, yet the arrears could not carry intereſt, although the coſts and charges muſt.

Bacon v. Clerk, 1 P. Wms. 478. Prec. Ch. 500. S. C. Eq. Ca. Abr. 530 9.

A Maſter's report, computing intereſt, makes that intereſt principal, and to carry intereſt; for a report is as the judgment of the court, and appoints a day for the payment, carrying on intereſt to that day; and the party's diſobedience to the court, in not complying with the time of payment, ought to ſubject him to intereſt.

1 P. Wms. 453 480. Kelly v. Ld Bellew, 1 Brown's Parl. Ca. 202. *Ibid.* 566. Moſely, 27. Attorney General v. Iſlington Overſeers et al. 1 P. Wms. 376-7. 2 Eq. Ca. Abr. 530.

But the report muſt be confirmed; for where *A.*, the defendant, inſiſted that 800*l.* was owing to him, and, upon the Maſter's report, only 180*l.* appeared due; the court ordered intereſt for that ſum, from the time of confirming the report abſolute, *and not before*; becauſe, until then, it was not any liquidated ſum.

Moſely, 247

Where creditors are decreed to be paid according to their priority, if the eſtate is deficient, the principal only ſhall bear intereſt after the confirmation of the report.

Harris v. Harris, 3 Atk. 722.

And although the report *be* confirmed, yet, if the ſuit be for a ſale, and not to foreclоſe, intereſt ſhall not carry intereſt, if there be other mortgagees, and bond creditors, parties thereto. Thus, the plaintiff, a mortgage brought a bill, in conjunction with ſeveral bond creditors, againſt the heir at law of the mortgagor, for a ſale of the mortgaged premiſes, and had a decree accordingly, with a direction to pay the mortgagee his principal and intereſt in the firſt place. The Maſter made a report of a ſtated ſum due, which was confirmed; the mortgagee then moved, that the maſter might compute ſubſequent intereſt and coſts upon the ſum reported due. There was not near enough ariſing from the ſale, to pay the ſecond mortgagee and the bond creditors. The reſt of the creditors and the mortgagor oppoſed this motion, and endeavoured to ſhew a difference between the preſent bill and a bill of foreclоſure,

foreclosure, insisting, that, in the latter, the court directs the Master to allow subsequent interest upon the sum reported due, because it is a compensation to the mortgagee for being kept out of his money, by the court's allowing time to the mortgagor to redeem; but that here a sale was directed in the first instance, and the interest of the other creditors was concerned; therefore, it would be hard to give interest upon interest in favour of one creditor to the prejudice of the rest. And the Lord Chancellour allowed the distinction, saying, that it would be rather too much to give such an advantage to the mortgagee over the rest of the creditors, especially, as the mortgage carried 5*l. per cent*, and proposed to the counsel, that, from the time of the Master's report being confirmed, it should carry only 4*l. per cent.*, in which the plaintiff acquiesced.

Where the court enlarges the time for a mortgagor, or a subsequent mortgagee, that is a favour, for they would otherwise be foreclosed, and it is but just and reasonable they should pay for it, and that the first mortgagee should be no loser thereby; therefore, if on a bill to foreclose, principal, interest, and costs, are lumped into one sum by a Master; if the mortgagor, or a puisne mortgagee, pray longer time to redeem, they always pay interest for the whole sum. Moseley, 246, 247.

Although, according to the above case, a mortgagee, refusing to receive his money on tender, after forfeiture, will lose his interest from the time of the tender; yet notice of paying off the mortgage must have been given to the mortgagee, at least *six calendar months* before, and the money must have been tendered on the day of the determination of that notice; for where the mortgagor omitted to tender the money on the *very* day on which the notice expired, and, in consequence thereof, the mortgagee refused the tender, the payment of the interest was held by Lord *Hardwicke* not to be *thereby* suspended; for that by the omission of the mortgagor, the mortgagee was become entitled to a farther notice of *six calendar months*, at the expiration of which a strict tender must be made. Hix v. Ling before Ld. Hardwicke, 2 Pow. Mortg. 256

But, it seems, the plaintiff ought to make oath, that the money was always ready, and no profit was made of it; which may be controverted by the mortgagee, who may prove the contrary; namely, that the mortgagor was not ready to pay it, in which case the interest must run on. Sutton v. Rodd, 2 Ch Ca. 206. Gyles v. Hall, 2 P. Wms. 378.

A tender must be made by a person actually interested; and, accordingly, it was said by *Coke* to have been adjudged, *Trin.* 27 *Eliz.* that, where one, who was not guardian, nor was to have any interest in the land, tendered money upon a mortgage for an infant, it was adjudged a void tender. Watkins v. Ashwicke, Cro. Eliz. 132. The above case is reported more at large in Owen, by the name of Watkins and Astwick, and is thus stated: A man made a feoffment on condition, that if he, his heirs or executors, did pay 100*l.* before such a day, that he might reenter; the feoffor died, his heir within age; the mother, without any notice to the son, requested *I. S.*, that he would pay the money for her son. All this was found by special verdict, but it was not found of what age the the son was. Clinch said, that if the jury had found, that the son was of the age of seventeen years, the payment had been good. But by Wray, if a bond be upon condition, that the obligor or his heirs shall pay 100*l.*, and the obligor die, his heir within age, I conceive payment by the guardian, or by some other friend, is good. And afterwards, all the justices agreed, that if the infant were within the age of fourteen years, the tender of the money by his mother had been good, but otherwise if he had been more than fourteen years of age; and because no age was proved, but that he was within age, it should not be intended that he was within the age of fourteen years; and therefore, they advised the party to begin *de novo*, and that it might be found, that the infant was within the age of fourteen years.

The

Co. Lit. 210. b. 2 Eq. Ca. Abr. 603. 34

The money being a ſum in groſs, and collateral to the title of the land, the mortgagor muſt tender it to the *perſon* of the mortgagee, and it is not ſufficient for him to tender it *upon the land.*

Co. Lit. 211. b. 212.

But, if a time and place for payment of the money be appointed, in that caſe he need not ſeek for the mortgagee, or be in any other place but in that compriſed in the indenture, or *there* longer than the time ſpecified therein.

Gyles v. Hall, 2 P. Wms. 378.

And ſo it is, although a place be not appointed in the proviſo, if the mortgagor give notice *where* he will pay it off. Thus, where the mortgagor gave perſonal notice, in writing, to the defendant the mortgagee, that he would tender the money and intereſt between the hours of ten and twelve in the morning, at *Lincoln's Inn Hall*, at a day and hour appointed therein, which accordingly was done; it was objected, that *Lincoln's Inn Hall* was not named in the proviſo in the mortgage-deed, as the place for payment, and therefore, that the tender muſt be to the perſon; but it was held, that the money being lent in town, it would be very hard, after perſonal notice being given for payment thereof, and no objection made by the mortgagee to the place at the time of notice, to make the mortgagor travel with this ſum of money to *Oxford*, where the mortgagee lived.

Manning v. Burgeſs, 1 Ch. Ca. 29.

In ſome caſes, a tender at the houſe of the mortgagee will be ſufficient. Thus, where there was a mortgage, and the mortgagor afterwards meeting the mortgagee, ſaid to him, I have monies now. I will come and redeem the mortgage; to which the mortgagee replied, he would hold the mortgaged premiſes as long as he could, and then when he could hold them no longer, let the devil take them if he would. Afterwards the mortgagor went to the mortgagee's houſe with money, more than ſufficient to redeem, and tendered it there, but it did not appear that the mortgagee was within, or that the tender was made to him; the court decreed a redemption, and that the defendant ſhould have no intereſt from the time of the tender, becauſe of his wilfulneſs. And a like determination was made, in the caſe of *Peckham* and *Legay*.

Wiltſhire v. Smith. 3 Atk. 90.

But, if there be a deed of aſſignment preſented to be executed, at the time when the tender is made, in which there are covenants, the mortgagee is entitled to lay them before his attorney, and ſhall have reaſonable time allowed him ſo to do before the intereſt ſhall ſtop. Thus, a bill was brought in *May* 1742, to redeem a mortgage, in which the plaintiff inſiſted upon a redemption, on paying the principal money only, for that the intereſt ought to determine in *February* 1741, becauſe he had given ſix months notice to pay it off, and had, on that day, tendered the principal and intereſt, with a deed of aſſignment, but the defendant abſolutely refuſed to take the money: the defendant ſwore, that he offered to take the money, provided he might have time to conſider of it, and to adviſe upon the deed of aſſignment, there being covenants therein on his part, upon which, as he was not of the profeſſion of the law, it was reaſonable he ſhould conſult his attorney, whether they were ſuch as he might ſafely execute. And the Lord Chancellour ſaid, that the plaintiff, not having ſent a draught of the aſſignment to the defendant any time before the money was tendered, as he ought to have done, he was in the wrong; for where there were covenants on the part of the mortgagee, it was very reaſonable that he ſhould have ſome time to look them over; the plaintiff's attorney ought to have left the deed for a week with the defendant, that he might have had an opportunity to adviſe upon it, and ſhould have appointed a time to pay the money, after the defendant had had ſufficient time to conſider it. And his Lordſhip decreed the

the mortgage-money, with intereſt, to be paid within ſix months, otherwiſe the plaintiff's bill to ſtand diſmiſſed.

So, if there be a controverſy, to whom the equity of redemption belongs, no aſſignment can be made until that point is ſettled; therefore the intereſt of the mortgage will not ceaſe, although the money be tendered to the mortgagee, and he refuſe it. Sharpnel v. Blake, 2Eq. Ca. 603. 34.

Lord *Milton*, being poſſeſſed, under a conveyance from his father, of divers mortgaged premiſes, and all the ſecurities for the ſame, and entitled to all the money due thereon, filed his bill in the court of Exchequer in *Ireland*, in *June* 1764, againſt *Moore Edgeworth* and *Damer Edgeworth*, infants, heirs to the mortgagor; praying the benefit of the proceedings in a former cauſe, and for an account; and that the money which ſhould appear due thereon might be paid the plaintiff by a ſhort day, or that the defendants might be foreclоſed, and the mortgaged premiſes ſold, for payment of what ſhould appear due. The defendants, by their anſwer to this bill, admitted moſt of the matters therein ſtated; but inſiſted upon the benefit of an agreement, which they alleged had been made between the plaintiff's father, *John Damer*, and the father of the defendants, for reducing the intereſt of the ſaid mortgages, which, by the deed, was originally at 8 *per cent* to 6 *per cent*. Iſſue being joined in the cauſe, ſeveral witneſſes were examined; and the ſame came to be heard in *November* 1771; when (upon reading an anſwer put in by the ſaid *John Damer*, in 1758, to a bill, filed againſt him by the defendant's father in 1757, whereby the former admitted, that, pending a former ſuit, the ſaid defendant's father had told the ſaid *John Damer*, "That the debts, affecting the eſtates mortgaged, were ſo "great, that if *John Damer* did not make an abatement in the intereſt of "the money due to him, he would have little benefit in caſe he ſucceeded "in the ſaid ſuit" and that *Damer* then ſaid, "that if that ſhould be the "caſe, he would leave any reaſonable abatement to his friend *Ambroſe* "*Harding*."; Whereby it appeared, that ſuch converſation had paſſed between them; and that the ſaid *Ambroſe Harding* underſtood, that *Damer* had agreed to accept of 6*l. per cent.* intereſt upon the money ſo due to him on the ſaid ſecurities; and alſo, upon reading other evidence, the court made an order, directing an iſſue to be tried at the next aſſizes, "Whether "there was any, and what agreement between *John Damer*, eſq. deceaſed, "and *Packington Edgeworth*, deceaſed, at any, and at what time, for any, "and what abatement of intereſt, on the principal ſums due to the ſaid "*John Damer*?" From this order, Lord *Milton* appealed to the Houſe of Lords, and the principal objection urged by him againſt directing ſuch iſſue, was, that conſidering the ſtate of the evidence before the court, it was unjuſt to direct an iſſue; becauſe the anſwer of Mr. *Damer*, which was read by the defendants at the hearing, denied any agreement between him and *Packington Edgeworth*, to reduce the rate of intereſt; and this denial, being ſet in oppoſition to any concluſion drawn from *Harding*'s evidence, took away all ground for the court's interpoſing; whereas, by directing an iſſue, upon the trial of which Mr. *Damer*'s anſwer could not be read for the appellant, he would be deprived of that evidence which the defendants had made evidence at the hearing of the cauſe. But it was adjudged, that the order ſhould be affirmed, with this addition, *viz.* that the plaintiff ſhould be at liberty, at ſuch trial, to read the anſwer of *Damer*. Ld. Milton v. Moore Edgeworth, and Damer Edgworth, infants, 6 Brown's Ca. Parl. 580.

Intereſt due upon a mortgage of money which is in ſettlement, will not be conſidered as in the nature of rent, and, conſequently, go with the mortgage; Edwards v. Counteſs of Warwick, 2 Will. 171

mortgage; but, if the tenant, under the ſettlement, die in the broken part of the quarter or half year, the intereſt will be apportioned; and what is due from the laſt day of payment, to the day of the death of the tenant for life, will be paid to his executor, and the reſidue to him in remainder.

Wilſon v. Harman. 2 Vez. 672. The reaſon is, that intereſt increaſes on a mortgage from day to day; and the mortgagor, whenever he pays the principal and intereſt, muſt pay the intereſt up to the day of payment.

Ibid. In this, a mortgage likewiſe differs from ſtock, for dividends upon ſtock are by the legiſlature made payable only half-yearly, and are in nature of rents, and, conſequently, not liable to apportionment.

3 Atk. 154. On the ſtatute 12 *Ann. ſtat.* 2. *c.* 16. § 1. which enacts, "That all "bonds and aſſurances for the payment of any principal, or money to be "lent upon uſury, whereupon there ſhall be reſerved or *taken* above five in "the hundred, ſhall be utterly void;" parol evidence has been admitted, to ſhew *uſurious* intereſt *taken* by a mortgage, though there was none reſerved upon the face of the deed itſelf.

Ruſſel v. Smithies, Anſtr. 96. A mortgagee is not bound, after great length of poſſeſſion, to leave the premiſes in as good repair as he found them.

Woolley v. Drag, Anſtr 551. Money diſburſed by a mortgagee for the benefit of the eſtate, as, for the renewal of leaſes under which it is holden, ſhall carry the ſame intereſt with the money originally lent.

Lloyd v. Hatchett, Anſtr. 525. A mortgagee in poſſeſſion for thirty years brought his bill to foreclose. Some of the creditors of the mortgagor, who had obtained from him a conveyance of the equity of redemption for the uſe of the creditor at large, filed a bill to redeem. At the hearing it was, among other things, referred to the Deputy Remembrancer to take an account of what was due to the mortgagee upon a bond from the mortgagor of nearly equal date with the mortgage, which the conveyance from the mortgagor to the creditors had directed to be firſt paid. The Deputy Remembrancer reported the whole principal and intereſt for thirty-three years to be due thereon. Exception was taken to this report, that the ſum reported due exceeded the penalty of the bond. The exception was allowed.

2 Vez. 678. It is a ſettled rule, that nothing ſhall prevent intereſt from running on a mortgage but a proper tender and notice: for the mortgagee has a legal ſecurity for his debt, may bring an ejectment, and a bill for foreclosure at the ſame time, which the court will not prevent. If therefore there be a mortgage on one ſide, and open accounts on the other, and it be manifeſt, that upon the account more will be due than the principal and intereſt on the mortgage will amount to, and propoſals be made to deduct, yet the intereſt ſhall not ſtop. However, as the mortgagee in ſuch caſe has intereſt on his mortgage, the court will oblige him to anſwer as to the money in his hands, which will be due on the account.

Murder and Homicide.

(A) In what Caſes a Man may be ſaid to kill another.

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(*S. if by dureſs*) A gaoler, knowing that a priſoner infected with the ſmall-pox, lodged in a certain room in the priſon, confined another priſoner, *againſt his will*, in the ſame room. The ſecond priſoner, who had not had the diſtemper, *of which the gaoler had notice*, caught the diſtemper, and died of it. This was holden to be murder in the gaoler. 2 Str. 856. Foſt. Cr. L. 322. Another ſtraitly confined his priſoner in a low, damp, unwholeſome room, without allowing him the common neceſſaries of chamber-pot, &c. for keeping things ſweet and clean about him. The priſoner, having been long confined in this manner, contracted an ill habit of body, which brought on diſtempers, of which he died. This likewiſe was holden to be murder in the party guilty of the dureſs. 2 Str. 884. 2 Ld. Raym. 1578. Foſt. Cr. L. 322.

Whether taking away the life of an innocent man by perjury in a courſe of legal proceeding amounts to murder? See Foſt. Cr. L. 131. 4 Bl. Comm. 196. note.

(C) What ſhall be deemed Murder: And herein,

A. and *B.*, two brothers, were at play together; they then wreſtled; afterwards cudgelled; *A.* gave *B.* a ſmart ſtroke; *B.* grew angry, threw away his cudgel: they fought in earneſt, and were parted. *A.* went away angry, threatening to fetch ſomething and ſtick *B.* He went home, took off a thin coat, and put on a thick one, returned with a ſword concealed under his coat, drew on a diſcourſe of the quarrel, and offered to cudgel, if *B.* would keep off his hands. *B.* went to him, and took up the cudgel which *A.* dropped, and gave him two blows on the ſhoulders. *A.* drew out the concealed ſword, ſaid. "Stand off, or I'll ſtab you," thruſt at, but miſſed him. *B.* went back, *A.* ſhortened his ſword, leaped towards *B.*, ſtabbed him, and killed him. This was adjudged murder. Maſon's caſe, Foſt. Cr. L. 132.

Three *Scotch* ſoldiers were drinking together in a publick houſe; ſome ſtrangers, who were ſitting in the next box, uſed ſeveral opprobrious epithets, and reviled the character of the *Scotch* nation; whereupon one of the ſoldiers ſtruck one of them with a *ſmall rattan cane*. An altercation enſued; and one of the ſtrangers laid hold of the ſoldier who had ſtricken, and threw him againſt a ſettle. The altercation increaſed; and when the ſoldier had paid his reckoning, the ſtranger again ſhoved him from the room into the paſſage. Upon this, the ſoldier exclaimed, that "*he did "not mind killing an* Engliſhman *more than eating a meſs of crowdy.*" The ſtranger, aſſiſted by another perſon, then violently puſhed the ſoldier out of the houſe, whereupon the ſoldier inſtantly turned round, drew his ſword, and ſtabbed the ſtranger to the heart. This was adjudged manſlaughter. Rex v. Taylor, 5 Burr. 2794.

A quarrel aroſe between ſeveral ſoldiers, and a number of keelmen: one of the ſoldiers, to protect himſelf and his comrades from the aſſaults of the Brown's caſe. Leach's Caſes, 135

the mob, drew his ſword, and miſtaking a perſon paſſing by for one of the keelmen, ſtruck him on the head with his ſword, of which blow he died. This was adjudged *manſlaughter*.

Snow's caſe, *Id.* 138. *A.* and *B.* ſuddenly quarrelled: upon ſome provoking language *B.* ſeized *A.* by the collar; a fight enſued; they both fell to the ground; and while ſtruggling on the ground, *B.* received a mortal wound from a knife which *A.* held in his hand. This alſo was adjudged manſlaughter.

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(*So, where*) According to Croke's report, *a ſmall cudgel*, and according to Godbolt's, *a rod*. "It may be fairly collected," ſaith Sir Mr. Foſter, "from Croke's manner of ſpeaking, [and Godbolt's report,] that the accident happened by *a ſingle ſtroke* with a cudgel *not likely to deſtroy*, and that death did not immediately enſue." The words of Croke are, "*Rowley ſtruck* the child "with a *ſmall cudgel*, of which *ſtroke* he *afterwards* died" The ſtroke was given in heat of blood, and not with any of the circumſtances which import malice, and therefore manſlaughter. Obſerve that Lord Raymond (Ld. Raym. 1498.) layeth great ſtreſs on this circumſtance, *that the ſtroke was with a cudgel not likely to kill!* Foſt. Cr. L. 295.

Foſt. Cr. L. 292. There being an affray in the ſtreet, one *Stedman* a foot-ſoldier ran haſtily towards the combatants. A woman ſeeing him run in that manner cried out, "You will not murder the man, will you?" *Stedman* replied, "What "is that to you, you bitch?" The woman thereupon gave him a box on the ear, and *Stedman* ſtruck her on the breaſt with the pommel of his ſword. The woman then fled, and *Stedman* purſuing her ſtabbed her in the back. *Holt* was at firſt of opinion, that this was murder, *a ſingle box on the ear from a woman not being a ſufficient provocation to kill in this manner, after he had given her a blow in return for the box on the ear;* and it was propoſed to have the matter found ſpecially. But it afterwards appearing in the progreſs of the trial, that the woman ſtruck the ſoldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manſlaughter.

The ſmart of the man's wound, and the effuſion of blood, might poſſibly keep his indignation boiling to the moment of the fact.

Rex v. Tranter, 1 Str. 499. This is the caſe as reported by Sir John Strange; and an extraordinary caſe it is, that all theſe circumſtances of aggravation, two to one, he helpleſs and on the ground begging for mercy, ſtabbed in nine places, and then diſpatched with a piſtol; that all theſe circumſtances plain indications of a deadly revenge or diabolical fury, ſhould not outweigh a ſlight ſtroke with a cane. But in the printed trial (6 St. Tr. 195.) there are ſome circumſtances ſtated, which are entirely dropped, or very ſlightly mentioned by the reporter:—1. Mr. Lutterel had a ſword by his ſide, which, after the affray was over, was *found drawn and broken*. How that happened did not appear in evidence; for part of the affray was at a time when no witneſs was preſent, nobody ſpak

Mr. *Lutterel*, being arreſted for a ſmall debt, prevailed on one of the officers to go with him to his lodgings, while the other was ſent to fetch the attorney's bill, in order, as *Lutterel* pretended, to have the debt and coſts paid. Words aroſe at the lodgings about *civility money*, which *Lutterel* refuſed to give; and he went up ſtairs pretending to fetch money for the debt and coſts, leaving the officer below. He ſoon returned with a brace of loaded piſtols in his boſom, which, at the importunity of his ſervant, he laid down on the table, ſaying, *He did not intend to hurt the officers, but he would not be ill-uſed.* The officer, who had been ſent for the attorney's bill, ſoon returned to his companion at the lodgings; and words of anger ariſing, *Lutterel* ſtruck one of the officers on the face with a walking-cane, and drew a little blood. Whereupon both of them fell upon him, one ſtabbed him *in nine places, he all the while on the ground begging for mercy, and unable to reſiſt them;* and one of them fired one of the piſtols at him *while on the ground*, and gave him his death's wound. This is reported to have been holden manſlaughter *by reaſon of the firſt aſſault with the cane.*

ſpake to the whole. 2. When Lutterel laid the piſtols on the table, he declared that he brought them down, *becauſe he would not be forced out of his lodgings*. 3. He threatened the officers ſeveral times. 4. One of the officers appeared to have been wounded in the hand by a piſtol-ſhot, (for both the piſtols were diſcharged in the affray,) and ſlightly on the wriſt by ſome ſharp-pointed weapon: and the other was ſlightly wounded in the hand by a like weapon. 5. The evidence touching Lutterel's begging for mercy was not, that he was on the ground *begging for mercy*; but that on the ground he held up his hands AS IF *he was begging for mercy*. The Chief Juſtice directed the jury, that if they believed Mr. Lutterel endeavoured to reſcue himſelf, which he ſeems to think was the caſe, and very probably was the caſe, it would be juſtifiable homicide in the officers. However, as Mr Lutterel gave the firſt blow *accompanied with menaces to the officers, and the circumſtance of producing loaded piſtols to prevent their taking him from his lodgings*, which it would have been their duty to have done, if the debt had not been paid, or bail given, he declared IT COULD BE NO MORE *than manſlaughter*. Foſt. Cr. L. 293.

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(1. *Nor is it any*) If the proceſs, be it bywrit or warrant, be not defective in the frame of it, and iſſue in the ordinary courſe of juſtice from a court or magiſtrate having juriſdiction in the caſe; though there may have been error or irregularity in the proceeding previous to the iſſuing of the proceſs, yet, if the officer or other miniſter be killed in the execution of it, this will be murder. And therefore if *a capias ad ſatisfaciendum*, *fieri facias*, writ of aſſiſtance, or any other writ of the like kind, iſſue directed to the ſheriff, and he or any of his officers be killed in the execution of it it is ſufficient, upon an indictment for this murder, to produce the writ and warrant, without ſhewing the judgment or decree So ruled by Lord Hardwicke, in the caſe of one Rogers, at the ſummer aſſizes in Cornwall in the year 1735. Foſt. Cr L. 311.——In the caſe of a warrant from a juſtice of the peace, *in a matter wherein he hath juriſdiction*, the perſon executing ſuch warrant is under the ſpecial protection of the law; though ſuch warrant may have been obtained by groſs impoſition on the magiſtrate, and by falſe information touching matters ſuggeſted in it.—Curtis's caſe, Foſt. Cr L. 135 ——An attachment iſſued out of the county court, and ſigned by the county clerk in his own cauſe, is legal proceſs; and if the officer be reſiſted and killed in the execution of it, it will be murder. Baker's caſe, Leach's Caſes, 1 6.

Where an officer on the impreſs ſervice, *fired in the uſual manner* at the hallyards of a boat, in order to *bring her to*, and happened to kill a man, this was adjudged to be only manſlaughter. Rex v. Philips, Cowp. 830.

A captain of a ſhip had a preſs-warrant, directing *that no perſon but a commiſſioned officer was to be intruſted with the execution of it*; and his name to be inſerted on the back of it. The captain appointed his lieutenant to execute it, and ſent his boat with ſome of the crew to preſs, but the lieutenant ſtaid in the ſhip. The boat's crew ſome leagues off boarded a ſhip and attempted to preſs, when one of them was killed. This was ruled to be only manſlaughter, for they did not act according to the warrant. Broadfoot's caſe, Foſt. Cr. L. 154.

So, where a peace officer about to take a man to priſon under a warrant, which turned out to be illegal, was killed in the attempt by a woman whom the man kept, this was adjudged to be only manſlaughter. Mary Adey's caſe Leach's Caſes, 188.

(D) Of Manſlaughter: And herein, of Manſlaughter exempt from Clergy by the ſtatute of 1 *Jac.* 1. *c.* 8.

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(*In the degree*) The puniſhment of murder, and that of manſlaughter, were originally one and the ſame; both having the benefit of clergy: So that none but unlearned perſons, who leaſt knew the guilt of it, were put to death for this enormous crime. But now, by ſeveral ſtatutes, 23 H. 8. c. 1., 1 Edw. 6. c. 12., 4 & 5 P. & M. c. 4., the benefit of clergy is taken away from murderers through malice prepenſe, their abettors, procurers, and counſellors. It is alſo enacted by ſtat. 25 G. 2. c. 37. that the judge, before whom any perſon is found guilty of wilful murder, ſhall pronounce ſentence immediately after conviction, unleſs he ſees cauſe to poſtpone it, and ſhall, in paſſing ſentence, direct him to be executed the next day but one, (unleſs the ſame ſhall be Sunday, and then on the Monday following,) and that his body be delivered to the ſurgeons to be diſſected and anatomized; and that the judge may direct his body to be afterwards hung in chains, but in nowiſe to be buried without diſſection. And during the ſhort, but awful, interval between ſentence

ſentence and execution, the priſoner ſhall be kept alone, and ſuſtained with only bread and water. But a power is allowed to the judge, upon good and ſufficient cauſe, to reſpite the execution, and relax the other reſtraints of this act. 4 Bl. Comm. 200. Foſt. 107. 141.

(*But there*) This ſtatute was made at a critical time, and, as tradition hath it, upon a very ſpecial occaſion. It is ſuppoſed to have been principally intended to put an effectual ſtop to outrages then frequently committed by perſons of inflamable ſpirits and deep reſentment; who, wearing ſhort daggers under their clothes, were too well prepared to do quick and effectual execution upon provocation extremely ſlight. Foſt. Cr. Law. 297.

"Whether it was merely a declaratory law," ſaith Sir M. Foſter, "I will not take upon me to "determine. But certain it is, that though the words deſcriptive of the offence are very general, "probably *in terrorem*, yet in the conſtruction of the ſtatute the circumſtances which at common "law will ſerve to juſtify, excuſe, or alleviate in a charge of murder, have always had their due "weight in proſecutions grounded on the ſtatute." Foſt. Cr. Law. 298.

1 Hale, 42. 474. Cro. Car. 538. Sir Wm. Jones, 429. Foſt. Cr. Law, 299.

Upon an outcry of thieves in the night time, a perſon, who was concealed in the cloſet, but no thief, was, in the hurry and ſurpriſe the family was under, ſtabbed in the dark. This was holden to be an innocent miſtake, and ruled chance-medley. Poſſibly, obſerves Sir *M. Foſter*, it might have been better ruled manſlaughter at common law, due circumſpection not having been uſed; but it was not manſlaughter within the ſtatute.

(E) Of juſtifiable Homicide: And herein,

Vailor's caſe, Foſt. Cr. Law, 278.

2. As it happens in the Defence of a Man's Perſon, Houſe, or Goods.

The priſoner was indicted for the murder of his brother, and the caſe upon evidence appeared to be, that the priſoner on the night the fact was committed came home drunk. His father ordered him to go to bed, which he refuſed to do; whereupon a ſcuffle happened betwixt the father and ſon. The deceaſed, who was then in bed, hearing the diſturbance got up, and fell upon the priſoner, threw him down, and beat him upon the ground, and there kept him down, ſo that he could not eſcape, nor avoid the blows; and as they were ſo ſtriving together, the priſoner gave the deceaſed a wound with a penknife, of which wound he died. The Judges preſent doubted, whether this were manſlaughter or *ſe defendendo*, and a ſpecial verdict was found to the effect here ſet forth. At a conference of all the judges of *England*, it was unanimouſly holden to be manſlaughter; for there did not appear to be *any inevitable neceſſity ſo as to excuſe the killing in this manner*.

Holt, Tracy, and Bury.

(F) Of excuſable Homicide: And herein,

1. Of Homicide *per Infortunium*, or Chance-medley.

By ſtat. 10 *Geo.* 2. *c.* 31. if any waterman between *Graveſend* and *Windſor* receives into his boat or barge a greater number of perſons than the act allows, and any paſſenger ſhall then be drowned, ſuch waterman is guilty (not of manſlaughter, but) of felony, and ſhall be tranſported as a felon.

Nonſuit.

THE plaintiff in a *qui tam* action on the 7 *G.* 2. *c.* 8. withdrew his record, becauſe the broker who negociated the illegal bargain for ſtock, refuſed to give evidence for fear of ſubjecting himſelf to a penalty on the ſame act. This was holden to be a ſufficient reaſon to diſcharge a rule for judgment as in caſe of a nonſuit for not proceeding to trial; although the witneſs's liability to be ſued would not be removed till after the three ſucceeding terms. Raynes v. Spicer, 7 Term Rep. 178.

(A) Of the Nature thereof, and how it differs from a *Retraxit*.

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(*Debt was*) Proude v Willimote, 1 Barnard. B. R. 18. acc. But it is ſufficient if the defendant obtain this rule any time before the trial. King v. Pippet, 1 Term Rep. 695.

Yet, where the plaintiff does not countermand notice of trial, but withdraw the record after the cauſe is called on, the court will make it a condition for diſcharging a rule for judgment as in caſe of a nonſuit, (on a peremptory undertaking to try,) that he ſhall pay the defendant the coſts incurred by omitting to try Jordaine v. Sharpe, 2 H. Bl. 280.

It is now ſettled, that ſuch nonſuit may be ſet aſide. Lady Windſor's caſe, 4 Burr. 1984.

The inſolvency of the defendant ſince the action brought, Bailey v. Wilkinſon, Dougl. 671. or, that the cauſe was caried down and made a *remanet*, Mewburn v. Langley, 3 Term Rep. 1. are ſufficient cauſes to prevent judgment as in caſe of a nonſuit. Indeed, the court of Common Pleas have lately holden, that in all caſes where an application is made for the firſt time for judgment as in caſe of a nonſuit, it is a ſufficient anſwer to it, to undertake peremptorily to try, without alleging any reaſon for not having before tried the cauſe; and that whatever might have been formerly the practice, in future, it ſhould be underſtood, that the firſt motion for judgment as in caſe of a nonſuit, is only a mode of obtaining a peremptory undertaking to try. Mallet v. Hilton, 2 H. Bl. 119.—It ſeems now by the practice of the courts both of *B. R.* and *C. P.*, that the judgment as in caſe of a nonſuit cannot be moved for till the third term after that in which iſſue is joined. Hall v. Buchanan, 2 Term Rep. 734. Da Coſta v. Ledſtone, 2 H Bl. 558.

A replevin is not; for in replevin both parties are actors, and the defendant may carry down the record by proviſo. Jones v. Concannon, 3 Term Rep. 661. Shortridge p Hiern, 5 Term Rep. 400. Judgment as in caſe of a nonſuit may be given in a traverſe of a return to a mandamus, Rex. v. Mayor, &c. of Stafford, 4 Term Rep. 689.

Where a Plaintiff has once proceeded to trial, judgment as in caſe of a nonſuit cannot be entered for not proceeding to a new trial. Porzelius v. Maddocks, 1 H. Bl. 101.

(E) How far the Nonſuit of one ſhall be the Nonſuit of another.

In treſpaſs againſt ſeveral, if any of them ſuffer judgment by default, the plaintiff cannot be nonſuited. Harris v. Butterley, Cowp. 483.

Nuiſances.

(A) What ſhall be ſaid a Nuiſance.

Tumbling is not an entertainment of the ſtage within the meaning of the above act, Rex v. Handy, 6 Term Rep. 286.

It is enacted by 9 & 10 *W.* 3. *c.* 7. "That it ſhall not be lawful for "any perſon to make or cauſe to be made, or to ſell or utter, or offer or "expoſe to ſale, any fire works, or any caſes, moulds, or implements, for "making the ſame, on pain of 5*l.* on conviction before one magiſtrate on "the oath of two witneſſes: or, for any perſon to permit fire-works to be "caſt, thrown, or fired from, out of, or in his houſe, lodging, or habi-"tation, or from, out of, or in any part or place thereto belonging or ad-"joining, into any publick ſtreet, highway, road, or paſſage, on pain of "20*s.* on conviction as aforeſaid: or for any perſon to caſt, throw, or fire "or to be aiding or aſſiſting therein, on pain of 20*s.* and that every ſuch "offence is and ſhall be adjudged a common nuiſance."

See too 17 G. 2. c. 5. 27 G. 3, c. 1.

By 10 & 11 *W.* 3, *c.* 17. all miſchievous games, called lotteries, and all other lotteries, are declared to be publick and common nuiſances.

By 6 *G.* 1. *c.* 18. § 19. "All undertakings, attempts, and projects by "publick ſubſcriptions, for adventuring on certain ſchemes of commerce, "tending to the common grievance of his Majeſty's ſubjects or a great num-"ber of them, and the receiving and paying of any money upon ſuch ſub-"ſcriptions, *&c.* and more particularly the preſuming to act as a body cor-"porate, or to raiſe transferable funds, or pretending to act under any "charter formerly granted from the crown for any particular or ſpecial "purpoſe therein expreſſed, by perſons making, or endeavouring to make "uſe of ſuch charter, for any ſuch other purpoſe not thereby intended, "and alſo acting, or pretending to act under any ſuch obſolete charter, *&c.* "ſhall be deemed a publick nuiſance."

(D) How the Offence is puniſhable.

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(*But, if by*) But this does not extend to entitle one, who has received detriment by a county bridge being out of repair, to bring an action againſt the inhabitants of that county, there being no ground to conſider them, for this purpoſe, as a corporation, and in that capacity liable to be ſued. 2 Term Rep. 667.

Obligations.

(A) Of the Nature of the Security, called a Bond or Obligation.

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(*This ſecurity*) But the bond of a ſurety will not extinguiſh the ſimple contract debt of the principal. White v. Cuyler, 6 Term Rep. 176.

(*A bond or*) If the bond be dated at a certain place, the declaration ſhould ſet it out as made at the true place, and introduce the place of trial under a *videlicet*. 1 Str 612. Therefore, where the plaintiff declared, "that the defendant by his bond *apud Londin conceſſit* &c. and on oyer the bond appeared to be dated at Port St. David in the Eaſt Indies, which was not mentioned in the declaration, the variance was pronounced to be fatal. Roberts v. Harnage, 2 Salk. 659.

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(*If a man*) It is more correct to plead the ſum really due; and indeed if the bond be not forfeited, ſuch ſum only can be pleaded. 5 Term Rep. 309 However, if the penalty be pleaded, the plaintiff may reply the ſum really due for principal and intereſt, which he may aver the obligee is ready to receive, and that the bond is kept on foot by fraud.

(*And as the*) It hath been holden in ſome caſes, that in an action *at law* on a bond, damages may be recovered beyond the amount of the penalty. Lord Lonſdale v. Church, 2 Term Rep. 388. *Sed vide* Wilde v. Clarkſon, 6 Term Rep. 330. *contr.* In general, however, the rule of equity is not to compute any thing beyond the penalty of the bond. Tew v. Earl of Winterton, 3 Br. Ch. Rep. 492. Thus, where there was a deviſe for payment of debts, it was holden, that ſimple contract debts, even for ſeventy years ſtanding, were renewed by it, and were ordered to be paid with full intereſt; but the bond debts were only allowed intereſt to the amount of the penalty. Ketilby v. Ketilby, before Lord Bathurſt, cited in 2 Anſtr. 527. So, though the principal and intereſt on a mortgage bond exceed the penaly, yet the obligee, on a bill to redeem, can claim only to the extent of the penalty. Lloyd v. Hatchett, *Id.* 525.

A bond was dated on a day certain in a penal ſum conditioned for the payment of a leſs ſum generally, but no day of payment was expreſsly named, nor was intereſt reſerved in terms. On motion to refer it to the Maſter under the ſtatute of 4 and 5 *Ann. c.* 16. § 13. *a*) to compute principal, intereſt, and coſts thereon, and on payment thereof to ſtay the proceedings, it was objected, that this bond was not within the act, as not being payable on a day certain. But by the court.—This bond is payable on a day certain; for it is payable on the day of the date, no other time being mentioned for payment. Intereſt alſo is payable from the time of payment, namely, from the date, though not expreſsly reſerved.

Farquhar v. Morris, 7 Term Rep. 124.

(*a*) Vol. v. pag. 157.

(B) What Words create ſuch a Security.

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(*It hath been*) By ſtatute 4. Geo. 2. c. 26. bonds muſt be in the Engliſh language, and not in Latin or French, or any other language whatſoever.

(C) Of the Ceremonies requiſite to a Bond or Obligation: And herein of Signing, Sealing, Date, and Delivery.

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(*A bond*) That circumſtances may amount to delivery, ſee Goodright v. Strahan, Cowp. 204.

If *A.* and *B.* enter into a bond, and ſet but one ſeal to it, and *A* execute it for himſelf and *B.* with the authority and in the preſence of *B.*, it is obligatory on both.

Lord Lovelace's caſe, Sir Wm. Jones, 268.

Ball v. Dunſterville, 4 Term Rep. 313.

(D) Of the Parties to the Obligation: And herein,

1. Who may bind themſelves, or be Obligators.

If a man menace me unleſs I make him a bond for 40*l.* and I tell him, I will not do it, but will give him a bond for 20*l.* the court will not expound this bond to be a voluntary one; for *non videtur conſenſum retinuiſſe, qui ex preſcripto minantis aliquid mutavit.*

Bac. Reg. 22.

Alſo

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(*Alſo though*) Modern caſes conſider the bond of a lunatick as abſolutely void; and the obligee himſelf may, on *non eſt factum*, give lunacy in evidence. Yates v. Boen, 2 Str. 1104. A bond may be avoided in the like manner by reaſon of exceſſive drunkenneſs at the time of executing it. Cole v. Robbins, Buil. N. P. 172.

(*But a feme*) A bond given by the huſband to the intended wife prior to marriage, conditioned for payment of money to her after the obligor's death, is not extinguiſhed by the coverture; and ſuch a bond may be enforced *at law* againſt the heirs of the huſband. Milbourn v. Ewart, 5 Term Rep. 381. Cage v. Acton, 1 Ld. Raym. 515,

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(*If A. by his*) The *ſolvendum* will ſhew to whom bound, though the obligee's name be omitted in the preceding part of the inſtrument. Langdon v. Goole, 3 Lev. 21. Lambert v. Branthwaite, 2 Str. 945.

(*If A bind*) In this caſe the court only inclined to the opinion here ſtated: there was no determination: the matter was adjourned.—As courts of law now take notice of truſts, the defendant may plead, that the nominal obligee in the bond, is not the real owner of it, but merely a truſtee for another, and ſo entitle himſelf to ſet off a debt due from the *ceſtuy que* truſt to him Rudge v. Birch, Mich. 25 G. 3. B. R. Bottomley v. Brook, Mich 22 G. 3. C. B. 1 Term Rep. 621-2.

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(*If three are*) Spencer v. Durant, 1 Show. 8 S. P. But if one is ſued, he muſt take advantage of it by pleading in abatement; for if he demands oyer, and demurs, the plaintiff ſhall have judgment; for the court will preſume, that the other never ſealed it. Gilbert v. Bath, 1 Str. 503. They will preſume the like, unleſs the plea ſtate that the other actually did ſeal it. Hollingworth v. Aſcue. Cro. El. 355.

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(*If two are*) 26 H. 6. T. Barre, 37. Obligee made an acquittance to one obligor, which was dated before the obligation, but was delivered afterwards: the other obligor pleads this in bar, and it was adjudged a good plea in bar. *Nota*, each was bound in the entierty, therefore it was joint and ſeveral. 34 H. 6. So, in the caſe of the king, if he releaſes to one of the obligors, the other ſhall take advantage. 5 Rep. 56. *contra*.—And as a releaſe in deed to one obligor diſcharges the other, ſo of a releaſe in law, as 8 Rep 136. Needham's caſe. A woman obligee marries the obligor, that is another ſort of diſcharge. But in 17 Car. 2. B. R. two were bound jointly and ſeverally. The plaintiff ſued both, and afterwards entered a retraxit againſt one: whether that diſcharged the other was the queſtion? Berkley ſaid it was, for it amounts to a releaſe in law, as the plaintiff confeſſes thereby that he had not cauſe of action, and therefore he cannot have judgment, as in Hickmot's caſe, 9 Rep. and retraxit is a bar to an action; and the plaintiff by his own act has altered the deed from joint to ſeveral, and therefore the other ſhall have advantage of it. Co. Inſt. *contra*; for a retraxit is only in nature of an eſtoppel, and therefore the other ſhall not have advantage; neither is it a releaſe, though it be in the nature of a releaſe; and if the obligee ſues both, and then covenants with one not to ſue farther, that is in the nature of a releaſe, but the other ſhall not take advantage of it; and in 21 H. 6 it is ſaid, that there muſt be an actual releaſe to one obligor to diſcharge the other. See March's Rep. 165.—Paſch. 18 Car. Hannam v. Roll. The obligee releaſes to one obligor: the other, in conſideration of the forbearance, undertakes to pay, and in an action on the caſe the matter was found ſpecially; and Rolle argued, that the debt was not abſolutely diſcharged, bnt only *ſub modo*, viz. if the other can have the releaſe to plead, and becauſe the forbearance was a good conſideration But the court was of opinion, that the debt was abſolutely diſcharged, and therefore the conſideration was inſufficient.———See Hob. 70. Parker v. Sir John Lawrence In treſpaſs againſt three, they divided on the pleading. Judgment againſt one. Then he entered a *nolle proſequi* againſt the two others; it was held to be no diſcharge to him againſt whom judgment was had; for as to him, the action was determined by the judgment, and the others are divided from him, and not ſubject to the damages recovered againſt him; but a *nol proſequi*, or nonſuit before judgment againſt one, would diſcharge all. Lord Nott. MS. Co. Lit. 232. a. note (i). laſt edit.

(*a*) Vol. 5. pag. 164. It is laid down in a preceding part of this work (*a*), that "if two are "bound jointly, and one dies, the ſurvivor only is liable in *equity*;" in ſupport of which poſition, 2 *Vern.* 99. is referred to. But upon turning to that book we find that the court are not ſpeaking of the remedy in *equity*, but of that *at law*. The words are, "Where two are jointly bound, "and one dies, you muſt ſue the ſurvivors, and cannot maintain an action "againſt

"againſt the executor or adminiſtrator of him that is dead." It is true, that from the form of the contract, the remedy *at law* is gone; but *in equity* both are conſidered as having undertaken to pay, and if the obligee cannot recover againſt the one, he ſhall againſt the other. This will appear from the following caſes. 1 Br Ch. Rep. 29.

Nutt and *Baker*, partners in trade, borrowed on their joint bond: *Nutt* died: *Baker*, the ſurviving partner, became bankrupt: the plaintiff, as executor of the bond-creditor, proved his debt, received ſatisfaction, in part, and brought a bill againſt *Vaughan*, as executor of *Nutt*, to have the deficiency ſupplied out of his aſſets. Lord *Hardwicke* held, that it was a ſum lent to both, of which both had the advantage; and a debt aroſe againſt both from the nature of the tranſaction: it was no lien on the partnerſhip in particular, becauſe the plaintiff might have had it againſt either of them. There was farther in this caſe reaſonable evidence of fraud or miſtake, for *Baker* filled up the bond. Simpſon v. Vaughan, 1740, cited in 2 Vez. 101.

Owen and *Church*, partners in trade, borrowed from *Biſhop* at two different times two ſums of 1000*l.* each; for which they gave two bonds, binding themſelves, and their heirs, executors, and adminiſtrators, with condition, that if they or either of them, their or either of their heirs, executors, or adminiſtrators, *&c.* *Church* broke off the partnerſhip, and died in 1740. *Biſhop* died in 1747; and his repreſentatives, *Owen* becoming bankrupt, brought a bill againſt the repreſentatives of *Church* for a ſatisfaction of this debt out of the real and perſonal aſſets. Lord *Hardwicke* ſet up the bond both againſt the perſonal repreſentatives and the heir of *Church*. His lordſhip ſaid, the bond is conſidered as an agreement in writing; and therefore though the obligation and penalty are gone by the legal demand being gone, yet the condition, taking it altogether, is conſidered as an agreement in this court to pay the money, and an agreement under hand and ſeal; therefore the court will ſet it up againſt executor and heir. Biſhop v. Church, 2 Vez. 100. 371.

If an obligee in a bond make any variation in the original contract with the principal without the privity of the ſurety, as, if he change the nature of the ſecurity, or agree to poſtpone the day of payment, he thereby diſcharges the ſurety. It is the cleareſt and moſt evident equity not to carry on any tranſaction without the privity of him, who muſt neceſſarily have a concern in every tranſaction with the principal debtor. Skip v. Huey, 3 Atk. 91. Niſbet v. Smith, 2 Br. Ch. Rep. 579 Rees v. Parrinton, 2 Vez. jun. 540.

5. Of their Remedies againſt each other.

There were three obligors in a bond, and the obligee filed his bill againſt the principal, and the repreſentatives of one of the ſureties, ſtating that *A.* the third obligor was dead inſolvent. An objection was made for want of parties, becauſe the repreſentatives of the third obligor were not before the court. But by Lord *Hardwicke*—The general rule of the court, to be ſure, is, where a debt is joint and ſeveral, the plaintiff muſt bring each of the debtors before the court, becauſe they are entitled to the aſſiſtance of each other in taking the account (*a*). Another reaſon is, that the debtors are entitled to a contribution, where one pays more than his ſhare of the debt. A further reaſon is, if there are different funds, as, where the debt is a ſpecialty, and the plaintiff may ſue at law either the heir or executor for ſatisfaction, he muſt make both parties, as he may come in the laſt place againſt the real aſſets. But there are exceptions to this, and the exception out of the firſt rule is, that if ſome of the obligors are only ſureties, there Madox v. Jackſon, 3 Atk. 405.

(*a*) *Sed vid.* Collins v. Griffith, 2 P. Wms. 313.

there is no pretence for the principal in the bond to ſay, that the creditor ought to bring the ſurety before the court, unleſs he had paid the debt. The exception out of the ſecond rule is, that if there are no perſonal aſſets at all, and this fact appears plainly in the cauſe, there is no reaſon to bring the repreſentative of that co-obligor before the court. But this is a ſpecial excepted caſe, and therefore not within the rule. But ſuppoſe it was a common caſe, and the bill had been brought by the repreſentatives of *B.*, one of the ſureties in the bond, whether it is neceſſary to make the repreſentative of *A.* a party. As to the taking of the account, it is quite out of the caſe by the admiſſion of the defendants, that the bond is not paid, nor any part of the principal and intereſt, ſo that here is no ground to make the repreſentative of *A.* a party, in order to aſſiſt him in taking the account. The other pretence is, in order for a contribution. It is admitted by all the anſwers, that *A.* is dead inſolvent; and therefore this differs from the caſe of *Aſhhurſt* v *Eyre*, (2 *Atk.* 51. 3 *Atk.* 341.) determined before me upon a plea. For though there was an admiſſion of inſolvency in that caſe, yet it did not appear whether the principal and intereſt might not have been paid by the co-obligor, who was not before the court, and that was the reaſon of allowing the plea. His Lordſhip therefore overruled the objection for want of parties.

(E) Of the Condition and Conſideration of the Obligation.

For the law on the ſubject of conditions of bonds, ſee tit. *Conditions*, K. L. &c.

(F) Of the breach and Performance of the Condition of an Obligation: And herein,

How the Breach of the Condition muſt be aſſigned and ſet forth, and the Manner of pleading Performance, and in Bar.

Soreſby v. Sparrow, 2 Str. 1186. 1 Wilſ. 36. S. C.

THE bond being the ſole foundation of the action, the cout muſt ſee that it is properly executed; and therefore it is matter of ſubſtance, that *proſert* be made of it. And the defendant being entitled to it by law, the court can in no caſe diſpenſe with it.

Read v. Brookman, 3 Term Rep. 151. Totty v. Neſbitt, *Id.* 152. n.

But where a bond is loſt, it is now holden, that the plaintiff may declare ſpecially, "that it is loſt by time and accident," and without a *proſert*. nd where he has made a *proſert*, and the deed is loſt, he may move, that the production of a copy ſhall be oyer, or if he have no copy, to amend his declaration, and plead as above.

1 Cr. Pr. 141. Matiſon v. Atkinſon, 3 Term Rep. 153. n. And ſee Whitfield v. Fauſſet, 1 Vez. 392.

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(*In an action*) However, in ſuch caſe, the plaintiff has his election to which bond to apply the money. Bloſs v. Cutting, 2 Str. 1194.

(*In debt*) Not of the condition be illegal upon the face of it, for in that caſe the demurrer is proper. 2 Bl. Rep. 1108. 11 Co. 26.

But

But where the condition of a bond was, "that the defendant ſhould "from time to time *render a juſt and true account* of all monies received by him as treaſurer of the pariſh of *B.*" &c. and the breach aſſigned was, that on the laſt account furniſhed by the defendant, there appeared to be due by him a large ſum of money, which he had not *paid over*; the defendant demurred, becauſe the breach was not within the condition, which was only to *account*: but *per curiam*, the intention of the parties, and fair conſtruction of the condition is, that the money ſhould be paid; for to conſtrue it a condition to enforce the making out a paper of items and figures is idle and nugatory. Bache v. Procter, Dougl. 382.

Where the defendant, being appointed agent to the plaintiffs, gave a bond, conditioned for the payment of all ſums of money by him received to the uſe of the Company; and the breach aſſigned was, "that the defend- "ant had received from *J. S.* and ſeveral other perſons divers ſums of mo- "ney, which he had not paid to the Company;" it was holden, that the aſſigning of the breach in the receipt of *divers ſums* from *ſeveral perſons*, was too general and uncertain, and therefore bad. African Company v. Maſon, Gilb. Rep. 238. cited 2 Burr. 773. and 1 Str. 227.

But where in debt on a bond as ſecurity for a perſon appointed agent to a regiment, the breach aſſigned was, "that the defendant had received ſe- "veral ſums of money from the paymaſter-general, for the uſe of the regi- "ment, which he had not paid over to the officers according to their reſ- "pective proportions:" this breach was, on demurrer, holden to be well aſſigned; for the money was received from one perſon, (not from many, as in the laſt caſe,) and for one purpoſe, to pay the regiment; and the defendant's omitting to pay any part of it was a breach of the bond. Cornwallis v. Savery, 2 Burr. 772

In debt on a bond given as a ſecurity for the faithful ſervice of a clerk, the breach aſſigned was, "that a large ſum of money, *viz.* 13*l.* came to the clerk's hands on account of the plaintiff, "which he (the clerk) had ſpent and embezzled." This breach is ill aſſigned, inaſmuch as it does not ſhew how and from whom the money ſo embezzled had been received. Jones v. Williams. Doug. 214.

The condition of a bond was, "that the plaintiff ſhould furniſh the de- "fendant with ale and beer, to be uſed in his houſe, at ſuch prices, and "that he ſhould take it of nobody elſe; but might take his other liquors "from whom he pleaſed, malt liquors only excepted." The breach aſſigned was, "that ſuch a quantity of *liquors* was drawn and unpaid for." On demurrer, it was holden, that the breach was improperly aſſigned, for it did not appear, that the liquors unpaid for were *malt liquors*, which only the defendant was bound to take from the plaintiff. Stibbs v. Clough, 1 Str. 227.

The defendant's wife, when ſole, gave a bond to the plaintiff in the penal ſum of 1200*l.* if ſhe married *any other perſon* than the plaintiff, *or* refuſed to marry him within one month after her father's death. She married the defendant in her father's lifetime, upon which the plaintiff brought debt on the bond, and aſſigned her marriage as a breach: and it was holden to be good, (though it was inſiſted, that ſhe might ſtill perform one part of the condition by marrying the plaintiff after her father's death, as he might ſurvive her huſband); for that by the breach of one of the conditions the bond became abſolute. Box v. Day, 1 Wilſ. 59.

A bond was for the payment of a ſum of money by inſtallments; the condition was for the payment of theſe inſtalments, without the words *or any of them*. It was nevertheleſs reſolved, that the obligee might, on default of payment of any of the inſtalments, bring his action on the bond. Hallett v. Hodges, Say Rep. 29.

Debt

Smith v. Yeomans, 1 Saund. 316.

Debt on bond for performance of covenants in certain indentures: the defendant demands oyer; and then pleads, that there are not any covenants in the indenture on his part to be performed: the plaintiff prays oyer of the indenture by the defendant brought into court, which is entered at large *in hæc verba*; and it appears, that there are several covenants in the indenture on the defendant's part, upon which the plaintiff demurs. It was insisted by the defendant's counsel, that the plaintiff had demurred too hastily, for he ought to have shewn a breach of one of his covenants to maintain his action; as, in debt on a bond to perform an award, if the defendant pleads no award made, it is not sufficient for the plaintiff to reply, and shew an award made, but he ought likewise to shew a breach thereof: so, here, when the defendant pleads, there are no covenants in the indenture, the plaintiff ought not only to shew the covenants, but likewise to assign a breach on them. *Sed non allocatur*—and judgment was given for the plaintiff without any difficulty. And the reason seems to be, that when the defendant brings the indenture into court, and saith, that there are no covenants therein, on oyer thereof, the indenture is made part of the (*a*) plea; and it thereby judicially appears to the court, that he hath pleaded a false plea, and hath taken an averment against the truth of that which appears to the court by the very indenture which he himself hath brought into court; and so the plaintiff need not shew any matter of fact in a replication to maintain his action, as in the case of an award, but a demurrer was more proper. *Quod nota*, saith the Reporter.

(*a*) Jeffery v. White, Dougl. 476. *aac.*

Baldee v. Eler, 5 Term Rep. 250.

To debt on bond conditioned for the payment of a certain sum on a certain day, the defendant pleaded, that by articles of agreement between the plaintiff, her sister, and the defendant, the interest of the money was to be paid to one of the sisters upon an event which had happened: but, as the plea did not allege the payment of the interest accordingly, it was holden bad.

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(*In debt on a bond the defendant may*) Bonds are within the act of 4 & 5 Ann. c. 16. which allows the defendant to plead double: therefore, where the condition was to marry on request, *non est factum*, and *never requested*, were allowed to be pleaded together. Dunn v. Vacher, 2 Str. 908. So, *non est factum*, and *a discharge by bankruptcy*. Atkinson v. Atkinson, *Id.* 871. But not, *non est factum*, and *solvit ad diem*, Arnold v. Bass, 2 Bl. Rep. 993.; or *solvit post diem*, Fox v. Chandler, *Id.* 905.; or *non est factum*, and a tender as to part. Jenkins v. Edwards, 5 Term Rep. 97.

(*In debt on an* (*a*) So held on a general demurrer. Anonymous, 2 Wilf. 10.

Colton v. Goodridge, 2 Bl. Rep. 1108. Pigot's case, 11 Co. 26.

On the plea of *non est factum*, only questions of fact can arise. Where therefore the condition is void in law, the defendant should pray oyer, and demur, if the illegal condition appears upon the face of it; if not, plead the special matter to avoid it. Thompson v. Leach, 2 Salk. 675.

Colborne v. Stockdale, 1 Str. 493. Hinton v. Roffey, 3 Mod. 35.

Hence, if a bond be given for a gaming debt, the statute should be pleaded. And in such plea, the defendant should set out the game played at, and conclude *contra formam statuti* that the court may see, that it was within the statute. So, in pleading simony or usury, the simoniacal or usurious contract must be shewn.

Winch v. Pardon, Mich. 1 G. 1. Bull. N. P. 174.

If the defendant has paid the money before the day, he may, to debt on bond conditioned to pay, *at a day certain*, plead *solvit ad diem*, and give in evidence payment *before* the day, as he could not plead it: for if the defendant were to plead payment before the day, the issue would be immaterial, as it would still leave the presumption open that there might be payment at the

the day. And therefore a difference is to be obſerved between pleading where the condition of a bond is to pay *at a day certain*, and where *at or before* ſuch a day: for to the firſt, the defendant may only plead *payment at the day*, for the reaſon now given; beſides, that the performance of a condition ought to follow the terms of it: but to a bond payable *at or before ſuch a day*, the defendant may plead payment *before the day*, for it is within the condition. And therefore where it was ſo pleaded, and the defendant demurred to it as an immaterial iſſue, the court over-ruled the demurrer, and laid down the rule to be, "That where the defendant pleads performance "of the condition, the plaintiff muſt aſſign an abſolute breach, though it "is not neceſſary where he pleads a collateral matter, as, a releaſe; and "that, therefore, where the defendant had pleaded payment before the "day, the plaintiff ſhould have replied, that the money was not paid "at the day mentioned in the plea, *nor at any time before, on*, or after "that day."

Tryon v. Carter, 2 Str. 994. Fletcher v. Henning-ton, 2 Burr. 944. 1 Bl. Rep. 210. S. C.

But a tender and refuſal of principal and intereſt at a ſubſequent day cannot be pleaded in bar under the ſtatute, as not being within the equity of it; for ſuch conſtruction would be prejudicial, as it would empower the obligor at any time to compel the obligee to take his money without notice.

Underhill v Matthews, P. 1 G. 1. C. B. Bull. N. P. 171.

A. gave *B.* a bond to ſecure an annuity, and, before any payment became due, *A.* lent *B.* a ſum of money, on which it was agreed, that *B.* ſhould retain the payments of the annuity, as they became due, till that ſum was diſcharged; then *B.* became a bankrupt. The agreement to retain was holden to be a good plea to an action on the bond by *B.*'s aſſignees for the payments accruing after the bankruptcy; ſuch agreement and retainer being equivalent to a plea of *ſolvit ad diem*.

Sturdy v. Arnaud, 3 Term Rep. 599.

If no intereſt has been paid on a bond for twenty years, it ſhall be in law preſumed to be ſatisfied; and in ſuch caſe the defendant may plead *ſolvit ad diem*, and rely on the preſumption. Lord *Raymond* indeed left it to the jury on ſixteen years, where there were circumſtances to fortify the preſumption. But without any circumſtances a period of nineteen years and a half has been holden inſufficient.

1 Burr. 434. Cowp. 109. Oſwald v. Legh, 1 Term Rep. 270.

To a bond of thirty years ſtanding the defendant pleaded *ſolvit ad diem*, and relied on the preſumption: the plaintiff in anſwer could only prove payment two years after the time mentioned in the condition, but gave no evidence of any receipt or demand for twenty-eight years paſt. The Chief Juſtice was of opinion, that this plea of payment at the day was to be taken as ſtrictly in this caſe, which went only upon the preſumption, as in any other caſe; and the plaintiff having falſified the plea by ſhewing a payment of intereſt two years after, it was not ſufficient to ſay the other twenty-eight years were enough to let in the preſumption; becauſe, to take advantage of that, the defendant ſhould have pleaded upon the act for the amendment of the law, that he paid the money *after the day*, in which caſe it would have been with him upon the evidence.

Moreland v Bennett, Str. 652.

To debt on a bond, the defendant pleaded *ſolvit ad diem*, and relied on the preſumption of non-payment of intereſt for twenty years: the plaintiff offered in evidence an indorſement on the back of the bond, being a receipt for intereſt on it ten years before the preſumption accrued. This evidence was refuſed by the Chief Juſtice, on the ground, that it was the act of the obligee himſelf, and ſo inadmiſſible. But the court granted a new trial, for it was proper evidence to be left to a jury, whether the indorſement of the receipt of the money had not been made with the privity of the obligor, it

Searle v. Lord Barrington, 2 Str. 826. 2 Ld. Raym 1370. S. C.

it being the conſtant practice for the obligee to indorſe the payment of intereſt, and that for the ſake of the obligor, who is ſafer by taking ſuch an indorſement, than by taking a looſe receipt. On a new trial the evidence was admitted, and the plaintiff recovered.

2 Str. 827. In Barnes v Ranſom, 1 Barnard. B R. 452. a ſimilar indorſement

But in *Turner* v. *Criſp*, *B. R. Hil.* 14 *G.* 2. the Chief Juſtice refuſed to let the indorſement of a receipt of part of the bond, made after the preſumption had taken place, be given in evidence; for that it differed from the above caſe, where the indorſement appeared to be made before it could be thought neceſſary to be made uſe of to encounter the preſumption.

ſeems to have been admitted, tho' made after the preſumption had taken place. But in Glyn v. Bank of England, 2 Vez 43. Ld. Hardwicke took the ſame diſtinction as was done in the preſent caſe. In a copy of *Select Caſes of Evid*, 152. (where this caſe is alſo reported), formerly in the poſſeſſion of the late Mr. J. Wilſon, but now in that of Mr Nolan, the editor of Strange's Reports, it is ſtated, that "at the Sittings after Michaelmas term at Weſtminſter 6 Geo. 3., Lord Cam-"den ſaid, he was never much pleaſed with the determination of Searle v. Lord Barrington; "however, he ſaid, it was law."

Moyle v. Lord Roberts, cited in 1 Term Rep 271, Hulland v. Malken, 2 Will. 116.

Where the plaintiff ſhewed two writs of *teſtatum capias* ſued out by him before the twenty years run, but not ſerved, becauſe defendant could not be found; Lord *Mansfield* ſaid, there was no ground for the preſumption.

To debt on bond to ſave harmleſs, the defendant can only plead, either that he has ſaved the plaintiff harmleſs, or, that if he has received any injury, it was through his own default.

White v. Cleaver, 2 Str. 681.

Where the defendant pleads that he has ſaved the plaintiff harmleſs, he ſhould ſhew *how he has done ſo*. But as the ſaving harmleſs is the ſubſtance, and *how* matter of form, the plaintiff muſt take advantage of this defect in the plea by ſpecial demurrer.

See further tit. *Covenant*, Vol. I. 544. and tit. *Set-off*, *infra*.

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Offices and Officers.

Vol. 5. pag. 180.

IT is obſerved in a former part of this work, that conſtant uſage hath not only ſanctioned the firſt eſtabliſhment of ſuch offices as have exiſted time out of mind, but alſo hath preſcribed and ſettled the manner in which they are to continue to exiſt, in what manner to be exerciſed, how to be diſpoſed of, *&c.* But a uſage ſhort of ſuch as may be legally ſet up as a preſcription will be ſufficient for this purpoſe. In offices in every court of *Weſtminſter-hall* new cuſtoms and new uſages grow up, and get firm root by continuance much ſhort of legal preſcription. Thus in the court of Chancery, ſince Lord *Northington*'s time, the regiſtrar's clerks have uniformly ſucceeded to be regiſtrars in regular ſucceſſion. The office itſelf is probably within the time of legal memory, and this practice has only prevailed ſince the time above mentioned: yet it ſhould ſeem to be now too firmly eſtabliſhed to be ſhaken; and the Duke of *St. Albans*, in whoſe gift the office is, would hardly venture to break through the ſucceſſion.

Per Macdonald, C. B. Anſtr. 624.

R

It has been ſettled, that the Treaſurer's Remembrancer in appointing clerks to his office, is, by the uſage, limited to thoſe who have ſerved a clerkſhip in the office. *Ex parte* Deverell, Anſtr. 438. 616.

Qu. Whether there can be a direct legal aſſignment of the office of regiſtrar of the court of Chancery? Colman v. Duke of St. Albans, 3 Vez. jun. 25.

(B) Offices, by what Authority created.

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(*King E.* 4.) The queſtion, according to Moor, was, Whether the Biſhop of Saliſbury had, under this grant, *by ſucceſſion*, ſuch a title to the office, that he ought to be admitted to it? It appeared, that Beauchamp accepted the office, executed it, and died biſhop of Saliſbury in the 22d year of Ed. 4th.: but there was no proof extant of any ſucceeding biſhop of Saliſbury being admitted to the office, but the kings of England, one after another, had appointed chancellours at their pleaſure. The three judges to whom the matter was referred, viz. the Chief Juſtice Flemming and Coke, and the Chief Baron Tanfield, agreed in opinion, and ſo reported to the king, that the biſhop by *ſucceſſion* had no title to the office, for two reaſons: 1ſt, Becauſe the patent originally was void as to the appointment of any ſucceeding biſhop to the office; for Beauchamp took the eſtate for his life in the office in his natural capacity, not in his publick capacity; ſince if it had happened, that he had been removed from the biſhoprick of Saliſbury, yet, in reſpect of the expreſs limitation to him for his life, he muſt have continued in the office, and his ſucceſſor in the ſee could not have taken it: then the conſequence is, that he did not take an inheritance of ſucceſſion in the office; and he could not take in his natural capacity for life, and alſo in his politick capacity; nor could the grant enure by ſuch a fraction. Wherefore they all thought the grant void as to the ſucceſſion. The other reaſon was, becauſe there had been no uſe or exerciſe of this office by any ſucceeding biſhop of Saliſbury.—But this ſtate of facts, from which the above judgment was formed, does not ſeem to be correct; for in truth, this office was enjoyed and executed by biſhops of Saliſbury from the time of the above grant to Richard Beauchamp to the reign of Edward 6th. Upon the Reformation of the order by that king his ſtatutes wholly leave out the eccleſiaſticks, and appoint that the office ſhall be executed by one of the knights companions, and from that time till the reign of C. 2. it remained in the hands of laymen. It appearing, however, that there were ſeveral charters granted to the ſee of Saliſbury, particularly one in the 4th of Elizabeth, which confirmed charters of Queen Mary, King Henry 8 h. and Henry 7th, and alſo another in the 4th of Car. 1., in which laſt the letters patent of E 4. are recited *totidem verbis*, and expreſsly confirmed, the pretenſions of the ſee of Saliſbury to the office were revived in the laſt-mentioned reign, and the claim was agitated in a chapter of the order, but the troubles which ſhortly afterwards followed, prevented a deciſion. The claim, however, was renewed ſoon after the Reſtoration, and at a chapter of the order in 21 Car. 2. was allowed on the ground of the above grant. It was declared, that the Biſhop of Sarum, and his ſucceſſors for ever ſhould have and execute the office of Chancellour of the moſt noble order of the Garter, and receive and enjoy all the rights, privileges, and advantages thereunto belonging, immediately upon the firſt vacancy. Aſhmole's Inſtitution, &c. of the Garter, c. 8. § 2.

(*The king*) But it is ſaid, that courts of equity may be holden by preſcription, 4 Inſt 87.; which implies a legal inconſiſtency, (unleſs we believe the royal authority to have varied in this reſpect at different periods), ſince preſcription, as a title to any franchiſe, pre ſuppoſes a royal grant. It is alſo aſſerted, 4 Inſt. 204. marg. Dav. 60. b., that counties palatine (to which courts of equity are thought incident, Hob. 63.) may be erected by the king without parliament. Chester, Durham, Lancaſter, are ſaid to be counties palatine by preſcription 4 Inſt. 204. However, the doctrine in the text is ſupported by the reſolution of many of the judges, amongſt whom was Sir E Coke, that the king cannot grant a commiſſion to determine any matter of equity, but it ought to be determined in the court of Chancery, which hath had juriſdiction in ſuch caſe immemorially, and had always ſuch allowance by the law; but ſuch commiſſioners, or new courts of equity, ſhall never have ſuch allowance, but have been adjudged to be againſt law. 12 Co. 113. See 1 Wooddeſ. 188.

(D) Of the Grant of Offices by Eccleſiaſtical Perſons.

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(*Here it will*) Notwithſtanding what is ſaid here and in ſeveral other caſes concerning the *neceſſity* of the office, yet that point is not at all material. For it hath been determined upon ſolemn hearing that an office and fee which exiſted before the firſt of Elizabeth are not within the reſtraint of that ſtatute, but that they may be granted as before the ſtatute; and that the utility or neceſſity of the office is not more material ſince, than it was before the ſtatute. Sir John Trelawney v. the Biſhop of Wincheſter, 1 Burr. 219

(E) Of the Ceremony requiſite to a complete Creation or Grant, and of the Oaths required by Statute.

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(*But it is ſaid,*) Some have thought, that ſtewards without deed cannot take ſurrenders out of court. Godb. 142. and 1 Ld. Raym. 159. But this hath been frequently denied, and indeed ſeems unſupported by any good reaſon. Cro. Jac. 526 Co. Rep. 83. Hargr. Co. Lit. 59. a. n. 6.

But a patent is neceſſary to the making of ſtewards of the king's manors. Co. Comp. Cop. 56. § 45.

But now by ſtat. 5 *G.* 1. *c.* 6. for quieting and eſtabliſhing corporations, it is enacted, "That all perſons in the actual poſſeſſion of any office that "were required by the above act to take the ſacrament within one year "next before their election into ſuch office ſhall be confirmed in their ſeve-"ral offices, and ſhall be indemnified and diſcharged from all *incapacities* "and penalties ariſing from ſuch omiſſion; and that none of their acts "ſhall be queſtioned by reaſon of ſuch omiſſion; nor ſhall any perſons who "ſhall be hereafter placed or elected in or to any of the offices aforeſaid, "be removed by the corporation, or otherwiſe proſecuted for or by reaſon of "ſuch omiſſion; nor ſhall any incapacity, diſability, forfeiture, or penalty, be "incurred by reaſon of the ſame, unleſs ſuch perſon be ſo removed, or ſuch "proſecution be commenced (*a*) within ſix months after his election."

(*a*) If neither of theſe happened within the time limited, the election becomes abſolute and unavoidable; for the Statute operates rather as a protection to the poſſeſſion, than as a bar to the remedy. 1 Bl. Rep. 229. 2 Burr. 1013. Cowp. 539.

However, by 1 *G.* 1. *ſtat.* 2. *c.* 13. amended by 2 *G.* 2. *c.* 31. & 9 *G.* 2. *c.* 26. all perſons who bear any office civil or military, &c. ſhall take the oaths of allegiance and ſupremacy (*b*), and the oath of abjuration. And all perſons who were before, ſhall ſtill continue, obliged to receive the ſacrament; and ſhall ſubſcribe the doctrine againſt tranſubſtantiation. And by 11 *G.* 1. *c.* 4. § 4. mayors, bailiffs, or other chief officers of corporations, elected purſuant to the directions of that ſtatute, ſhall take the oaths by law required at the time of their admiſſion into ſuch office, *before* ſuch officer as ſhall preſide at ſuch election.

(*b*) As recited in 6 G. 3 c. 53.

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(*By the* 25 *Car.* 2.) The acts which are annually paſſed to indemnify perſons in office who have omitted to qualify themſelves, have the effect of repealing this ſalutary ſtatute.

The deſign of the ſtatute of 13 *Car.* 2. was to exclude men who were not of the church of *England*, from all offices which concern the government: and is to be conſidered as prohibitory upon the electors *quoad* ſuch perſons.

A diſſenter

A diſſenter therefore being ineligible to ſuch office, cannot of courſe be fined for refuſing to accept it. Upon this ſimple point, however, there hath heretofore been ſome difference of opinion (*a*). And it became neceſſary to appeal to the court of ſovereign juriſdiction, in order to ſettle the law upon it. That was done in the caſe of *Harriſon* v. *Evans* (*b*), which caſe was as follows:—In 1748, the corporation of *London*, by a bye-law, impoſed a fine of ſix hundred pounds upon every perſon, who, being elected, ſhould refuſe to ſerve the office of ſheriff. The plaintiff, the Chamberlain of *London*, levied debt in the ſheriff's court, againſt the defendant for the penalty. The defendant pleaded the 13 *Car.* 2. averring, that he was a Proteſtant diſſenter within the toleration act 1 & 2 *W.* & *M.* *c.* 18. of ſcrupulous conſcience; and therefore had not received the ſacrament. The plaintiff replied the 5 *G.* 1. which confirms members of corporations in their reſpective offices, although they have not received the ſacrament according to the directions of 13 *Car.* 2. To this replication the defendant demurred, and judgment was given upon it in favour of the city. The defendant appealed to the court of Huſtings, where the judgment was affirmed. A ſpecial commiſſion was ſued out, directed to *Willes*, C. J., *Parker* C. B. and *Foſter*, *Bathurſt*, and *Wilmot*, J., by whom the judgments in the courts below were unanimouſly reverſed. The plaintiff brought a writ of error in parliament; and on the 4th of *February* 1767, Lord *Manſfield* with five other judges, againſt *Perrot* B., were of opinion, that upon the facts admitted by the pleadings in this cauſe, the defendant ſhould be allowed to object to the validity of his election to the office of ſheriff, in bar to the action, by reaſon that he had not taken the ſacrament within the time limited.

(*a*) Larwood's caſe, 1 Ld. Raym. 29. 4 Mod. 269. Guildford Town v. Clarke, 2 Vent. 247. Rex v. Groſvenor, 2 Str. 1103. 1 Wilſ. 18.

(*b*) 2 Burn's E. L. 8vo. edit. 185. 6 Br. P. C. 181.

(F) Of the Offence of Buying and Selling an Office, and what Offices are prohibited to be thus diſpoſed of.

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(*For which reaſons*) State Trials, 6 vol. 477.

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(*It hath been*) 1 Vern. 98. Nor to the purſer of a ſhip. 2 Vern. 308. Ca. temp. Talb. 140. But ſee 1 H. Bl. 326, where it is ſaid by Lord Loughborough, C. J. that this caſe in 2 Vern. is contrary to an evident principle of law. And clearly, if the Lords of the Admiralty were to take money for their warrant to appoint a perſon to be a purſer, it would be criminal in the corruptor and corrupted. Purdy v. Stacey, 5 Burr. 2698.

13. It hath been adjudged, that a truſt may be created of an office clearly within this ſtatute. But ſubſequent determinations (*a*) have made this doctrine exceedingly queſtionable, if not entirely over-ruled it.

Bellamy v. Burrow, Ca. temp. Talb. 87.

(*a*) Ferdyce v. Willis, 3 Br. Ch. Rep 579. Parſons v. Thompſon, 1 H. Bl. 322. Garforth v. Fearn. *Id.* 327. Theſe two laſt caſes have determined, that if an action for money had and received be brought upon the foot of an agreement, to allow the plaintiff a certain proportion of the profits of the office, in conſideration of his having procured, or been aiding to the defendant's appointment to it, the plaintiff cannot recover.

As the proviſions of this ſtatute do not extend to all caſes within the miſchief which it was intended to prevent, it has become neceſſary for courts of equity, in many caſes, to interpoſe; for though it be true, that penal laws are not to be extended as to penalties and puniſhments, yet, if there be a publick

publick miſchief, and a court of equity ſee private contracts made to elude laws enacted for the publick good, it ought to interpoſe, and that, upon the publick policy of the law, though the office be not within the ſtatute of *E.* 6. For it is a rule of equity, "that if a man ſells his intereſt, to "procure a perſon an office of truſt or ſervice under the government, it "is a contract of turpitude. It is acting againſt the conſtitution, by "which the government ought to be ſerved by fit and able perſons, re-"commended by the proper officers of the crown for their abilities, and "with purity."

Morris v. M'Cullock, Ambl. 432.

The defendant, who was a linen-draper, entered into a treaty with the plaintiff, who was a livery ſervant, to procure him a commiſſion in the marines for 200*l*, which the defendant effected by means of a lady, who was intimately connected with one of the lords of the Admiralty, and afterwards received the money. The plaintiff, after ſix months, being diſcovered to have worn a livery, was diſcharged, upon which he filed a bill to be repaid the ſum he had advanced to the defendant. Lord *Henley* decreed the money to be repaid with intereſt; for though commiſſions in the army may be ſold, yet that is with leave of the crown, and the perſon to ſucceed is examined by the Secretary at War, and approved as a proper perſon: that that was not the caſe here: but the defendant ſold his intereſt with the lady to procure a commiſſion. The caſe of *Ive* v. *Aſh*, he ſaid, was very different, the commiſſion was ſold by leave of the crown, the defendant ſurrendered, and it was the plaintiff's fault he did not take it.

Law v. Law, Ca. temp. Talb. 140. 3 P. Wms. 391. S. C.

The offices of collector and ſupervifor of the exciſe are clearly within the ſtatute; and though a bond given to a perſon to influence a commiſſioner to appoint one to either of thoſe offices, be not directly a ſale within the ſtatute, yet in effect it is ſo, and equity will therefore relieve againſt it.

Hanington v. Du. Chatel, 1 Br. Ch. Rep. 124.

The late Lord *Rochford*, being groom of the ſtool to his majeſty, and, in conſequence of that office, recommending pages of the preſence, &c., treated with the plaintiff's teſtator, to recommend him upon a vacancy, on condition that he ſhould grant two annuities, one of 100*l* to *St. Ferrol*, the defendant's teſtator, who had been Lord *Rochford*'s travelling tutor, and was then a bond creditor of his Lordſhip for 600*l*., and the other of 40*l*. to another perſon. An action being brought upon the annuity bonds by defendant's teſtator for the arrears of the annuity, the plaintiffs filed their bill for an injunction. The defendants had demurred, and the demurrer had been over-ruled, and upon the motion to continue the injunction upon the merits, the anſwer being put in; it was argued on the part of plaintiffs, that this bond was *pro turpi cauſâ*; that Lord *Rochford* having a confidence placed in him by the king, had abuſed that confidence, by ſelling his recommendation, and that upon the publick policy of the law, ſuch an agreement ought not to ſtand. On the other hand, it was argued, that it was allowed this was not an office within the ſtatute of *E.* 6. that it was merely an office reſpecting the king's private, not his publick character; and that if it was *turpis contractus*, that might have been pleaded at law. Lord *Thurlowe* expreſſed his doubts, whether it might not have been brought upon the record at law by a plea, and made a defence there to the action, but thought that not a ſufficient reaſon to prevent his interpoſition, the court of law never having determined, that it could be ſo brought there as a defence. He then, admitting that it was not within the ſtatute of *E.* 6., but treating it as a matter of publick policy of the law, and ſimilar to marriage brokage bonds, where, though the parties are private perſons, the practice

That the illegality of the conſideration can be pleaded to an action on a bond is denied by the court in Andrews v. Eaton. Fitzg. 73.; but ſee Collins v. Blantern, 2 Wilſ. 341.

practice is publickly detrimental, ordered the injunction to be continued till the hearing; and afterwards, upon the hearing, ordered it to be perpetual,

(G) What Remedies a Perſon having a Right to an Office muſt purſue, to be let into the Enjoyment of it, and how a Diſturbance is puniſhable.

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(*A man may*) But if the perquiſites of an office are mere gratuities, not known and accuſtomed fees, neither an aſſiſe, nor an action for money had and received, will lie to recover them. Boyter v. Dodſworth, 6 Term Rep, 681.

The head of a college hath not ſuch an eſtate in his office as will enti-tle him to maintain an aſſiſe for it; for he hath no ſole ſeiſin. *Per* Holt C. J. in Philips v. Bury, 2 Term Rep. 335

(H) Of the Nature of Offices as to their Duration and Continuance: And herein of their being grantable in Fee, for Life, Years, at Will and Reverſion.

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(*Therefore, where*) By ſtat. 37 H. 8. c. 1. § 3. the *cuſtos rotulorum* is authoriſed to appoint a fit and able perſon to hold the office of clerk of the peace, during the time that the ſaid *cuſtos rotulorum* ſhall occupy the ſaid office of *cuſtos*, ſo as the ſaid clerk of the peace demean himſelf juſtly and honeſtly. By ſtat 1 W. & M. c. the *cuſtos* is authoriſed to nominate a clerk of the peace, for ſo long a time only as ſuch clerk of the peace ſhall well demean himſelf in his ſaid office; and if he do not well demean himſelf in his office, the ſeſſions of the county, on application and proof made as the act requires, may remove him.

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(*It hath been*) And by ſtat. 2 G. 3. c. 23. the offices of the judges do not become vacant on the demiſe of the crown.

(K) Of the manner of executing them: And herein of Offices that are incompatible, and where an Office may be executed by two or more Perſons.

Page 737.

(*Upon a mandamus*) But this caſe, as is well obſerved by Buller, J. will not aſſiſt in the determination of the point in queſtion. For in a writ of error in a civil action, the queſtion, Whether the judges in the court below are properly judges or not? can never be decided; it is ſufficient, if they be judges *de facto*. 2 Term Rep. 87.

The corporation of *Haſtings* conſiſts of a mayor, twelve jurats, freemen, and a town-clerk, which latter is elected by the others, and the jurats ſit as judges in a court of record, and hold pleas of the crown; and any two of them with the mayor may hold a court, but all the jurats have a right to attend as judges without being ſummoned. It was holden, that the acceptance of the office of town-clerk, though an inferior office, vacated that of jurat, for that theſe two offices were incompatible, notwithſtanding Milward v. Thatcher, 2 Term Rep. 81.

ing there were ſeveral inſtances within the borough of their having been veſted in the ſame perſon.

(L) Of the Execution of an Office by Deputy: And herein of Superiors being anſwerable for their Deputies.

Midhurſt v. Waite, 3 Burr. 1259. 1 Bl. Rep. 350. S. C. The high conſtable appointed a deputy to billet ſoldiers under the mutiny act. This appointment was by parol only, and the deputy was not ſworn. But the court.—The high conſtable hath power by the act to billet ſoldiers; and he may appoint a deputy to this particular miniſterial act. This is a miniſterial, not a judicial, act; and a conſtable may appoint a deputy to do miniſterial acts.

Bryant's caſe, 4 Term Rep. 716, 5 Term Rep. 511. The offices of clerk of the papers, and clerk of the day-rules in the King's Bench Priſon, cannot be executed by deputy.

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(*But the high*) That a high conſtable may appoint a deputy by parol, ſee *ſupra* Midhurſt v. Waite, 2 Burr. 1259.

Woods Inſt. b. 1. c. 7. A conſtable ſhall anſwer for his deputy upon any miſcarriage, unleſs the deputy is allowed and ſworn; for then the deputy is conſtable.

(M) Of the Forfeiture of an Office.

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(*There are ſays*) 2 Ld. Raym. 1237. But the bare being abſent, without any particular circumſtance of aggravation, will not induce a forfeiture. Rex v. Corporation of Wells, 4 Burr. 199.

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(*An office*) On the removal of the clerk of the peace, the evidence need not be ſet out in the order. Rex. v. Lloyd, 2 Str. 996.

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OUTLAWRY.

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(*Alſo it is ſaid*) But this is a vulgar error, for though an outlaw was ſaid *caput gerere lupinum*; yet it was never permitted any one who met him to kill him with impunity, but only in caſe he would not ſurrender himſelf peaceably; for if he made no attempt to fly, his death would be puniſhed as that of any other man: though it ſeems, that in the counties of Hereford and Glouceſter in the neighbourhood of the Marches of Wales, outlaws were treated as having *capita lupina*. Bracton, 128. b.

(A) In what Caſes Proceſs of Outlawry lies.

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(*It ſeems*) Whether the common law gives proceſs of outlawry againſt crimes, being merely *conſtructive* breaches of the peace, was queſtioned in the caſe of the King v. Wilkes on a libel. But Lord Mansfield, in delivering the judgment of the court of King's Bench, ſpoke at large to prove that ſuch proceſs lies againſt crimes *univerſally*. 4 Burr. 2537. However, the reaſoning on which this opinion is grounded, ſtands oppoſed by a former judgment of the Common Pleas on a prior

prior caſe relative to the ſame offender. 2 Wilſ. 151. But it was adopted by both Houſes of Parliament, when, in Wilkes's caſe, they reſolved, that privilege of parliament doth not extend to *libels*. See Ann. Reg. 1764.

(*But in account*) This opinion, that the writ of *capias* did not lie at common law for debt and damages, is contradicted by the hiſtory of our legal proceſs. For in the reign of Henry 3 the proceſs in all perſonal actions was as follows: If the party did not appear upon the ſummons, he was attached by pledges; and afterwards by better pledges: if he ſtill did not appear, the ſheriff was commanded *quod habeat corpus*: if the ſheriff returned *non inventus*, there iſſued a *diſtringas, per terras et catalla*; after that, another *diſtringas*, commanding him alſo to take the body; after that, another *diſtringas, ne manum apponat*; and laſtly, a writ to take the lands and chattels into the kings hands. Thus, there might be one ſummons, two attachments, a *capias* (as it was afterwards called), and four diſtreſſes. To this, it is added by Bracton, that ſhould the defendant not be found, nor have any lands or goods, whether the action was for money, or for a treſpaſs, he was to be demanded from county to county, and outlawed: and perſons ſo outlawed were condemned to perpetual impriſonment, or to abjure the realm. Bract. 440-1. Reeves' Hiſt. of the Law, vol. 1. 483-4. vol. 2. 439

(C) Againſt whom Proceſs of Outlawry may be awarded: And herein.

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(*If two*) In ſuch caſe the plaintiff muſt diſcontinue, and take out an original, on which he will proceed to outlawry againſt the one, after which he may go on in the action againſt the other. Edwards v. Carter, 1 Str. 473. Symonds v. Parminter, 2 Str, 1269, 1 Wilſ. 78. 1 Bl. Rep. 20. In an action upon a contract. if the defendant plead, that the promiſe was made by another jointly with him, the plaintiff cannot reply that ſuch other perſon is out of the kingdom, and that it is not poſſible to ſummon or attach him, but muſt proceed to outlawry. Sheppard v. Baillie, 6 Term Rep. 327.

(D) What Forfeitures and Diſabilities an Outlawry ſubjects the Parties to: And herein,

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(*Alſo the king*) If the outlaw die before his term is ſold by a *venditioni exponas*, the court of Exchequer will let the widow in to plead this matter againſt a purchaſer. Watts v. Robinſon, Bunb. 220.

(*But outlawry*) But of copyhold lands belonging to the outlaw, the king is not entitled even to the profits. by reaſon of the prejudice which would accrue thereby to the lord, who hath not committed any offence, and therefore ſhall not loſe his cuſtoms or ſervices. Rex v. Budd, Parker, 190. Seliard v. Everard, Owen, 37.

Upon a ſeizure of goods of an outlaw in a civil ſuit, the landlord is entitled, under the ſtatute 8 *Ann. c.* 14., to be ſatisfied one year's rent out of the money in the ſheriff's hands. Graves v. d'Acaſtro, Bunb. 194.

As to the preference upon outlawries, the following differences were ſtated by *Parker*, C. B., as ſettled in *Eaſter* term, 11 *W.* 3. 1699. Parker, 90.
Firſt, Where there are two outlawries at different times, the firſt inquiſition ſhall prevail: this was *Bradnell*'s caſe. *Mich.* 36 *Car.* 2. Secondly, Where there are two outlawries on one day, the firſt inquiſition ſhall be preferred: this was *Pain* and *Dew*'s caſe, *Eaſt.* 21 *Car.* 2. Thirdly, Where there are two inquiſitions on one day, the firſt outlawry ſhall be preferred. And, fourthly, Where there are two outlawries on one day, and both inquiſitions on one day, there, the firſt leaſe ſhall be preferred.

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(*When the*) 1 P. Wms. 650. S. C. cited in argument. 2 P. Wms. 269. S. P. And the court will not subject the property to the debt of the party, unless he obtain a grant of it under the Exchequer seal, and make the Attorney-General a party. Balch v. Wastall, 1 P. Wms. 445. Rex v. Fowler, Bund. 38.——v. Broomley, 2 P. Wms. 269.

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(*The king*) Although they may not be claimed immediately by prescription, yet may they be had obliquely, or by a mean by prescription; for a county palatine may be claimed by prescription, and by reason thereof to have *bona et catalla prediturum, felonum*, &c. Co Lit. 114. b. Durham is a county palatine by prescription. 4 Inst, 216.

(*If a capias*) Throgmorton v. Church, 1 P. Wms. 693. S. P. Leighton v. Walwin, 1 Roll. Abr. 810. 895. Cro. Eliz. 706. S. C. by the name of Leighton v. Carnous, 5 Co. 88. S. C. Moor, 506. S. C. Yelv. 20. S. C. cited. 5 Mod. 201. S. C. cited.

(*So, if a capias*) Cooke v. Champness, Pitzg. 265. S. P. Stanton v. James, 1 Lutw. 110. S. P.

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(*It was found*) 2 Salk. 469 Bunb. 103.

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(*It hath also*) It is stated in Lutw. as having been so said in 11 H. 7. pl. 27. But no such dictum is to be met with in the place referred to. The decision in Jon. 239. was, that the defendant may plead outlawry in bar to a *scire facias* by the plaintiff after imparlance.

(*So where a relator*) The relator in this case seems to have sustained the character of plaintiff as well as relator; for outlawry cannot be alleged in disability of a *mere* relator. Mitf. Eq. pl. 186.

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(*Outlawry may*) But plea of an outlawry with the common averment of the identity of the person need not be on oath. *Id.* 198.

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(*It is held*) For this point see Hawk. P. C. *ubi supra*, 4 Term Rep. 543.

(E) Of the Regularity of Proceeding on an Outlawry, and (*c*) for what Errors it may be reversed: And herein,

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1. Where, for want of such Process as is required by Law, the Outlawry may be reversed.

Rex v. Yandell, 5 Term Rep. 521. This statute doth not apply to a court of oyer and terminer, and gaol delivery, but is confined to the sessions of the justices of the peace.

2. Where, for want of Form in such Processes, the Outlawry may be reversed.

Rex v. Perry, 6 Term Rep. 573. It need not indeed be stated in express terms on a record of a judgment of outlawry, that a writ of *capias* issued; for it is sufficient, if it appear "that the sheriff was commanded to *take* the defendant."

Ibid. Neither is it necessary in stating every writ to repeat the day and year when each was issued: it will suffice, if it appear by reference to the preceding parts of the record; as if, after stating that the *capias* was returned on such a day, it proceed, *Whereupon* the exigent was awarded; without *upon* referring to the day when the *capias* was returned.

Rex v. Yandell, 5 Term Rep. 521. It need not appear on a record of outlawry, that the *capias* and exigent were sealed by the justices of oyer and terminer, &c.

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(*If there be*) It is not neceſſary, that the names of the coroners ſhould be ſubſcribed to the judgment of the outlawry; it is ſufficient if it appear on the record, that the judgment of outlawry was given by them. Rex v. Yandell, 5 Term Rep. 541.

2 *To what Place the Proceſs is to iſſue; and herein of the* Quinto exactus, *and Proclamation on an Outlawry.*

By ſtatute 4 & 5 *W. & M. c.* 22. § 4. made perpetual by 7 & 8 *W.* 3. *c.* 36. § 4. it is enacted, "That upon the iſſuing of any exigent out of "any of their majeſties' courts, againſt any perſon or perſons for any "criminal matter, before judgment or conviction, there ſhall iſſue out a "writ of proclamation, bearing the ſame teſt and return, to the ſheriff or "ſheriffs of the county, city, or town corporate, where the perſon or per-"ſons in the record of the ſaid proceedings is or are mentioned to be or "inhabit, according to the form of the ſtatute made in the one-and-thir-"tieth year of the reign of the late Queen *Elizabeth*, which writ of pro-"clamation ſhall be delivered to the ſaid ſheriff or ſheriffs three months be-"fore the return of the ſame."

Note: This ſtatute extends the proviſions of the 31 El. only to criminal caſes *before* judgment: in thoſe caſes *after* judgment, no proclamations are neceſſary.

If upon the record of the outlawry, in a criminal caſe *before* judgment, it appear from the writ of proclamation and return, that the party was outlawed after he had a day given to appear in court, and before the arrival of that day, this will be error. Thus, *George Barrington* was outlawed on the 21ſt of *February*, and the writ of proclamation required the ſheriff to proclaim him, ſo that he ſhould be before the juſtices of the peace at the general ſeſſions of the peace to be holden for the county aforeſaid next after the firſt day of *February* next enſuing; and the return by the ſheriffs to that writ was, that he had proclaimed the ſaid *George Barrington* that he ſhould be before his majeſty's juſtices of the general ſeſſions of the peace laſt within mentioned. The next ſeſſions of the peace were holden on the 25th of *February*; ſo that by the terms of the writ, and the proclamation too, the priſoner had a day given him to appear till the 25th of *February*; and if he had appeared that day, he would have complied with the requiſition of the writ and have ſaved his default. But he was outlawed before that day came, *viz.* on the 21ſt of *February*; and upon that ground the court held the outlawry bad. Barrington v. Regem, 2 Term Rep. 499.

But, where it appeared by the writ of proclamation and the return to it, that the priſoners were required to render themſelves to the ſheriffs, ſo that he might have their bodies before the juſtices, &c. at the return of the writ; it was adjudged to be good. Yandell v. Regem, 5 Term Rep. 521.

If it appear upon the record, that the writ of proclamation was delivered to the ſheriff three months before the return of it, it is ſufficient, though it be not expreſsly ſo alleged. *Ibid.*

The ſheriff need not allege in his return to the writ of proclamation, that "the perſons proclaimed did not appear and render themſelves;" though he muſt in his return to the exigent. *Ibid.*

A writ of proclamation requiring the ſheriff to proclaim the parties *in open court in the ſheriff's county* (not ſaying *county* court,) is good. *Ibid.*

3. *What ſhall be ſaid a good Execution and Return.*

If one exigent be awarded againſt the principal and acceſſary together, it is error only as to the acceſſary. Rex v. Yandell, 5 Term Rep. 521

So

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(*So, an outlawry*) From the authorities referred to in this and the two preceding paragraphs, and ſeveral others, which the court of King's Bench was furniſhed with, it was holden in Wilkes's caſe, that a technical form of words was requiſite in the deſcription of the county-court, at which an outlaw is enacted; and therefore where, in that caſe, the ſheriff ſtated that "at my county-"court," without adding "of Middleſex," and "*held at the houſe known by the ſign of the Three* "*Tuns in Brook-ſtreet, near Holborn, in the county of Middleſex*," without adding the words, "*for* "*the county of Middleſex*," after the word "*held*," the outlawry was reverſed. Rex v. Wilkes. 4 Burr. 2527.——In a later caſe, Buller, J. ſays, "I do not know, that it has ever been determin-"ed, that in any return made by a ſheriff, any technical form of words is neceſſary: certain re-"quiſites muſt be obſerved; but if obſerved in ſubſtance, and the return be not in equivocal "terms, a great deal of argument is neceſſary to convince me, that ſuch a return is bad." Barrington v. Regem, 2 Term Rep, 502. The inclination of the opinion of the court in this caſe of Barrington ſeems to have been, that a return to a *capias cum proclamatione*, that the priſoner was exacted, "*at my county-court, holden at the houſe known by the name of the Sheriff's Office in Took's Court* "*Curſitor-ſtreet, in and for the county of Middleſex*," was well enough; though objected, that the name of the county was not added after, "*my county-court*," and that the county-court was not ſtated to have been holden in Took's Court, Curſitor-ſtreet, *and* in and for the county of Middleſex. However, the *clearneſs* of the other objection made to the return in that caſe, relieved the court from the neceſſity of giving an opinion upon this.——In Barrington's caſe let it be obſerved, the outlawry was before judgment; in Wilkes's caſe, it was *after* conviction.

(*The Sheriff*) Rex. v. Almon, 5 Term Rep. 202. S. P.

(F) Of the manner of reverſing an Outlawry; And herein of the Difference between Errors in Fact and in Law.

Biſcoe v. Kennedy, 2 Wilſ. 127.

In debt upon bond entered into by the wife *dum ſola*, the huſband was abroad and outlawed; and the wife, though ſhe appeared publickly, *waived*. On motion to ſet aſide the outlawry againſt the wife, and to reſtore her the goods taken on a ſpecial *capias utlagatum*, on affidavit, that they were her ſeparate goods, the court held, that the goods muſt be taken to be her huſband's goods in point of law; and that, if ſhe had any equitable right to them, ſhe muſt reſort to a court of equity: but, as ſhe appeared publickly, ſhe had been wrongfully waived; and therefore the rule was made abſolute for ſetting aſide the outlawry as to the wife, but diſcharged as to reſtoring the goods.

Oſborne v. Carter, Barnes, 319.

The defendant was taken on a *capias utlagatum*, on a *Sunday*, and therefore he moved to be diſcharged, the taking being contrary to the 29 *Car.* 2. But, notwithſtanding the court held the taking bad, they refuſed to grant an attachment, and put the defendant to take the remedy given by the ſtatute.

White v. Dunſter, Barnes, 321.

The defendant was waived ſpecially on meſne proceſs, as a ſingle woman, by the name of *Dunſter*; and after the exigent, and before the outlawry, ſhe married one *Priſeley*; and on being taken by a *capias utlagatum* after the outlawry, on motion, a rule was obtained to ſhew cauſe, why the outlawry ſhould not be reverſed at her huſband's expence, on his entering a common appearance for himſelf and his wife. But the rule was diſcharged, the court refuſing to interpoſe in a ſummary way, as the marriage was after the exigent.

(G) Wha

(G) What the Party muſt do in order to entitle him to a Reverſal; And herein,

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(*And it is further*) That is, to put in bail to a new action, plead within the limited time, put the plaintiff in the ſame condition, and ſuch like matters. 4 Burr. 2540.

The defendant was outlawed in a perſonal action, without any affidavit made of the plaintiff's demand; and having brought error, he aſſigned his being beyond ſea at the time of the outlawry, for which the court made no difficulty to reverſe it. But then the queſtion was, upon what terms they ſhould do it, the plaintiff inſiſting upon ſpecial bail, and having now made a proper affidavit; and the defendant inſiſting to file common bail only. The court, upon conſidering the words of 4 & 5 *W. & M. c.* 18. § 3. which empowers the outlaw to appear by attorney, (as he did here,) and ſays, "It ſhall be reverſed without bail in all caſes, but where ſpecial bail ſhall "be ordered by the court," declared, they were of opinion, they had a diſcretionary power to require it or not; and that the want of an affidavit before, was no objection; becauſe that is only neceſſary to warrant an arreſt; and here was one in time for the new action that muſt be brought. And although the 31 *Eliz. c.* 3. § 3. is the only act that expreſsly requires bail; it is not to be inferred from thence, that in other caſes it is not to be inſiſted upon; for that act makes a new error, and the bail upon it is abſolutely to pay the condemnation money. And it is now ſettled, that on reverſing an outlawry for any other error in law, beſides the want of proclamations, the bail is *common* or *ſpecial*, in like manner as upon the arreſt. Serocold v. Hamſon, 2 Str. 1178, 1 Wilſ. 3. S. C. Tidd's Pr. 73.

Where ſpecial bail is required, it need not be put in before the allowance of the writ of error; but it is well enough, if put in at any time before the reverſal. 1 Ld. Raym 605 2 Str. 951. 2 Barnardiſt 298. S. C.

The bail may render the defendant, and are not, at all events, anſwerable for the debt. Impey, 456.

Defendant being arreſted on a *capias utlagatum*, the ſheriff took an attorney's engagement, under his hand, to appear for the defendant, and reverſe the outlawry, without taking ſecurity by bond in double the ſum for which bail was required, purſuant to the above ſtatute of 4 & 5 *W. & M.* On ſhewing cauſe why an attachment ſhould not iſſue againſt the ſheriff for diſcharging the defendant out of his cuſtody, it was urged, that he neither did, nor could know, that it was a caſe requiring bail, as the *capias utlagatum* was not marked for bail; and that the 12 *G.* 1. *c.* 29. required an affidavit; and that the ſum, for which bail is to be taken, is to be marked on the proceſs, &c. For the plaintiff, it was urged, that proceſs of outlawry is not within the ſtatute of 12 *G* 1.; that this was by *ſpecial original*, and the cauſe of action is expreſſed in the original proceſs, in which it appears the plaintiff was entitled to bail. The court were clear, that this was not a caſe within the 12 *G.* 1., and thought the ſheriff had acted improperly; but, as there was an affidavit of the under-ſheriff, that he had acted to the beſt of his underſtanding without any ill intention, they enlarged the rule, in order to give the ſheriff an opportunity to put in bail. After which the ſheriff undertook to pay the debt and coſts. Craciaft v. Gledowe, 3 Burr. 1482.

The ſtatute of 4 & 5 *W. & M.* hath been conſtrued not to extend to *criminal* caſes; at leaſt, not to miſdemeanours after conviction. And even in Rex v. Wilkes, 4 Burr. 2539-40.

in *civil* caſes, the defendant cannot be bailed, where he was not bailable on the proceſs to outlawry; for it was the deſign of the ſtatute to put him in the ſame condition, as if he had not been outlawed: and therefore, he is not bailable, when taken upon an outlawry *after* judgment.

Symmons v. Ling, 2 Salk. 496. Two perſons were outlawed in a joint action againſt them, and one moved, that on filing common bail, he might have liberty to reverſe the outlawry. *Sed per cur.*—The writ of error to reverſe the outlawry muſt be brought in the names of both the parties that are outlawed; and, if one only appears, the other may be ſummoned and ſevered, and then the outlawry may be reverſed for the benefit of the party appearing.

3. Of ſuing out a *Scire Facias.*

Trye, 131. 154. Where the defendant has obtained a charter of pardon, he muſt ſue out a *ſcire facias*, to give notice thereof to the plaintiff, in order that he may further proſecute his action, if he think proper.

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Papiſts and Popiſh Recuſants.

(A) The Diſabilities, Reſtraints, Forfeitures, and Inconveniencies which Popiſh Recuſants are ſubject to; And herein,

Page 785 4. Of the Inconveniencies they are ſubject to: And herein,

1. *That their Houſes may be ſearched for Reliques, whether they be Men or Women.*

(*To this purpoſe*) Repealed by 31 G. 3. c. 32.

2. *If they be Women, and married, that they may be committed.*

(*To this purpoſe*) Repealed by ſtat. 31. G 3. c. 32§ 3. in favour of perſons taking the oath therein required.

(B) Of the Offence of not making a Declaration againſt Popery, and the Reſtraints it ſubjects the Parties to: And herein,

2. Holding a Place at Court.

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(*By the* 30 *Car* 2) The fifth ſection ſubjects peers of Great Britain and Ireland, and members of the Houſe of Commons, not conforming as mentioned in the text, and all recuſants convict who ſhall come unadviſedly into or remain in the king or queen's preſence, to the like penalties. But this clauſe is repealed as to peers of Great Britain and Ireland by ſtat. 31 G. 3. c. 32. § 2. who ſhall take the oaths therein appointed.

3. From

3. From living within ten Miles of *London*.

(*By the* 1 *W & M.*) Repealed by 31 G. 3. c. 32. § 19 as to perſons taking the oaths therein mentioned.

(C) Of the Offence in Promoting or Profeſſing the Popiſh Religion: And herein,

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(*By the* 23 *Eliz.*) Repealed by 31 G. 3. c. 32. § 4. as to perſons taking the oaths therein appointed.

(*Alſo it is*) Repealed by 18 G. 3. c. 60. as to popiſh biſhops, &c. taking the oath therein appointed before they ſhall have been apprehended, or any proſecution commenced againſt them.

4. Of keeping School.

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(*By* 11 & 12 *W.* 3.) Repealed by 31 G. 3. c. 32 § 13. as to perſons taking the oaths and ſubſcribing the declaration therein appointed. Roman Catholicks, however, are reſtrained from holding the maſterſhip of any college or ſchool of royal foundation, or of any endowed college or ſchool, and from keeping a ſchool in either of the univerſities: neither is any catholick ſchoolmaſter to educate in his ſchool the child of any proteſtant father; nor is any ſchool-maſter or miſtreſs to keep a ſchool until his or her name ſhall have been regiſtered at the quarter or general ſeſſions of the peace for the county, diviſion, or place wherein ſuch ſchool ſhall be ſituated, by the clerk of the peace. § 14, 15, 16.

6. Of the Diſability of thoſe profeſſing the Popiſh Religion to preſent to a Church. *

* This diſability from preſenting to advowſons is not taken away by any of the acts which have been paſſed in favour of the Catholicks: and it is complained of as a hardſhip peculiar to them, all other non-conformiſts, even Jews, having the full enjoyment of the right of preſentation. See Mr. Butler's note on Co. Lit. 391.—It is indeed remarkable, that a proviſion ſo eſſential to the ſecurity of the eſtabliſhment, and to the integrity of the doctrines it maintains, ſhould be confined only to one deſcription of non-conformiſts. To leave the right of preſentation in the hand of men who are inimical to our church, is, in truth, to create an intereſt in the church againſt the church. It has the pernicious tendency too of ſetting the private intereſts of the individual in oppoſition to the ſuperior intereſts of the church; and of tempting the clergy to temporize with the errors of thoſe to whom they look up for preferment. For is it probable, that a bold and honeſt zeal for the doctrines and diſcipline of our eſtabliſhment will recommend to a patron, who diſſents from the one, or diſapproves of the other? In the preſence of ſuch a perſon, we muſt expect either a cold friend, or a ſecret enemy to our church: one, who can be ſilent, where he ought to object; paſſive, when he ought to reſiſt; or, one who can ſubſcribe to doctrines he deems erroneous, and can pledge himſelf to the maintenance of a ſyſtem it is his wiſh to ſubvert. By this means, the effect of thoſe proviſions which have been eſtabliſhed for ſecuring an orthodox clergy, and which, it is urged, render it unneceſſary to lay diſſenters under any reſtriction in this reſpect, will in a great meaſure be done away: it is to little purpoſe to inſiſt upon a profeſſion of conformity, if we allow a temptation to ſchiſm; to exact a vow of chaſtity, if we licenſe ſeduction.

So, it hath been reſolved upon the ſame ſtatute, that it doth not make the whole truſt void, but only the turn upon an avoidance, ſo that if the party conforms before any avoidance happens, nothing can veſt in the univerſities. Cottington v. Fletcher, 2 Atk. 155.

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(*By the* 11 & 12 *W.* 3.) Repealed by 18 G. 3. c. 60. as to all papiſts or perſons profeſſing the popiſh religion, claiming under titles not theretofore litigated, who within ſix months after the act paſſed, or their coming of age, ſhould take the oath thereby preſcribed.—Upon this act a caſe was decided in Chancery, on the 18th December 1783, under the name of Bunting v. Williamſon. In that caſe, a bill had been filed, claiming an eſtate given to a perſon profeſſing the popiſh religion, by will alleging, the incapacity occaſioned by the act of 11 & 12 W. 3. The teſtator died many years

years before, and after his death, a ſuit had been inſtituted by another perſon, who claimed as his heir at law, and that ſuit was depending at the time when this ſtatute of 18 G. 3. was paſſed; but was afterwards diſmiſſed for want of proſecution. The plaintiff filed his bill ſome time after the act, claiming in right of his wife, as heir at law. The defendants pleaded their title under the teſtator's will; and that defendant, who was beneficially intereſted, having or claiming the eſtate under that will, had taken the oath preſcribed by the act, and concluded with an averment, that the title had not been before litigated by the plaintiff, or any one under whom he claimed. The plaintiffs, on argument of the plea, contended, that the words *not hitherto litigated*, extended to the caſe then before the court, becauſe the title had been litigated, and was in litigation at the time the act paſſed. But the Lords Commiſſioners, Aſhhurſt and Hotham, were clearly of opinion, that the plaintiff not having before litigated the title, nor claiming under any perſon, who had litigated it, the caſe of the defendants was within the benefit of the act, notwithſtanding the prior litigation: and the plea was allowed. Co. Lit. laſt edit. 391. a. note 2.—Note, The oath preſcribed by the 18 G. 3. c. 6., and that preſcribed by the 31 G. 3. c. 32, are different. As the laſt act was originally framed, and as it ſtood, when, having paſt the Commons, it was brought into the Houſe of Lords, the firſt clauſe in it directed, that the oath contained in the act of the 18th year of the reign of his preſent Majeſty ſhould be taken no longer; but that the oath appointed by the bill ſhould, in future, be adminiſtered in its ſtead, and ſhould give the ſame benefits and advantages, and ſhould operate to the ſame effects and purpoſes, as the oath contained in the 18th of his preſent Majeſty. This clauſe was altered in the Houſe of Lords to the form in which it now ſtands. It does not expreſs, that the oath contained in it ſhall entitle the perſons taking it to the benefits of the act of the 18th of his preſent Majeſty: it only expreſſes, that *it ſhall be lawful* for catholicks to take the oath of the 31ſt of his preſent Majeſty at the places and times, and in manner therein mentioned. Thus, it is very uncertain, whether perſons taking only the oath preſcribed by the 31ſt of his preſent Majeſty will be entitled to the benefit of the act of the 18th of his preſent Majeſty. It ſeems therefore adviſable for every Roman catholick, who wiſhes to be ſecure in the enjoyment of his landed property, to take both the declaration and oath preſcribed by the act of the 31ſt, and the oath preſcribed by the 18th of his preſent Majeſty. *Ibid.*

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(*And it is further*) Repealed abſolutely by 31 G. 3. c 32. § 21.

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(*John Roper Eſq.*) *A fortiori* then it does not prevent a papiſt, who is a creditor, from receiving his debt out of money ariſing from the ſale of an eſtate by the appointment of a will. Foone v. Blount, Cowp. Rep. 464.

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(*Upon the marriage*) So, in Harriſon v. Southcote, the ſame plea was allowed to a bill brought againſt a purchaſer to diſcover, whether the perſon, under whom he derived title, were a papiſt. 1 Atk. 528, 2 Vez. 389. 8. C.

All the ſtatutes of recuſancy are now repealed by the 31 *G.* 3. *c.* 32. in favour of perſons taking the oath thereby required. Nor is any catholic to be ſummoned to take the oath of ſupremacy preſcribed by 1 *W. & M.* § 1. *c.* 8. and 1 *G.* 1. § 2. *c.* 13. or the declaration againſt tranſubſtantiation required by 25 *Car.* 2. The act diſpenſeth perſons, acting as a counſellour at law, barriſter, attorney, clerk, or notary, from taking the oaths of ſupremacy, or declaration againſt tranſubſtantiation. It alſo tolerates under due regulations the publick exerciſe of the popiſh religion, provides againſt diſturbing the congregation, and miſuſing the officiating miniſter, and exempts the miniſters from ſerving upon juries, and from ward and parochial offices. The regulations, under which the publick exerciſe of the religion is tolerated, are, that no congregation for religious worſhip ſhall be had in any place, with the doors locked, barred, or bolted, during any time of ſuch meeting together; and that no congregation or aſſembly for religious worſhip ſhall be permitted, until the place of ſuch meeting ſhall be recorded at the ſeſſions.

As to the double land-tax, that being impoſed by the annual land-tax act, a repeal of it could not be effected by any proſpective act. It is repealed by omitting from the ſubſequent annual land-tax acts, the clauſe impoſing it.

PARDON.

PARDON.

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(B) In what Caſes, and for what Offences it may be granted.

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(*But where*) By 7 & 8 W. 3. c. 38. ſuch licence may be granted by the king alone. Hence, it hath been holden, that an act of grace doth not diſcharge the forfeiture of twenty-five pounds to the city of London, for acting as a broker without licence. Ludlam v. Lopez, 1 Str. 529. Neither will it diſcharge penalties given by a popular ſtatute between the informer and the poor. Howel v. James, 2 Str. 1272.

But after the impeachment is ſolemnly heard and determined, it is not underſtood, that the king's royal grace is farther reſtrained or abridged; for after the impeachment and attainder of the ſix rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's pardon. 4 Bl. Com. 392.

(C) Where a Pardon is grantable of common Right.

It is enacted by 8 *Geo.* 1, *c.* 18, § 7. "That if any runner of foreign "goods ſhall within two months after his offence, and before his convic- "tion, diſcover two or more of his accomplices therein to the commiſſion- "ers of the cuſtoms or exciſe in *England* or *Scotland*, ſo as they or two of "them at leaſt be convicted of ſuch offence (as deſcribed in the act), the "offender or offenders ſo diſcovering ſhall receive the ſum of 40*l.* for eve- "ry ſuch offender ſo diſcovered and convicted, ſo as the value of the goods "recovered by ſuch diſcovery ſhall exceed 50*l.*; and ſuch perſon ſo diſ- "covering ſhall be clearly acquitted and diſcharged of ſuch his or her of- "fence." And the like is enacted by 9 *Geo.* 2. *c.* 35,

Perſons to whom the king has, by ſpecial proclamation in the *Gazette*, or otherwiſe, promiſed a pardon, are alſo entitled to it of legal right. Cowp. 333.

(G) In what Manner a pardon is to be taken Advantage of: And herein,

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(*Where a priſoner*) The mode of taking advantage of a pardon upon the circuits and at the Old Bailey is, to procure the King's ſign manual or privy ſeal, ſignifying his Majeſty's intention to afford a pardon to the priſoner either abſolutely or conditionally as the caſe may be, and directing the juſtices of the gaol delivery to bail him, on his entering into a recognizance to appear and plead the next general pardon that ſhall come out. This mandate the juſtices obey; taking ſecurity, if the pardon is conditional, for the performance of the ſtipulations on which it is granted, and afterwards iſſuing their warrant to the gaoler for his diſcharge. 1 Bl. Rep. 497. 2 Bl. Rep. 777.

(H) The

(H) The Effects and Conſequences of a Pardon, and to what the Party ſhall be reſtored.

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(*If a man*) But now the act takes effect only from the day it receives the royal aſſent, unleſs another period of commencement be provided by the act. St. 33 G. 3. c. 13.

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PAUPER.

(A) Of the Right to ſue *in formâ Pauperis*, and the Manner of Admittance.

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(*Before a perſon*) The ſame is neceſſary to entitle proſecutors to proſecute *in forma pauperis*. 3 Burr. 1308. This affidavit muſt be made by the party himſelf, not by a third perſon. Wilkinſon v. Belſher. 2 Br. Ch. Rep. 272.

Gibſon v. M'Carty, Ca. temp. Hardw. 311. — The admiſſion in one court is not binding on the officers of another court; and therefore if an iſſue out of Chancery where the plaintiff had been admitted in *formâ pauperis*, comes to be tried in *K. B.*, he muſt be admitted there alſo.

Say, Coſts, 90. 3 Wilſ. 24. Andr. 306. — The admiſſion to ſue *in formâ pauperis* may be either at the commencement of the ſuit, or afterwards *pendente lite*.

Codron v. Hayman, 5 Term Rep. 509. — A perſon ſuing in *formâ pauperis* is not entitled to the iſſue-money.

(B) Whether a Defendant may be allowed to defend, as well as a Defendant to ſue *in formâ Pauperis*.

Rex v. Pearſon, 2 Burr. 1039. — A defendant upon an attachment for a contempt will not be admitted to defend *in formâ pauperis*.

Rex v. Morgan, 2 Str. 1214. — A perſon convicted of perjury, and outlawed for forgery, was admitted, no cauſe being ſhewn to the contrary, to plead the king's pardon *in formâ pauperis*.

(D) In what Caſes to be diſpaupered, and to pay Coſts.

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(*But, notwithſtanding*) In Solomon v. Agnel, Forteſc. 320. it was holden, that a pauper, though diſpaupered ſhould not pay any coſts; and if taken in execution for coſts, he ſhould be diſcharged on motion.

A. brought

(*A. brought a bill*) Unleſs the pauper's conduct appears to have been vexatious, the court will not ſtay the proceedings in a ſecond action, until the coſts are paid of a nonſuit in a prior one for the ſame cauſe. Winter v. Slow, 2 Str. 878. Brittain v. Grenville, *Id*, 1121. 3 Wilſ 24., but where the coſts of a former nonſuit in treſpaſs were not paid, the court, though no circumſtances of vexation were ſtated, ſtaid the proceedings, notwithſtanding the plaintiff was a priſoner at the time of bringing the ſecond action, and ſued *in formâ pauperis*. Weſton v. Withers, 2 Term Rep. 511.

A perſon ſuing in equity *in formâ pauperis* ſhall not amend his bill by leaving out ſome of the defendants, Wilkinſon v. Belſher, 2 Br. Ch. Rep. 272., or diſmiſs it as againſt ſome of them without payment of coſts, Pearſon v. Belſher, 3 Br. Ch Rep. 87.; nor it ſeems, will a party be protected by an order to ſue *in formâ pauperis* from the coſts of proceedings previous to the order. Moſel. 103.

PERJURY.

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IN an indictment for perjury (at common law) in an affidavit, it is not neceſſary to allege that the affidavit was uſed: neither is it neceſſary that it ſhould appear in the indictment, that the affidavit was filed on record. Rex v. Croſsley, B. R. Tr. 37 G. 3.

(C) How charged and aſſigned.

(A) What it is by the Common Law, and how reſtrained and puniſhed.

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(*7thly, The thing*) It is not neceſſary that it appear to what degree the point in which the man is perjured was material to the iſſue; for if it is but circumſtantially material, it will be ſufficient. 1 Ld. Raym. 258. Still leſs is it neceſſary that the evidence be material for the plaintiff to recover upon; for an evidence may be very material, and yet it may not be full enough to prove directly the point in queſtion. 2 Ld. Raym. 889.

(B) How reſtrained and puniſhed by Statute.

(*By the 5 Eliz.*) The judgment for the pillory need not ſpecify the time when it is to be executed. Rex v. Atkinſon, Dom. Proc. July 1, 1785.

By 12 *G.* 1. *c.* 29. § 4. " If any perſon who ſhall be convicted of wilful " and corrupt perjury, or ſubornation of perjury, ſhall act or practiſe as " an attorney or ſolicitor, or agent in any ſuit or action, in any court of " law or equity in *England*, the judge or judges of the court where ſuch " ſuit or action ſhall be brought, ſhall upon complaint or information there- " of, examine the matter in a ſummary way in open court, and if it ſhall " appear, to the ſatisfaction of ſuch judge or judges, that the party hath " offended contrary to this act, ſuch judge or judges ſhall cauſe ſuch offen- " der to be tranſported for ſeven years."

By 8 *G.* 1. c. 6. " If any perſon, making ſuch affirmation or declara- " tion as is appointed by this act, ſhall be lawfully convicted of wilful, " falſe, and corrupt affirming and declaring any matter or thing, which, " if ſworn in the common or uſual form, would have amounted to wilful

" and

" and corrupt perjury; every perſon ſo offending ſhall incur ſuch and the " ſame pains, penalties, and forfeitures as are inflicted or enacted by the " laws againſt perſons convicted of wilful and corrupt perjury."

By 31 *G.* 2. *c.* 10. § 24. " Whoever ſhall willingly and knowingly " take a falſe oath, or procure any perſon to take a falſe oath, to obtain the " probate of any will or wills, or to obtain letters of adminiſtration in order " to obtain the payment of any wages, pay, or other allowances of money or " prize money, due, or that were ſuppoſed to be due, to any officer, ſeaman, " or other perſon entitled, or ſuppoſed to be entitled, to any wages, pay, or " other allowances of money, or prize-money, for ſervice due on board " of any ſhip or veſſel of his Majeſty, *&c.* or the executor, adminiſtrator, " wife, relation, or creditor of any ſuch officer or ſeaman, or other perſon " who has really ſerved, or was ſuppoſed to have ſerved, on board any " ſhip or veſſel of his Majeſty, *&c.* ſhall be deemed guilty of felony, and " ſuffer death without benefit of clergy."

And by 28 *G.* 2. *c.* 13. § 14. " for the relief of inſolvent debtors, if " any ſheriff or other officer perjure himſelf in taking the oaths directed " by the act, he ſhall forfeit 500*l.* And if the offence be committed by " a priſoner or other perſon enabled and intending to take the benefit of the " act, it is felony without benefit of clergy."

The better to prevent great offenders from eſcaping puniſhment by reaſon of the expence attending proſecutions, it is enacted by 23 *G.* 2. *c.* 11. § 3. " That it ſhall be lawful for any of his Majeſty's juſtices of aſſiſe, or *niſi* " *prius*, or general gaol-delivery, or any of the great ſeſſions of *Wales*, or " of the counties palatine, and they are hereby authoriſed (ſitting the court " or within twenty-four hours after) to direct any perſon, examined as a " witneſs upon any trial before him or them, to be proſecuted for the ſaid " offence of perjury, in caſe there ſhall appear to him or them a reaſonable " cauſe for ſuch proſecution; and that it ſhall appear to him or them pro- " per ſo to do; and to aſſign the party injured, or other perſon undertа- " king ſuch proſecution, counſel, who ſhall, and are hereby required to " do their duty without any fee, gratuity, or reward for the ſame." Such proſecution is alſo exempt from tax or duty and fees of court, and the clerk of the aſſiſe is ordered to give the proſecutor a certificate of the ſame, being directed, with the names of the counſel aſſigned; which certificate is to be deemed ſufficient proof of ſuch proſecution having been directed, but no ſuch direction or certificate is to be given in evidence upon the trial of the perſon againſt whom the proſecution is directed.

(C) How charged and aſſigned.

BY 23 *G.* 2. *c.* 11. " In every information or indictment for wilful and " corrupt perjury, it ſhall be ſufficient to ſet forth the ſubſtance of the " offence charged upon the defendant, and by what court, or before " whom the oath was taken, (averring (*a*) ſuch court, or perſon or per- " ſons, to have a competent authority to adminiſter the ſame,) together " with the proper averment or averments to falſify the matter or matters " wherein the perjury or perjuries is or are aſſigned; without ſetting forth " the bill, anſwer, information, indictment, declaration, or any part of any " record or proceeding, either in law or equity, other than as aforeſaid; " and

(*a*) Before the paſſing of this act, this averment ſeems not to have been made. Dougl. 156. (*b*) Rex v. Dowlin, 5 Term Rep. 317. If, however,

" and without ſetting forth the commiſſion (*b*) or authority of the court, or " perſon or perſons before whom the perjury was aſſigned." the proſecutor undertakes to ſet

out in the indictment more of the proceedings than he need under this act, he muſt ſet them forth correctly. *Ibid.*

And by § 2. " In every information or indictment for ſubornation of " perjury, or for corrupt bargaining or contracting with others to commit " wilful and corrupt perjury, it ſhall be ſufficient to ſet forth the ſubſtance " of the offence charged upon the defendant, without ſetting forth the bill, " anſwer, information, indictment, declaration, or any part of any record " or proceeding either in law or equity, and without ſetting forth the com- " miſſion or authority of the court, or perſon or perſons before whom the " perjury was committed, or was agreed or promiſed to be committed."

The fact in the affidavit in which the defendant was charged to have perjured himſelf, was, that he never did, at any time during his tranſactions with the commiſſioners of the victualling-office, charge more than the uſual ſum of ſixpence *per* quarter, beyond the price he actually paid *for* any malt or grain purchaſed by him for the ſaid commiſſioners as their corn-factor: the aſſignment in the indictment to falſify this alleged that the defendant did charge more than ſixpence *per* quarter *for and in reſpect of* ſuch malt and grain ſo purchaſed. It was objected, that the words *in reſpect of* may include lighterage, freight, and many collateral and incidental expences attending the corn and grain jointly with the charge for the corn or grain, and bearing that ſenſe, the defendant was not guilty of perjury. This objection however was over-ruled. Rex v. Atkinſon, Dom. Proc. July 1, 1795.

A complaint having been made *ore tenus* by a ſolicitor, before the Chancellour, in the court of Chancery, of an arreſt in returning home after the hearing of a cauſe, the indictment ſtating that, " *at and upon the hearing of the ſaid complaint*," the defendant depoſed, *&c.* it was holden a ſufficient averment, that the complaint was heard. Rex v. Aylett, 1 Term Rep. 70. Dom. Proc. July 6, 1786.

It is ſufficient, if the aſſignments of perjury falſify the meaning attributed by the verdict to the matter ſworn. *Ibid*

Where it was ſtated, that *at ſuch a court* J. K. *was in due form of law tried upon a certain indictment then and there depending againſt him for murder, and that at and upon the ſaid trial it then and there became and was made a material* queſtion—Whether, *&c.* it was adjudged, that theſe were ſufficient averments, that the perjury was committed on the trial of *J. K.* for the murder, and that the queſtion on which the perjury was aſſigned was material on that trial. For it is not neceſſary to ſet forth ſo much of the proceedings of the former trial as will ſhew the materiality of the queſtion on which the perjury is aſſigned: it is ſufficient to allege generally, that that queſtion became a material queſtion. Rex v. Dowlin, 5 Term Rep. 318.

In perjury in an anſwer in Chancery, it is not neceſſary to prove the identity of the perſon who ſwore the oath: it is enough if the hand-writing be proved, and that the jurat was ſubſcribed by the Maſter as being ſworn before him. Rex v. Morris, 2 Burr. 1189.

In general, the court will oblige the defendant to plead or demur to even a defective indictment; and they are very cautious in granting a *certiorari* to remove it (*a*). And Lord *Thurlowe* refuſed permiſſion to amend the anſwer in Chancery, where an indictment for perjury had only been threatened, though the party, having no intereſt, could not be ſuppoſed to make the falſe oath intentionally. For it is the province of the grand jury to judge of the intention (*b*). 2 Hawk. P. C. c. 25. § 146. (*a*) *Id.* c. 27. § 28. (*b*) Earl Verney v. Macnamara. 1 Br. Ch. Rep. 419.

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PIRACY.

2 Wooddef. 422. The word "pirate" was formerly uſed in a better ſenſe than that in which it is now received. It ſignified the perſon to whoſe care the mole, or pier of a haven, which in Latin was called *pera*, was intruſted. It was uſed too ſometimes, according to Spelman, for a ſea captain, or ſoldier. Aſſer., in the life of King Alfred, telis us, *Rex Ælfredus juſſit cymbas et galeas*, i. e. *longas naves fabricari per regnum, impoſitiſque piratis in illis vias maris cuſtodiendas commiſit.*

PIRACY is incurred by depredations on or near the ſea, without authority from any prince or ſtate. For if theſe violations of property be perpetrated by any national authority, they not acts of piracy. Thus, when a *Briſtol* merchant ſhip, in the reign of *Charles* the Second, was taken by the *Algerines*, and afterwards driven on the coaſt of *Ireland*, with ſome *Turks* and renegadoes on board, Sir *Leoline Jenkins*, then Judge of the Admiralty, certified to the king in the following words (*a*): "As for the *Moors* and *Turks*, that are ſo by birth, and were found on board this ſhip, it is my humble opinion, that ſince the government of *Algiers* is owned as well by ſeveral treaties of peace and declarations of war, as by the eſtabliſhment of trade, and even of conſuls and reſidents amongſt them, by ſo many princes and ſtates, and particularly by your Majeſty, they cannot, as I humbly conceive, be proceeded againſt as pirates or ſea-rovers, acting without commiſſion, but are to have the privileges of enemies in an open war, and muſt be received to their ranſom by exchange or otherwiſe, the ordering of which doth in this caſe belong to the Lord high Admiral."

(*a*) 2 Sir L. Jenk. 791.

2 Sir L. Jenk. 754. So, when one *Cheline* attaked a *Dutch* ſhip near the port of *Dublin*, and carried her away, having two *Britiſh* ſubjects on board, though it was a crime againſt our ſovereign as a neutral power, under whoſe protection the ſhip lay, yet, it was holden not to be puniſhable as piracy; for the captor had a commiſſion of war in due form againſt the enemies of the *French* king.

Jenk. 165. Godb. 193. 3 Bulſtr. 29. Cro. Eliz. 685. It is eſtabliſhed by many authorities, that goods taken by pirates remain the property of the original owners, although ſold here, unleſs the ſale be in market overt.

Indeed the contrary is aſſerted (2 Bur.. 694. 5.); but the reaſon aſſigned, (viz. that there can be no condemnation to entitle the pirate,) ſhews, he acquired no property, and therefore could tranſmit none. See 2 Wooddef. 431.

(*b*) 27 E 3. ſtat. 2. c. 13. Such goods therefore the king cannot grant; for by an expreſs ſtatute (*b*), the merchant robbed on the ſeas ſhall be received to prove that the goods or chattels belong to him by his chart or cocket, or by other lawful proof of merchants, *&c.*, and then the ſaid goods ſhall be delivered without any ſuit at the common law; which act is general, be the party robbed privy or a ſtranger.

(*c*) 4 Inſt. 154. 3 Bulſtr. 28. But, it was holden (*c*) by all the judges in the reign of *Richard* the third, that any foreigner, who ſues on this ſtatute, muſt prove his own ſovereign and the ſovereign of the captor to have been in mutual amity, and alſo his own ſovereign to have been in amity with our king, at the time of the capture. For in our municipal law books it is generally and indiſcriminately aſſerted, that piracy cannot be committed by the ſubjects of ſtates at enmity.

The

The goods of pirates, not taken from others, belong, after attainder, to the crown or its grantee; and thoſe of which others have been deſpoiled will be forfeited in the ſame manner, if the owners come not within a reaſonable time to vindicate their property. And until they do ſo, the king may ſeize them, and if they be *bona peritura*, he may ſell them, and upon proof, reſtore the value. But by ſtat. 22 & 23 *Car.* 2 *c.* 11. § 11. if the company belonging to any *Engliſh* merchant ſhip take any ſhip, which firſt aſſaulted them, the officers and marines ſhall receive ſuch ſhare of the condemned ſhips and goods as is uſually practiſed in private men of war. 3 Bulſtr. 148. 12 Co. 73.

About the time of the treaty of *Nimeguen*, the captain of a *French* merchant ſhip, having put into a port in *Ireland*, was accuſed by his crew of robberies on the ſeas, and fled. His ſhip and goods were confiſcated, as having belonged to pirates. The *French* ambaſſador preſented memorials, requiring the cauſe to be remanded to the natural judge, as was pretended, in *France*. But the king and his council finally adjudged, that he was ſufficiently founded in point of juriſdiction to confiſcate the ſhip and goods, and to try capitally the perſon himſelf, had he been in hold, the matter of *renvoy* being a thing quite diſuſed among princes; and as every man by the uſage of our *European* nations is *juſticiable* in the place where the crime is committed, ſo are pirates, being reputed out of the protection of all laws and privileges, and to be tried in what ports ſoever they are taken. 2 Sir L. Jenk. 714.

By 18 *G.* 2. *c.* 30. "All perſons, being natural-born ſubjects or denizens of his Majeſty, who during any wars have committed any hoſtilities upon the ſea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or juriſdiction, againſt his Majeſty's ſubjects, by virtue or under any colour of any commiſſion from any his Majeſty's enemies upon the ſea, or any the places where the admiral hath juriſdiction as aforeſaid, may be tried as pirates, felons, and robbers in the ſaid court of Admiralty, on ſhip board, or upon the land, in the ſame manner as perſons guilty of piracy, felony, and robbery are directed to be tried; and on conviction ſhall ſuffer as any other pirates, *&c.* ought by virtue of 11 & 12 *W.* 3. *c.* 7. or any other act: Provided that any perſon who ſhall be tried and acquitted, or convicted according to this act, for any of the ſaid crimes, ſhall not be liable to be proſecuted for the ſame crime or fact, as high treaſon. But this act ſhall not prevent any perſons who ſhall not be tried according to it, from being tried for high treaſon by 28 *H.* 8. *c.* 5."

And by 32 *G.* 2. *c.* 25. § 12. "In caſe any commander of any private ſhip of war duly commiſſioned according to the directions of this act, or the 29 *G.* 2. *c.* 34. ſhall agree with the commander or other perſon of or belonging to any neutral or other ſhip or ſhips, veſſel or veſſels, except thoſe of his Majeſty's declared enemies, for the ranſom of any ſuch neutral or other ſhip, *&c.* or the reſpective cargo or cargoes thereof, or any part thereof, after the ſame ſhall have been taken as prize, and ſhall, in purſuance of any ſuch agreement or agreements, actually quit, ſet at liberty, or diſcharge any ſuch prize or prizes, inſtead of bringing the ſame into ſome port or ports belonging to his Majeſty's dominions, every ſuch offender ſhall be deemed guilty of piracy, felony, and robbery; and on conviction (in the manner the act deſcribes) ſhall ſuffer ſuch pains of death, *&c.* as pirates, felons, and robbers upon the ſeas ought to ſuffer according to the laws now in being. But the commander of any private

By 22 G. 3. c. 25. all contracts for ranſoming any private veſſel, &c. captured by the king's enemies, are void and the offender liable to a penalty of 500*l.*

" ſhip of war, upon the capture of any neutral veſſel, which by any law " or treaty ſhall be liable only to the forfeiture of ſuch contraband goods " as ſhall be on board thereof, may receive ſuch goods in caſe the com- " mander is willing to deliver them, and thereupon quit, ſet at liberty, or " diſcharge ſuch neutral ſhip or veſſel."

By 30 *G.* 2. *c.* 25. § 20. and 33 *G.* 3. *c.* 66. § 70. a ſeſſion of oyer and terminer, and gaol-delivery, for the trial of offences committed on the high ſeas, ſhall be holden twice at the leaſt in every year at the Seſſions-houſe in the *Old Bailey*, or at ſuch other place as the Lords of the Admiralty ſhall appoint. And the commiſſioners named in the commiſſions of oyer and terminer for the trial of ſuch offences, as alſo any juſtices of the peace, may take informations touching offences committed upon the ſeas, and cauſe the parties to be apprehended and committed: They may alſo oblige any perſons they think neceſſary to enter into recognizances to appear, proſecute, and give evidence at the ſeſſions, and upon their refuſal to do ſo, may commit them; which recognizances and informations are to be tranſmitted to the regiſtrar of the court of Admiralty.

PISCHARY.

Blount's Law Dict. verb. Piſchary.

A PISCHARY is ſaid to be a right or liberty of fiſhing in the ſoil of another.

But a man may have *liberam piſcheriam* in his own ſoil. Skin. 678.

2 Salk. 637.

Our law books make mention of three ſorts of fiſhery, *libera*, *ſeparalis*, *communis*.

Seymour v. Lord Courtenay, 5 Burr. 2814.

In order to conſtitute a *ſeveral* fiſhery, it is neceſſary, that the party claiming it ſhould ſo far have the right of fiſhing independently on all others, as that no perſon ſhould have a *co-extenſive* right with him in the ſubject claimed; for where any perſon has ſuch co-extenſive right, there, it is only a *free* fiſhery. But a partial, independent right in another, or a limited liberty, is not inconſiſtent with a right to a *ſeveral* fiſhery.

5 Burr. 2814. Dougl. 56.

Whether ownerſhip of the ſoil is eſſential to a *ſeveral fiſhery* is a point upon which there hath been a great diverſity of opinion, and which is not yet finally ſettled.

That it is neceſſarily included in a ſeveral fiſhery, ſee 2 Bl. Com. 39. 2 Salk. 637. Dav. 55. b. 17 E. 4. 6. 18 E. 4. 4. 10 H. 7. 24. 26. 28. Plo. Com 154. That it is not, Co. Lit. 4. b. 112. a. Bract. 108. b. Br. tit. Tenures, pl. 75. Fitzh. Sci. Fa. 100. Godb. 117. 20 Vin. Abr. 201. The latter ſeemeth to be the better opinion, for the utmoſt that can be deduced from the caſes cited in ſupport of the former is that a ſeveral fiſhery ſhall be preſumed to include the ſoil, until the contrary is proved. See Co. Lit. 112. a. note 7. laſt edition.

2 Bl. Com. 39. (*a*) F. N. B. 88. G. Fitzh. Abr. Aſſ. 422. 4 E. 4. 28. 17 E. 4. 6. b. 7. a.

A free fiſhery is conſidered by Sir *William Blackſtone* as an excluſive right of fiſhing in a publick river, and is referred by him to the head of franchiſes. But this doctrine is, at leaſt, queſtionable, our law books (*a*) extending this kind of fiſhery to *all* ſtreams indiſcriminately, whether *private* or *publick*. The ſame learned writer too ſaith, that a *free fiſhery* imports an excluſive right, and ſo differeth from *common of piſchary*; that in a *free fiſhery* a man hath a property in the fiſh before they are caught; in a *common of piſchary*

chary not till afterwards. But this doctrine, though ſupported by ſome (*b*) authorities, is impugned by others. Lord *Coke* (*c*) conſiders common of fiſhery and free fiſhery as the ſame thing. For, he ſaith, that a man may preſcribe to have *ſeparalem piſchariam* in ſuch a water, and the owner of the ſoil ſhall not fiſh there; but if he claim to have *communiam piſchariæ*, or *liberam piſchariam*, the owner of the ſoil ſhall fiſh there. And *Eyre*, J. ſaid (*d*) that the word *libera, ex vi termini*, implied *common*. And that a man cannot declare in treſpaſs for taking his fiſh in a *free fiſhery* was expreſsly holden in two caſes (*e*), and the judgment for that reaſon reverſed. The right to the property of the fiſh in a free fiſhery, till caught, was negatived by the court incidentally in a ſtill earlier caſe (*f*). Lord *Mansfield*, in the caſe of *Seymour* v. Lord *Courtenay*, ſaith, that where any perſon hath a *co-extenſive* right with another it is a *free* fiſhery (*g*).

7 H. 7. 13. b. Cro. Car. 554. 1 Ventr. 122 Skin. 677. Carth. 285. (*b*) Reg. 95. b. 43 E. 3. 24. 2 Salk. 637. Carth. 285. (*c*) Co. Lit. 122. a. (*d*) 2 Salk. 637. Carth. 285. (*e*) Upton v. Dawkins, 3 Mod. 97. Comb. 11. S. C. Peake v. Turner, cited in Carth. 286. in marg. (*f*) Child v. Greenhill, Cro. Car. 554. (*g*) 5 Burr. 2816.

If a man juſtifies for uſing a piſchary, he ought to ſhew whether it be common, free, or ſeveral. So, whether it be appurtenant to a manor or meſſuage, *&c.* for it is an intereſt, and not a mere liberty or eaſement. Hardr. 407.

A fiſhery, without more, is a tenement within the ſtatute 9 & 10 *W.* 3. *c.* 11. ſo as to entitle a perſon renting it to a ſettlement, for the court will intend that the ſoil paſſed with it. It is indeed doubtful, whether it is material for this purpoſe, that the ſoil ſhould paſs. Rex v. Old Alresford, 1 Term Rep. 358. In this caſe, one learned judge is reported to lay it down broadly, that a fiſhery is a *tenement*; that treſpaſs will lie for an injury to it; and it may be recovered in ejectment.

In rivers not navigable, the proprietors of the land have the right of fiſhery on their reſpective ſides; and it generally extends *ad filum medium aquæ*. But in navigable rivers, the proprietors of the land on each ſide have it not; the fiſhery is common, it is, *primâ facie*, in the king, and is publick. But the crown may grant a ſeveral fiſhery in a navigable river, where the ſea flows and reflows, or in an arm of the ſea; and on the other hand, there may be a free fiſhery, or a co-extenſive right of fiſhing with the owners of the ſoil, in a river not navigable. In the one caſe, the preſumption is in favour of the appropriate right, in the other caſe, the preſumption lies the contrary way. In theſe, as in all other caſes of preſumption, the preſumption will ſtand, till the contrary is *proved*. Carter v. Muſcot, 4 Burr. 2162. Lord Fitzwalter's caſe, 1 Mod. 105. Dav. 55. Mayor, &c. of Oxford v. Richardſon, 4 Term Rep. 439.

By the ſtatute of 5 *Geo.* 3. *c.* 14. perſons convicted of ſtealing, taking or deſtroying any fiſh in any river, or ſtream, pond, pool, or other water, in any park or paddock, or in any garden, orchard, or yard, adjoining or belonging to any dwelling-houſe, or aiding or aſſiſting therein, or receiving or buying the fiſh knowing them to be ſtolen or taken, ſhall be tranſported for ſeven years. The proſecution, however, muſt be within ſix months after the offence committed; and any offender convicting an accomplice is entitled to a pardon.

By § 3. every perſon convicted of taking or deſtroying, or attempting to take or deſtroy any fiſh in any river or ſtream, *&c.*, not being in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling-houſe, but ſhall be in any other incloſed ground which ſhall be private property, ſhall forfeit the ſum of five pounds to the owner of ſuch river or ſtream, *&c.* But this clauſe, it is expreſsly provided, § 5. ſhall not extend to any perſon who ſhall have a juſt right or claim to take, kill, or carry away any ſuch fiſh.

Kinnersley v. Orpe, Dougl. 517.

It is obvious, therefore, that a person who fishes in a fishery belonging to another, but to which he has a claim, for the purpose of giving occasion to an action in order to try the right, is not liable to a penalty under this act.

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Pleas and Pleadings.

(*But by* 6 G 2) See a similar reservation in the above act of 36 E. 3.

(B) The Declaration: And herein,

3. What Matters may be joined in the same Declaration.

Brown v. Dixon, 1 Term Rep. 276.

The old opinions upon this subject may be found in the first volume of this work, under title "Actions in general (C)." It would be unnecessary to introduce them again here, especially as the rule is now settled, that any causes of action, which can be comprised in counts, that admit of the same general plea, and are followed by the same judgment, may be joined in the same declaration.

4. Of the Declaration's agreeing with the Writ.

(*a*) Weavers Company v. Forrett, B. R. 2 Str. 1232. Lloyd v. Williams, C. B. 2 Bl. Rep 722. 3 Wilf. 141.

Upon general process (*a*), the plaintiff may declare *qui tam*, or as executor or administrator, &c. But this rule will not hold è *converso*; for where the process was to answer the plaintiff *qui tam*, &c. (*b*), and the declaration was in his own name only, omitting the *qui tam* part, the court held the variance to be fatal, and set aside the proceedings. And the like was done, where the process was to answer the plaintiffs (*c*) as assignees of a bankrupt, and the declaration was in their own right; for the plaintiffs cannot declare generally, on process sued out in a special character. And as such variance between the original writ and declaration may be taken advantage of by plea in abatement, so, where the action is by bill, the court will interfere upon motions (*d*).

(*b*) Canning v. Davis, B. R. 4 Burr. 2417. Canning v. Davis, C. B. Barnes, 454. (*c*) Meggs v. Ford, E. 25 G. 3. Imp. Pr. K. B. 172. (*d*) Turing v. Jones, 5 Term Rep 402.——It appears, however, to have been the opinion of Yates J. in the case of Canning v Davis, 4 Burr. 2417. that though the plaintiff style himself *executor*, or give himself any other superfluous description in the process, and declare otherwise, yet this will not hurt, for the demand is still the same.

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(*It is a general*) And in such case, if the suit is by bill, there must be a special memorandum of the day subsequent to the cause of action. However, where the cause of action was stated to have accrued on the first day of term, the court, on demurrer, held, that the declaration might be entitled of the term generally; for the delivery of the declaration is the act of the party, and in ancient times it could not have been delivered before the sitting of the court; so that the cause of action might well have accrued before the actual delivery of the declaration. Pugh v. Robinson, 1 Term Rep 116 ——The declaration by bill should, regularly, be entitled of the day on which the writ is returnable; for the bill, of which it is a copy, cannot be filed till bail is put in, which cannot be till the return of the writ. Southouse v. Allen, Ca. temp. Hardw. 141. But *qu.* as to the time of putting in bail, and see Tidd's Pr. 187.—Where there are several defendants, who put in bail of different terms, the declaration should be entitled of the term, when the last bail was put in. Stork v. Herbert, 1 Wilf. 242. But in a later case it hath been holden, that a declaration though

though filed and delivered, cannot be entitled, of a ſubſequent term to that in which the writ is returnable. Smith v. Muller, 3 Term Rep. 624.—Where a declaration is improperly entitled, the plaintiff may have it corrected on an affidavit of the fact. Symonds v. Parmenter, 1 Wilſ. 78. It may be ſet right too at the inſtance of the defendant, if neceſſary for his defence. Southouſe v. Allen, Ca. temp. Hardw. 141. Smith v. Key, 1 Str. 638. Smith v. Raydon, cited 1 Wilſ. 39. ſeems S. C. Thompſon v. Marſhall. 1 Wilſ. 304. Wilkes v. Earl of Halifax, 2 Wilſ. 256.

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(*It an action out*) Bennington v. Taylor, 2 Lutw. 1517. Chaſin v. Betſworth, 3 Lev. 190 S. P.

An action on the caſe was brought, ſetting forth, that the plaintiff was poſſeſſed of a tenement, and a cloſe of paſture, and a rood of land, *&c.* in *S. M.*, and that he had right of common in *Mendip* foreſt for his cattle, *&c.* as thereunto belonging; that the defendant digged and made coney-boroughs in the ſaid foreſt, and ſet nets and gins there, by which his ſheep were damnified; and he was deprived of common, *&c.* It was objected, that the declaration was not good, for that it reſted merely upon poſſeſſion, and did not ſhew any title to the common, either by grant or preſcription. But the declaration was adjudged to be proper, 1. Becauſe it is an action grounded upon the poſſeſſion againſt a wrong-doer; to which a title would be only an inducement. 2. Title to the common need not be alleged, becauſe it did not appear whether the defendant was owner of the ſoil, or a ſtranger. It is true, if it had been upon ſpecial pleading, as, in treſpaſs for diſtraining his cattle, and the defendant had pleaded, that he was owner of the ſoil, and ſo juſtified the taking, the plaintiff in ſuch caſe muſt have replied (*a*), and ſhewn a title by grant, or preſcription, or ſome conveyance. And laſtly, This matter is not traverſable; for upon the general iſſue a right of common muſt be proved and given in evidence, otherwiſe the plaintiff cannot maintain his action, but *what right* is not material.

Strode v. Byrt, 7 Mod. 418. Com. Rep. 4. Skin. 621. S. C. Dorney v. Caſhford, 1 Ld. Raym. 266. S. P. Bean v. Bloom, 3 Wilſ. 456. S. P.

(*a*) So, Vernon v. Goodrich, 1 Str. 6.

So, in an action for diſturbing the plaintiff in the enjoyment of a pew in a church, poſſeſſion and laying it to be appurtenant to a meſſuage (*b*) are ſufficient againſt a mere ſtranger, without laying or proving the plaintiff repaired the pew, or ſhewing any title or conſideration whatever. As againſt the ordinary indeed, who hath *primâ facie* the diſpoſal of all the ſeats in the church, a title muſt be ſhewn in the declaration, and proved.

Kenrick v. Taylor, 1 Wilſ. 326.

(*b*) In all caſes, it ſeems neceſſary to claim the pew in the declaration as appurtenant to a meſſuage. Stocks v. Booth, 1 Term Rep. 428.

If a plaintiff have a preſcriptive right of burial in a church, he need not againſt a wrong-doer ſet forth the whole of it: it hath indeed been doubted, whether he may not in ſuch caſe rely merely upon his poſſeſſion.

Waring v. Griffiths, 1 Burr. 440.

But, where a perſon claims a ſervitude upon another's property, it is ſaid in ſeveral caſes that he muſt, againſt the owner of ſuch property, ſet forth and prove the whole of his title. However, later caſes ſeem to have gone otherwiſe.

Vide the caſes *ſupra*.

The plaintiff declared, that he was ſeiſed in fee of a mill, and had a watercourſe running in the defendant's land to the ſaid mill, and that the defendant had ſtopped it. This was holden well upon demurrer, without ſhewing any title to the watercourſe.

Sands v. Treſuſis, Cro Car. 575.

The plaintiff declared, that he was for four years laſt paſt ſeiſed in fee of a parcel of land adjoining to the defendant's meadow, *et ſic inde ſeiſitus per totum tempus prædictum habere, frui et uti debuit quandam viam per quandam januam* of the defendant in the meadow of the defendant *uſque* a cloſe of the plaintiff, and that the defendant ſtopped the gate *cum ſerâ & catenâ*; and upon motion in arreſt of judgment, the declaration was holden to be good, though no title was ſhewn to the way, though the defendant was terre-

Winſord v. Watſon, 3 Lev. 266. Warren v. Sainthill, 2 Ventr. 180. S. P. Blockley v. Slater, 1 Lutw. 119. S. P.

terre-tenant, and though the charge was againſt common right, and ſuch a charge as could not commence but by grant.

2 Ld. Raym. 804. In the caſe of the King v. *Bucknall*, Lord *Holt* ſaid, "Where a man "is obliged to make fences againſt another, it is enough to ſay *omnes occu-* "*patores* ought to repair, &c., becauſe that lays a charge upon the right of "another, which, it may be, he cannot particularly know."

Anon. 1 Ventr. 264. In an action for not repairing a fence, the allegation was, that the tenants and occupiers of ſuch a parcel of land adjoining the plaintiff's, had time out of mind maintained it, &c. It was moved in arreſt of judgment, that the preſcription is laid in occupiers, and yet their eſtates are not ſhewn; and that hath been judged naught in 1 *Cro.* 155. and 2 *Cro.* 665. But the court ſaid, "It is true there have been opinions both ways, but it is good "thus laid, for the plaintiff is a ſtranger, and preſumed ignorant of the eſ- "tate; but otherwiſe it is, if the defendant had preſcribed."

Tenant v. Goldwin, 1 Salk. 360. 2 Ld. Raym. 1089. 6 Mod. 311. So, in an action on the caſe for not repairing a wall, "*debuit reparare*" hath been adjudged ſufficient.

Rider v. Smith, 3 Term Rep. 766. So, in an action for not repairing a private road leading through the defendant's cloſe, that the defendant as occupier is bound to repair.

Polybank v. Hawkins, Dougl. 329. In covenant on a leaſe, the plaintiff in ſtating his title ſet forth, that one *S.*, who was ſeiſed in fee, made the leaſe in queſtion, and that on his death the reverſion deſcended to the wife of the plaintiff, as the heir-at-law of *S.*, whereupon he (the plaintiff) became ſeiſed *of the reverſion, as of freehold in right of his ſaid wife.* On demurrer, the declaration was holden to be ill, for, from his own ſhewing, there was a ſeiſin in fee *in both* in right of the wife.

Aleberry v. Walby, 1 Str. 229. In general, however, in covenant, the plaintiff need not ſet out any title, but begin generally *quod cum dimiſiſſet:* and therefore where a plaintiff had merely ſet out his title imperfectly, as, by omitting the perſon under whom he claimed, it was holden, that this was ſurpluſage, and could be rejected.

Short v. Pruen, 6 Term Rep. 163. In an action againſt a perſon who farms the poſt-horſe duties, under the ſtatute of 27 *G.* 3. *c.* 26. for neglect of duty, the plaintiff muſt aver ſpecifically, that the defendant is the perſon appointed under and by virtue of the act of parliament upon whom the duty is thrown. It is not a ſufficient title to ſtate that the defendant is a collector of the rates and duties *recited* in a certain act, &c.

2. Where the Plaintiff muſt ſhew that he hath performed what was requiſite on his Part.

Kingſton v. Preſton, Dougl. 688. note. Jones v. Barclay, Dougl. 684. So, where two acts are to be done at the ſame time, neither party can maintain an action, without ſhewing a performance, or an offer to perform, on his part: for where the performance of the plaintiff is prevented by the neglect or default of the defendant, that is equal to a performance.

Blackwell v. Naſh, 1 Str. 535. Goodiſſon v. Nunn, 4 Term Rep. 761. Hotham v. Eaſt India Company, 1 Term Rep. 638. 645.

And

And where mutual covenants go to the whole of the conſideration on both ſides, they are in that caſe mutual conditions, and a performance muſt be averred. But it is otherwiſe where they go only to a part, and where recompence may be had in damages. Boone v. Eyre, cited 1 H. Bl. 273. note. Duke of St. Alban's v. Shore, *Id.* 270. Campbell v. Jones, 6 Term Rep. 572.

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(*As where a writing*) Trench v. Trewin, 1 Ld. Raym. 125. S. P.

If the plaintiff declares, that in conſideration he had agreed to deliver cloth to the defendant, the defendant agreed to pay him ſo much in caſe *A.*'s horſe beat *B.*'s, which he avers he did, he need not aver the delivery of the cloth. *Secùs*, if it were in conſideration that plaintiff would deliver cloth, defendant would pay; for in that caſe the delivery muſt be averred. Martindale v. Fiſher, 1 Wilſ. 88.

In *aſſumpſit* on an agreement to forfeit a depoſit of five guineas, and alſo to pay another ſum of 10*l.* if the defendant did not accept poſſeſſion of certain premiſes from the plaintiff, and alſo pay for certain fixtures therein, at a fair appraiſement by two appraiſers; it was adjudged on a ſpecial demurrer, that the declaration was ill, becauſe the plaintiff had not ſhewn his right to the premiſes, ſo that he could have delivered poſſeſſion according to the agreement. As each was to name an appraiſer, he ought alſo to have ſhewn that he had done ſo. Luxton v. Robinſon, Dougl 620.

3. Where general Allegations in the Declaration are ſufficient; and therein, of Miſrecitals and Omiſſions.

Where the defendant covenanted, that he would not take wood without the aſſent *or* aſſignment of the leſſor or his aſſigns, it was holden not to be ſufficient to allege in the declaration that the defendant took wood *without the aſſignment* of the leſſor or his aſſigns; for it might be with *their aſſent*, and ſo no breach. Sherwood v. Noone, 1 Leon. 250.

But, where the covenant was, "to pay or cauſe to be paid," that the defendant had not paid, was holden to be a ſufficient aſſignment of the breach, without adding "or cauſed to be paid," for if the defendant had cauſed to be paid, he had paid. Aleberry v. Walby, 1 Str. 229.

In aſſigning a breach of covenant for quiet enjoyment, the plaintiff alleged, that at the time of the demiſe to him, *A. B.* had lawful right and title to the premiſes, and having ſuch lawful right and title entered, *&c.*, and evicted him, *&c.*, and adjudged ſufficient, though he did not ſhew what title *A. B.* had, or, that he evicted the plaintiff by legal proceſs. Foſter v. Pierſon, 4 Term Rep. 617.

If a plaintiff in his declaration undertake to recite a ſtatute, which ſtatute is the ground of his action, and he miſrecite it, the variance is fatal. Rann v. Green, Cowp. 472.

In an action of covenant it is not only unneceſſary, but likewiſe improper to ſet forth the whole of the deed. So much only as is neceſſary to entitle the plaintiff to his action ought to be ſhewn; nor need that part be recited literally, but may be ſet forth according to its ſubſtance and effect; though it is uſual and adviſable to deviate as little as may be from the expreſſions in the inſtrument. Dougl. 667. Cowp. 665. 727.

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(*In debt for rent*) It is not true, that in debt the plaintiff ſhould demand the very exact ſum due that he cannot recover any other ſum than that which he demands. Many inſtances might be given where this action lies, and yet where it is impoſſible to ſtate the demand with preciſion, as, in debt againſt a tenant who holds over, under the ſtat. of 4 G. 2. c. 28. for *double the value of the land*; or in debt for *treble the value* for not ſetting out tithes, under the ſtat. of 2 & 3 E. 6. c. 13.; or, for the *value of foreign money*. In all theſe caſes the extent of the demand is uncertain at the commencement of the ſuit; the *value* is to be found by a jury. But if the declaration import a title

title to a fixed, groſs ſum, to a duty numerically certain, there, the evidence muſt ſhew a right to that very ſum, elſe the very giſt and foundation of the action fails. But this is not peculiar to this ſpecies of action: in *aſſumpſit* as well as debt the caſe proved muſt be conſiſtent with the declaration; the proof muſt be commenſurate with the allegation. Walker v. Whitter, Dougl. 6. Aylett v. Lowe, 2 Bl. Rep. 1221. Rudder v. Price, 1 H. Bl. 550. Grant v. Aſtle, Dougl. 731.

(C) Of Impaſlance: And herein,

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(*If a defendant*) But after a general ſpecial imparlance, he may plead to the juriſdiction of the court. 2 Bl Rep. 1096.

(*But the plea*) But ſee 1 Vent. 235.

Tidd's Pr. 241. 1 Burr. 59. Barnes, 343. 351. 355 357. 359. 361. 362.

A tender muſt therefore be pleaded before imparlance, of the ſame term with the declaration; unleſs the declaration be delivered or filed ſo late, that the defendant is not obliged to plead to it that term: and then it may be pleaded of courſe within the firſt four days incluſive of the next term; or even afterwards, upon motion, as of the preceding term.

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(*After a general*) A plea in abatement after a general imparlance is bad on a general demurrer. Buddle v. Wilſon, 6 Term Rep. 369. It has been conſidered too ſo far as a nullity, that the plaintiff may ſign judgment as for want of a plea. Doughty v. Laſcelles, 4 Term Rep. 520.

(*It is clearly*) Where the defendant pleaded a miſnomer in abatement after an imparlance, which was entered thus; "And *A. B.*, who was arreſted by the name of *A. C.*, comes, &c. the court held this to be tantamount to a ſpecial imparlance. Brewſter v. Capper, 1 Wilſ. 261. 1 Bl. Rep. 51. S. C. But this reſolution hath been over-ruled in a later caſe. See Doughty v. Laſcelles, 4 Term Rep. 520.

(E) The ſeveral Kinds of Pleas: And herein,

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(*The Defendant*) In theſe two points, viz. that they muſt be pleaded in perſon, and that in pleading them, the defendant muſt make but *half* defence, pleas to the juriſdiction differ from pleas in abatement; for theſe may be pleaded by attorney, and with *full* defence. Lutw 7. Wheatley v. Cudmerſon, Mich. 15 G. 2. C. P. Thompſon v. Stockdale, Hil. 23 G. 3. K. B.

(G) Of Pleas in Bar and in Chief: And herein.

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(*The general iſſues*) *Riens in arrere* is a good plea to an action of debt for rent; it is the general iſſue. *Secta* to an action of *covenant*, becauſe it confeſſes the covenant to be broken, and tends but in mitigation of damages. Warner v. Theobald, Cowp. 588 Hare v. Savile, 1 Brownl 19. *Nil debet* is alſo a good plea to debt for rent. Hardr. 332. 2 Ld. Raym. 1503. Bull. N. P. 170.

(*Some iſſues*) Of neceſſity, an iſſue may be joined on two affirmatives. Co. Lit. 126. a. Bro. Iſſue, 28. So, if iſſue be tendered by an affirmative, and the other join, it is good, though there was not a negative. As, if an executor plead, *no aſſets*, and the plaintiff reply, that he purchaſed another writ, and then he had aſſets, and tender an iſſue thereon, and the defendant join, it is good. Aldrich v. Welthal, Cro. Jac. 580. 589. So, to debt upon bond, the defendant pleaded dureſs of imprisonment; to which the plaintiff replied, that the defendant was at large, and at his own diſpoſal, and executed the bond of his free will, and not for fear of imprisonment, and concluded to the country. To this there was a demurrer, and judgment given for the plaintiff, which judgment was affirmed in error. For *per curiam*—This is ſuch an affirmative as implies a negative; like the caſe of pleading in a writ of right, where the demandant counts, that he has more right than the tenant, and the plea of the tenant is, that he hath more right than the demandant. The ancient rule of requiring an affirmative and negative hath been long broken into, as, in the common caſe of infancy, where formerly they not only replied full age, but alſo traverſed

verſed the infancy, which is not now required. Sir T. Jones, 6. It is enough, if the ſecond affirmative is ſo contrary to the firſt, that the firſt cannot in any degree be true. Tomlin v. Purlis, 2 Str. 1177. 1 Wilſ. 6. S. C. However, in Sav. 86. it is ſaid, that where there are two affirmatives, one of which implies a negative of the other, the iſſue cannot be properly joined upon them without a traverſe.

The plaintiff declared upon two bills of exchange, and ſeveral other promiſes: the defendant, as to the two firſt counts upon the bills of exchange, pleaded, *quod actio non accrevit infra ſex annos*, and as to the other counts *non aſſumpſit* generally. The plaintiff replied, that upon ſuch a day he ſued out a *latitat*, which he continued down to the preſent declaration, and averred, that the cauſe of action aroſe within ſix years before the ſuing out of the *latitat*. The defendant in his rejoinder, *proteſting* that there was no ſuch writ iſſued as ſet out by the plaintiff, for plea ſaid, that after the ſix years were expired, *viz.* ſuch a day, the plaintiff firſt ſued out a *latitat*, which he ſet forth, and that he appeared to it; and that the plaintiff declared upon it, as above, and traverſed that he appeared and put in bail to the writ mentioned in the replication, and concluded with an averment. The plaintiff demurred, and ſhewed for cauſe, that the rejoinder is contrary to the record of appearance, and a negative pregnant. The plaintiff had judgment. Crokatt v. Jones, 2 Str. 734. 2 Ld. Raym 1441.

An iſſue ought to be upon a point, which may be well tried. Thus, if it be alleged, that a woman was *enſeint* by her huſband at the time of his death, the iſſue muſt be, if ſhe was *enſeint*, not if *enſeint* by her huſband, for *filiatio non poteſt probari*. Co. Lit. 126. a.

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(*In an action*) *Qu.* Whether *not guilty* would not be a good plea in debt on a penal ſtatute, as for not ſetting out tithes, uſury, &c.? 1 Term Rep. 462. Upon a *devaſtavit* againſt executors, not guilty may be pleaded as well as *nil debent*. *Ibid.*

(*If in debt*) So, an iſſue, that gold was found in a ſhip paſſing or upon its paſſage from London to R. is good. Hardr. 17. 19. So, that the cuſtoms were not concealed or withholden. Hardr. 17. Dyer, 43. b. So, that he paid or cauſed to be paid. Hardr 19. For an iſſue may be upon a disjunctive, where the words of the disjunctive propoſition are ſynonymous.

In an action upon a contract for ſtock, which was required by act of parliament to be regiſtered before the 1ſt of *November* 1721, the defendant pleaded, that the contract was not regiſtered before the 1ſt of *November* 1720, *ſecundum formam ſtat.*; the plaintiff replied, it was regiſtered before the 1ſt of *November* 1720, *ſecundum formam ſtat.*; upon which they were at iſſue, and the plaintiff had a verdict. Upon motion in arreſt of judgment, that this was an immaterial iſſue, the court held it well enough; the regiſtering of the contract was the material part; and the time which was impertinently alleged, may be rejected as ſurpluſage. Woolley v. Briſcoe. 1 Str. 554. 8 Mod. 173. S. C.

To debt upon bond the defendant pleaded, *plenè adminiſtravit*; the plaintiff replied, that the defendant had aſſets in his hands to ſatisfy the *damages* aforeſaid, and thereupon iſſue was joined; and the jury found a verdict for the plaintiff. It was moved in arreſt of judgment, that this is an immaterial iſſue, for it ought to have been, whether the defendant had ſufficient to ſatisfy the *debt and damages*. In anſwer, it was ſaid, that the word *damages* is only ſurpluſage, and by leaving it out, the iſſue will be a ſenſible, material iſſue, *viz.* that the defendant had ſufficient to ſatisfy, &c.; and of that opinion was the court. Collet v. Maſterman, 1 Wilſ. 238.

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(*So in aſſumpſit*) So, on non aſſumpſit, the defendant may give in evidence an uſurious contract; for that makes it a void promiſe. Lord Bernard v. Saul, 1 Str. 498. And in general, whatever affects

affects the promiſe may be given in evidence on this plea: as, where a ſeaman had ſued in the Admiralty-court for his wages, and had judgment againſt him there, and afterwards brought an *aſſumpſit* at law, the defendant was allowed to give the ſentence in evidence on *non-aſſumpſit*. 2 Str. 733.

Colborne v. Stockdale, 1 Str. 493. So, if the bond were given for a gaming debt, the ſtatute ſhould be pleaded; and the defendant in his plea ſhould ſet out the game played at, and conclude *contra formam ſtatuti*, that the court may ſee that it was within the ſtatute.

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(*In debt againſt*) It was holden in Plumer v. Marchant, 3 Burr. 1380. as ſettled, that an adminiſtrator may either plead a retainer, or give it in evidence on *plene adminiſtravit*.

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(*By the ſtatute*) *Vide* tit. Bankrupt. *ſupra*, vol. 1. p. 452. A general plea of bankruptcy in *Ireland*, referring to an *Iriſh* act of parliament, and concluding to the country, (in a mode ſimilar to that given by ſtat. 5 G. 2. c. 30. § 7. to bankrupts in *England*,) is bad. Quin v. Keep, 2 H. Bl. 553.

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(*If there are*) It was in form an action of *aſſumpſit*, and its authority hath been denied in later caſes; for it hath been holden, that in *aſſumpſit* againſt one partner, the partnerſhip muſt be pleaded in abatement, and cannot be given in evidence. Rice v. Shute, 5 Burr. 2611. Abbot v. Smith, 2 Bl. Rep. 947. And the law is the ſame in an action on the cuſtom of the realm. Buddle v. Willſon, 6 Term Rep. 369. In an action *ex delicto*, that there are other partners not named is no cauſe of abatement, for every *tort* is ſeveral. Mitchell v. Tarbutt, 5 Term Rep. 649.

(*In debt for rent*) But in *aſſumpſit* under the ſtat. 11 G. 2. for uſe and occupation, *nil habuit in tenementis* is not good. Lewis v. Willis, 1 Wilſ. 314.

4 Burr. 2469. Whatever is matter of inducement may be given in evidence on the general iſſue: *ſecùs*, of matter of ſubſtance.

Ibid. A proviſo in the ſame act of parliament, whereon an action is brought, and the matter provided in it, may be given in evidence on the general iſſue: as, in an action againſt a parſon for merchandizing, contrary to 21 *H.* 8. *c* 13. which has a proviſo for neceſſaries to maintain his houſehold. So, it ſeems, that a proviſo in the bribery act of 2 *G.* 2. *c.* 24. that a perſon, who has been a diſcoverer, ſhall not be an object of that law, may be taken advantage of under the plea of *nil debet*.

Page 68 (H) Traverſe: And herein.

(*The inducement*) In general, the inducement to a traverſe cannot be traverſed: it ought, however, to be ſuch, as, if true, will defeat the title of the other party; otherwiſe it amounts to a negative pregnant. *Per* Parker, C. B. Park, 131.

(*A traverſe*) Hence, in an information in nature of a *quo warranto*, the defendant made title under the conſtitution of Honiton, and then traverſed the uſurpation: the Attorney-general, without taking any notice of the title, joined iſſue on the traverſe; and it was holden to be ill, becauſe the uſer being admitted by the defendant's making title, the uſurpation was a matter of law, not to be ſent to a jury. Rex v. Blagdon, Paſch. 1 Geo. cited in 2 Str. 841.—But matter of law connected with fact is clearly traverſable; as ſeiſin in fee, or in tail, Ewer v. Moile, Yelv. 140. ſimony, Raſt. Entr. 532. a. right of a county to repair a bridge, 2 Lev. 112. right to preſent to a church. Grocers' Company v. Archbiſhop of Canterbury, 3 Wilſ. 234. 2 Bl. Rep. 776.

(*And therefore*) In this caſe, according to Yelverton, the court ſaid, that the traverſe ought to purſue the very words of the plea traverſed. Though perhaps this may be too ſtrict, and it may be not neceſſary to follow the very words of the plea; yet, moſt certainly the traverſe muſt be *ad idem*, it muſt be the ſame with the plea in effect and ſubſtance; thus, where in treſpaſs, a plea alleged the injury to be in conſequence of cutting a beam, the replication, traverſing its being previous, was adjudged ill. Humphreys v. Churchman, Ca. temp. Hardw. 289.

(*An iſſue*) Although it is a general rule that a traverſe muſt conclude with a verification, yet it may, and when it compriſes the whole ſubſtance of the plea, it ought to conclude to the country.

try. Boyce v. Whitaker, Dougl. 96. Haywood v. Davies, 1 Salk 4. Robinſon v. Railey, 1 Burr. 316. Smith v. Dovers, Dougl. 428. Hedges v. Sandon, 2 Term Rep. 439.

2. In what Caſes a Traverſe is permitted.

In debt on a bail-bond, the defendant traverſed the arreſt of the principal; and on demurrer, judgment was given for the plaintiff; for otherwiſe this would be a way to avoid all bail-bonds that are civilly taken, without expoſing the party by an arreſt. Watkins v. Barry, 1 Str. 444. Hayley v. Fitzgerald, *Id.* 643. S. P.

4. Whether there may be a Traverſe upon a Traverſe.

In treſpaſs for fiſhing in the plaintiff's fiſhery, the defendant pleaded, that the place in queſtion is an arm of the ſea, in which every ſubject has a right to fiſh: the plaintiff in his replication claimed an excluſive right by preſcription, traverſing the general right: the defendant in his rejoinder inſiſting upon the general right, traverſed the preſcriptive right claimed by the plaintiff. The court of *K. B.* held, that the defendant ought to have taken iſſue on the traverſe in the replication, and not to have traverſed the preſcriptive right claimed in the replication; for that the firſt traverſe was a material one, and put in iſſue the true queſtion in diſpute between the parties. But this judgment was reverſed in the Exchequer-chamber. For the firſt traverſe was of the right of *all* the king's ſubjects to fiſh in an arm of the ſea, ſtated by the defendants; but this was clearly a bad and an immaterial traverſe, for it was not only a traverſe of an inference of law, but it was ſo taken, that if at the trial it had been proved, that it was the ſeparate right of others, and not of the plaintiff, the iſſue muſt have been found for the plaintiff, not only without his being obliged to prove either poſſeſſion or right, but where in fact he had neither poſſeſſion nor right. An immaterial traverſe may be paſſed over, and the matter of the inducement traverſed; which had been properly done by the defendant in this caſe. Mayor, &c. of Orford v. Richardſon, 4 Term Rep. 437. 2 H. Bl. 182.

In prohibition, for that the defendants had petitioned the court of common council, complaining of an undue election of the plaintiff as a common council man, which court had no juriſdiction therein, the juriſdiction belonging to the court of mayor and aldermen, the defendant pleaded, that the common council have the juriſdiction, *abſque hoc*, that the juriſdiction is in the court of mayor and aldermen; the plaintiff replied, that the common council have it not, and concluded to the contrary. The defendants demurred, and ſhewed for cauſe, that the replication is a departure, and that the plaintiff ought to have taken iſſue on the traverſe. But *per curiam* —The traverſe is immaterial; for what is the ground of ſending a prohibition? Not becauſe the court of aldermen have a right, but becauſe the common council have none; and therefore the traverſe which would avoid trying the right of the common council, and bring that of the court of aldermen in queſtion, is immaterial. And where the firſt traverſe is immaterial, that is, where it will not put the proper point in iſſue, there may be a traverſe upon that traverſe. King v. Bolton, 1 Str. 117. 1 Br. P. C. 98. S. C.

In *quare impedit* by the king, for the next turn of a living void by promotion, the defendant pleaded, that the crown preſented *D.*, who is ſince dead, and that he himſelf is parſon imparſonee, and concluded with a traverſe, that the church is ſtill vacant by the promotion. This plea is a full confeſſion and avoidance, without the traverſe; which for that reaſon is immaterial, and therefore may be paſſed over. Rex v. Archbiſhop of Armagh, 2 Str. 837.

In

Thrale v. Biſhop of London, 1 H. Bl. 376.

In *quare impedit*, the plaintiffs entitled themſelves to the advowſon in queſtion, as executors and deviſees in truſt under the will of *Caleb Lomax*, whom the declaration ſtated to have been ſeiſed in fee of the advowſon, and to have preſented on a former avoidance. The defendant in one of his pleas ſtated a title to the advowſon in one *Ellis*, who preſented in 1680; that *Ellis* conveyed it to *Killigrew*; that *Killigrew* deviſed it to his wife *Lucy* for her life; and that the reverſion on the death of *Killigrew* deſcended to his three daughters in coparcenary. It then ſtated an avoidance during the life of *Lucy* the widow, and a preſentation by *Lomax* the father of the teſtator, uſurping on *Lucy*. It then ſtated, that the living again became vacant after the death of *Lucy*, by the reſignation of the then incumbent *Romney*, and that the crown by uſurpation on the right of the eldeſt coparcener preſented again the ſame clerk. It then ſtated an avoidance by the death of that preſentee, and another preſentation on that avoidance by *Lomax*, uſurping on the right of the ſecond coparcener. A title was then deduced at conſiderable length to the defendant, from the ſecond and third coparcener, concluding with a claim to preſent on the exiſting vacancy, in the third turn. The replication to this plea ſtated a purchaſe by *Lomax* of the right of *Lucy* the widow, and a preſentation to the advowſon made by him during the life of *Lucy*, on an avoidance then happening. It then ſet forth a fine, levied by the three coparceners of the advowſon, and a conveyance to *Lomax* under that fine; and concluded, that the reſignation of *Romney* was fraudulent and without notice, and traverſed, that upon that reſignation it belonged to the eldeſt coparcener to preſent. In the rejoinder to this replication the defendant traverſed the fine; upon which the plaintiff demurred ſpecially, alleging as a defect in the rejoinder, that there was a traverſe upon a traverſe. But the court held, that the traverſe in the replication was an immaterial traverſe, and being ſuch, the defendants were at liberty to paſs it by; and therefore the rejoinder was good.

5. To what Point the Traverſe ſhall be taken; and therein, what Matters are traverſable, and of the Manner of taking thereof.

Hope v. Co.man, 2 Wilſ. 221.

In debt for an annuity, it appeared upon oyer of the deed, that the defendant covenanted to pay it, (if the ſame were perſonally demanded by the plaintiff,) whereupon the defendant traverſed the demand. The plaintiff demurred: and *per curiam*—The grant is ſubſtantive, and ſo is the covenant ſubſtantive, and the demand in this action is not traverſable, whatever it might have been, if an action had been brought upon the covenant; but we think it would not be traverſable in that caſe, as it is contained in a parentheſis in the deed.

Morewood v. Wood, 4 Term Rep. 157.

To an action of treſpaſs in the common called *A.* the defendant pleaded that *A.* and *B.* commons lie open to each other, and then preſcribes for a right in both commons. It was holden, that the plaintiff could not traverſe part only of the preſcriptive right claimed by the defendant, the preſcription in *A.*, but muſt traverſe the *whole* preſcription, for all preſcriptions are entire; and when they are pleaded, the adverſe party cannot deny a part only but muſt either demur or traverſe the whole.

Griffith v. Williams, 1 Wilſ. 338.

To an action of treſpaſs the defendant juſtified, under a preſcriptive right to a duty, and alſo a preſcriptive right to diſtrain for it. The plaintiff traverſed the preſcription for the duty, but not the preſcriptive right to diſtrain; and upon demurrer for that cauſe, the replication was holden good.

To

To an action of covenant by an aſſignee for rent arrear, the defendant pleaded, that the leſſor made a conveyance in fee before the leaſe, and traverſed, that he was afterwards ſeiſed in fee. This traverſe was adjudged to be bad for its generality, as it tied the plaintiff up to prove an eſtate in fee, when any other would do. Palmer v. Ekins, 2 Str. 817.

(I) Pleas in Bar, their Sufficiency and Certainty: And herein,

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(*Where the*) Certain it is, that the plea of not guilty to debt on a penal ſtatute is not ſuch a nullity, as will warrant the plaintiff in ſigning judgment. 1 Term Rep. 462.

(*In debt for rent,*) So, in debt for rent reſerved by deed, *riens in arrere* is a good plea. Cowp. 588.

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(*In trover*) The defendant may plead the ſtatute of Limitations, Lutw. 99.

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(*If the plaintiff declares upon an indebitatus aſſumpſit, and upon*) But an account without payment or releaſe is ſurely no bar in this caſe. Mayor, &c. of Scarbro' v. Butler, 3 Lev. 237. And an *infimul computaſſet* with payment amounts to the general iſſue. Com. Dig. tit. Pleader, (2 G. 2).

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(*Intreſpoſs for taking*) So, Stephens v. Haughton, 2 Str. 847.

3. Of general Pleading to avoid Proxility; and therein, of affirmative and negative Pleas.

So, in an action on a bond entered into by the agent of a regiment conditioned to pay to the colonel, commiſſioned and non-commiſſioned officers, &c. all ſuch ſums as he ſhould receive from the paymaſter general, it is not neceſſary in aſſigning a breach to enter into the detail, and ſtate the reſpective proportions each perſon was entitled to, and the various deductions out of the whole pay upon various accounts. Cornwallis v. Savery, 2 Burr. 772.

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(*If in debt*) If to debt upon bond conditioned to indemnify the plaintiff, the defendant plead *quod indempnem conſervavit*, without ſaying how; this is well enough, if not ſhewn for cauſe of demurrer. White v. Cleaver, 2 Str. 681 *Sed vide* Hillier v. Plympton, 1 Str. 422.

If the condition of a bond be, that *A.* ſhall not embezzle any money that ſhall be intruſted to him, or that *in any way* ſhall come to his hands on account of his maſter, it is neceſſary to ſtate in the breach, that a particular ſum of money was embezzled, and how, or from whom it was received. Jones v. Williams. Dougl. 213.

In debt upon bond conditioned to perform articles, it appeared by the plea, that the articles were an agreement, that the plaintiff ſhould furniſh the defendant with ale and beer to be ſold in his houſe at ſuch prices, and that he ſhould take it of nobody elſe, but might be at liberty to take any other liquors (malt liquors only excepted); and what ſhould not be paid for at breaking up the trade, and were undrawn, ſhould be taken back. The defendant pleaded performance. The plaintiff replied, that by the ſame articles it was further agreed, that what ſhould be drawn ſhould be paid for, and that there was ſuch a quantity of liquors unpaid for. On demurrer by the defendant, it was ſaid, that by the breach it does not appear the Stibbs v. Clough, 1 Str. 227.

the liquors unpaid for were malt liquors; and as other ſorts are mentioned, the plaintiff ſhould have been more particular; eſpecially in the caſe of a bond, where he is to ſubject the defendant to a penalty. And of that opinion was the court, who cited the caſe of the *African Company* v. *Maſon*. That was a bond, conditioned, reciting that the defendant was their receiver at *Briſtol*, if therefore he do well and truly account for all ſums by him received, then the bond to be void: the breach was, that he received ſo much money, and did not account for it; and becauſe it appeared by the recital in the condition to be only about tranſactions of a particular nature, the general aſſignment of the breach was holden ill. So, is 2 *Saun.* 411.

10 Mod. 227. Gilb Rep. 238. S. C.

4. Of Surpluſage and Repugnancy in Pleading.

In an information upon a ſtatute, if the proſecutor is not obliged to negative the exceptions in the ſtatute, and yet negatives ſome of them, that part of the information ſhall be rejected as ſurpluſage.

The King v. Hall, 1 Term Rep. 320.

In an action of aſſault againſt *A.* and *B.*, if *A.* confeſſes, and *B.* pleads that he and *A.* is not guilty, and iſſue is joined, and *B.* is found guilty, the words referring to *A.* may be rejected.

Hill v. Fleming, Ca. temp. Hardw. 341.

So, in debt on a ſimple contract, the declaration hath been holden to be good, though the aggregate amount of the ſeveral ſums in the different counts fell ſhort of the ſum demanded in the recital of the writ, and the breach was aſſigned in the non-payment of the ſum demanded in the writ.

M'Quillin v. Cox, 1 H. Bl. 249.

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(*It is laid*) There ſeems to be this ſort of affinity between an argumentative plea and negative pregnant; that as the latter is a negative pregnant with an affirmative, ſo is the former an affirmative pregnant with a negative; and the cure for both is, in moſt caſes, to add, or, at leaſt, to ſubſtitute, a direct denial of the ſubſtance and git of the plea or declaration which is to be anſwered. 3 Reeve's Hiſt. 435.

(*In caſe againſt*) More properly the general iſſue.

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(*If the obligee*) 1 Term Rep. 446.

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(*Colour is a*) See 3 Reeve's Hiſt. 438.

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(*By matter*) In the caſe of Combe and Pitt, it is ſettled that the actual day of ſuing out the writ may be ſhewn in pleading. 3 Burr. 1423. &c.

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Where the) The general rule was underſtood to be as here ſtated, that a deed could not be pleaded without a *profert*. But it hath lately been adjudged, that an inſtrument may be pleaded, as loſt by time or accident, or as deſtroyed by *fire*, or the like, without *profert*; for *lex non cogit ad impoſſibilia*, and no human prudence can render deeds of perpetual exiſtence. 3 Term Rep. 151.

3 Wilſ. 1

For the ſame reaſon, the indorſe of a promiſſory note indorſed over by an adminiſtrator, need not make a *profert* of the letters of adminiſtration.

Br. Oy. de Rec. pl. 10

In replevin, the defendant avowed for rent deviſed to him in mortmain by the cuſtom of *London* by teſtament. *Fulthorp* demanded oyer of the teſtament. *Per Strange*—It belongs to the executor; as a feme, who demands dower of the rent granted to her baron, ſhall not ſhew the deed, for it belongs to the heir.

Bro. Monſtr. p. 134.

If a man who ought to ſhew a deed, do not ſhew it, but only a confirmation, it is not good. *Quod nota bene.*

If a plaintiff deſcribe himſelf as adminiſtrator, where he has no occaſion to do ſo, a *profert* of the letters of adminiſtration is unneceſſary. Dougl. 5. n.

Where the probate of a will is loſt, a *profert* may be made of an exemplification of it. Shepherd v. Shorthouſe, 1 Str. 412.

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(b) *Oyer of a deed*) And the party, of whom oyer is demanded, is bound to carry it to the adverſe party. 2 Term Rep. 40.

2 Str. 1186. 1 Wilſ. 16. Where a deed is in the hands of a third perſon, the court will oblige him to give oyer, and produce it. 2 Str. 1198.

(*If a man*) But it is now ſettled, that if the defendant demand oyer of the original writ, the plaintiff is not bound to attend to it, but may proceed as if no ſuch demand had been made. Boats v. Edwards, Dougl. 227. Ford v. Burnham, Barnes, 340.

(*In treſpaſs*) A party is not obliged to give oyer of letters patent. 1 Term Rep. 149.

(*Oyer of the*) That is, if it be not denied; for in that caſe, the law doth adjudge it to be in the cuſtody of the party to whom it belongs: but if it be denied, then it ſhall remain in court until the plea is determined, and if it eventually turn out not to be the plaintiff's deed, it ſhall be deſtroyed. See the above authorities and Co. Lit. 231. b. But letters teſtamentary, or of adminiſtration, are not ſuppoſed to remain in court all the term; for the plaintiff may have occaſion to produce them elſewhere. 2 Salk. 497. 12 Mod. 590. S. G.

If the defendant plead a judgment or other matter of record in the *ſame* court, he muſt give a note in writing of the term and number-roll whereon ſuch judgment or matter of record is entered and filed; or in default thereof, the plea is not to be received. But in ſtrictneſs oyer is not demandable of a record. And it ſeems, not of an act of parliament. Keilw. 96. Carth. 454. 1 Ld. Raym. 347. 550. 2 Str. 823. R. T. 5 & 6 G. 2. B. R. Dougl. 476. 1 Term Rep. 149.

The time allowed for the defendant to give oyer of a deed, &c. to the plaintiff, is two days excluſive after it is demanded. If it be not given in that time, the plaintiff may ſign judgment as for want of a plea (*c*). If given, the plaintiff ſhall have the ſame time to reply after it is given, as he had at the time it was demanded. Carth. 454. 2 Term Rep. 40. (*c*) 6 Mod. 122. (*d*) R. T. 5 & 6 G. 2. B. R.

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(*After Imparlance*) This muſt be underſtood of a *ſpecial* imparlance to another day in the ſame term.

(*When a deed*) And this, though it were not ſtrictly demandable at the time of granting it. Dougl. 460. As it is a kind of plea, it ſhould regularly be made before the time for pleading is expired. Fowler v. Dyer, Mich. 20 G. 3. Tidd's Pr. 347.

(*Debt for the*) It ſeems, however, that the plaintiff, if he would conteſt the oyer, may either counterplead it, or ſtrike out the reſt of the pleading and demur; on which the judgment of the court is, either that the defendant have oyer, or that he anſwer without it; on the latter judgment the defendant may have a writ of error; for to deny oyer where it ought to be granted is error, but not *e converſo*. 2 Salk. 497. 2 Ld. Raym. 970. 2 Str. 1186. 1 Wilſ. 16.

It hath been ſaid, that the defendant is not bound to ſet forth the oyer in his plea; and that if he do not, the plaintiff may pray an enrolment, and ſo make it part of his replication. But it is now holden, that if the defendant after praying oyer of a deed, do not ſet forth the whole of it, the plaintiff may ſign judgment as for want of a plea, or the court will quaſh it, for that by craving oyer the defendant undertakes to ſet out the whole *verbatim*; and if he do not ſo, the plea is bad. Weavers' Company v. Forreſt, 2 Str. 1141. Simmonds v. Parmenter, 1 Wilſ. 97. Wallace v. Ducheſs of Cumberland, 4 Term Rep. 370. Slater v. Horne, E. 34 G. 3 B. R. Tidd's Pr. 309. S. P. See alſo Barnes, 327. S. P.

Where

Ferguſon v. Mackreth, Hil, 24G. 3. B. R. cited n 4 Term Rep. 371. note.

Where the defendant in an action on a bond, after craving oyer, and ſetting it out truly, pleaded payment, on which the plaintiff took iſſue, and ſerved the defendant's attorney with a rule to abide, &c., and gave notice of trial; and afterwards the defendant returned the paper book, ſetting out a falſe oyer of the bond, and pleading as before, on which the plaintiff enrolled the true condition, and demurred; the court ordered all the proceedings to be ſtruck out, that the plaintiff ſhould have judgment and the defendant's attorney ſhould pay all the coſts.

13. Pleading a Recovery in a former Action.

Sparry's caſe, 5 Co. 62. Dudfield v. Warden, Fitzg. 313.

Neither can the pendency of an action in an inferior court be pleaded to an action brought in one of the courts at *Weſtminſter* for the ſame thing. *Vide etiam ſupra*, Vol. I. 23.

Kitchen v. Campbell, 2 Bl. Rep. 827. 3 Wilſ. 304. S. C. (*a*) 2 Ld. Raym. 1216. That a former recovery may begiven in evidence on the general iſſue to an action on the caſe. 2 Str. 733. 3 Burr. 1353. 1 Show. 146. *Secus*, to debt *qui tam* 1 Str. 701-2. or on bond.

So, to an action of *indebitatus aſſumpſit* for the value of goods, a judgment for the defendant in trover for the ſame goods may be pleaded in bar, provided it appear by proper averments in the plea, that the queſtion between the parties was the ſame in both actions. So, *e converſo* (*a*), a recovery in *indebitatus aſſumpſit* for the value of the goods, may be pleaded in bar to an action of trover for the ſame goods. In theſe caſes the principal conſideration is, whether it be preciſely the ſame cauſe of action in both, which may appear either by proper averments in a plea, or by proper facts ſtated in a ſpecial verdict, or a ſpecial caſe. One great criterion of this identity is, that the ſame evidence will maintain both the actions.

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(K) Duplicity in Pleading: And herein.

(*The plea*) Duplicity is, where diſtinct matrers. not being part of one entire defence, are attempted to be put in iſſue But this does not preclude a party from introducing ſeveral matters in to his plea, if they are conſtituent parts of the ſame entire defence. For though it be true, that iſſue muſt be taken upon a ſingle point; yet it is not neceſſary that ſuch ſingle point ſhould conſiſt only of a ſingle fact. For inſtance, the point of the plea may be, that the defendant is entitled to common: but to eſtabliſh this point ſeveral facts may be neceſſary, as, that the cattle with which he is to uſe the common muſt be his own cattle, muſt be levant and couchant, &c. Robinſon v. Rayley, 1 Burr. 316.

Maclellan v. Howard, 4 Term Rep. 194. Jenkins v. Edwards, 5 Term Rep. 97.

A defendant ſhall not be allowed to plead *non aſſumpſit*, or *non eſt factum* to the whole declaration, and a tender as to part; for one of theſe pleas goes to deny that the plaintiff had any cauſe of action, and the other partially admits it.

Anderſon v. Anderſon, 2 Bl. Rep. 1157. Hillier v. Fletcher, *id.* 1207. Robins v. Crutchly, 2 Wilſ. 118. Semb. *contr.*

Neither ſhall he be allowed to plead ſeveral matters, which require different trials, as, in dower, *ne unques accouple en loyal matrimonie*, and mortgage, or *ne unques ſeiſie que dower*; for the firſt matter is triable by biſhop, and the others by a jury; and if the former be found againſt the defendant, the judge cannot certify, that he had a probable cauſe of pleading it.

This ſtatute of the 4 & 5 *Ann.* does not extend to any action, or information, upon a penal ſtatute. Morgan v. Luckup, Ca temp. Hardw. 262. 2 Str. 1044, S. C. Law v. Crowther, 2 Wilſ. 21, Lookup v. Frederick, Barnes, 365. Heyrick v. Foſter, 4 Term Rep. 702.

(L) Departure in Pleading.

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(*If a man lay a*) This part of the doctrine in the text is nothing more than a looſe *dictum* of my Lord Holt, and is contradicted by authorities. For, if the time laid in the declaration is immaterial, there, though it becomes material by the defendant's plea, yet the plaintiff in his replication may depart from it: as, in treſpaſs, Co. Litt. 282. a. b. 1 Salk. 222. 2 Ld. Raym. 1015., or trover, Cro. Car. 245. 333. 1 Salk. 222., or upon a general *indebitatus aſſumpſit*, 1 Str. 22. 2 Str. 806. 1 Lev. 110. 1 Keb. 566. 678. 10 Mod. 281. Fort. 375., where the time becomes material by the defendant's plea of a releaſe, tender, or the ſtatute of limitations, &c. And in actions for a tranſitory treſpaſs, where the defendant pleads a local juſtification, the plaintiff, in his replication may vary from the place laid in the declaration. 1 Ld. Raym. 120.

(M) Repleader: And herein,

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When iſſue) Note: The materiality of theſe words, "*not determining the right:*" for, if the court ſee, that by the verdict, as found, ſubſtantial juſtice hath been done, or, if they ſee that the party's caſe itſelf cannot be amended, or would be at all *material*, if put in any ſhape whatever, in neither of theſe caſes ſhall there be a repleader. For in no caſe will a repleader be awarded, but where complete juſtice may be anſwered. *Vide* Rex v. Philips, 1 Burr 292. Rex v. Philips, 1 Str. 394. Symmers v. Regem, Cowp. 510. Taylor v. Whitehead, Dougl. 740.

But, ſince the practice of ſetting aſide verdicts has prevailed, repleaders have been rarely granted, ſo that under the modern practice, the courts can direct the coſts to be paid by the party to whom the miſtake in the pleadings is imputable. 1 Burr. 304.

2. A Repleader in what Caſes to be awarded.

A bond was conditioned for the payment of money *on or before* the 5th of *December*. Plea of payment on the 5th of *December*. Replication, iſſue, and verdict for the plaintiff. This was holden to be an immaterial iſſue, and a repleader was therefore awarded: though it would have been exclu- ſive, if found for the defendant; but did not conclude, when found for the plaintiff. And though this was a ſlip of the defendant, yet, as it did not determine the queſtion, a repleader was awarded. Tryon v. Carter, 2 Str. 994. 1 Burr. 302. It was ſaid by Buller, J. to be a rule, to which he could find no eaſe of any exception, never to grant a repleader, when the iſſue is found againſt the party tendering it, Dougl. 396.

(N) Demurrer: And herein,

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(*In the ſtatute*) And when there are ſeveral counts in a declaration, ſome of which are good in point of law, and the reſt bad, the defendant can only demur to the latter; for if he were to demur generally, to the whole declaration, the court would give judgment againſt him. 1 Saund. 286. 2 Saund. 380. 1 Wilſ. 248. But, if a plea or replication, which is entire, be bad in part, it is bad for the whole. 2 Saund. 124. 1 Salk. 312. 1 Term Rep. 40. 3 Term Rep. 374.

(*If there be a*) In practice, it is uſual and adviſable to determine the iſſue in law firſt, for the following reaſons: firſt, that the determination of an iſſue in law is generally more expeditious,

and leſs expenſive, than the trial of an iſſue in fact: ſecondly, that if the iſſue in law go to the whole cauſe of action, and be determined againſt the plaintiff, it is concluſive, and there is no occaſion afterwards to try the iſſue in fact; whereas, if the iſſue in the fact be firſt tried, and found for the plaintiff, he muſt ſtill proceed to the determination of the iſſue in law, and if that be found againſt him, he will not be allowed his coſts of the trial of the iſſue in fact: and laſtly that whether the demurrer goes to the whole, or part of the cauſe of action, if the plaintiff proceed to argue it firſt, and the court ſhould be of opinion againſt him, he may amend as at common law; but, after the cauſe has been carried down to trial, he cannot amend any farther than is allowable by the ſtatutes of amendment. Tidd's Pr. 476, 7.

4. How far a Judgment on a Demurrer is peremptory.

Tidd's Pr. 478, 9. But in other caſes, the judgment is interlocutory or final, according to the nature of the action: if the action be for damages, in *aſſumpſit*, &c. it is interlocutory, and ſhould be ſigned, on treble-penny ſtamped paper, with the judgments, after which the damages ſhould be aſſeſſed on a writ of inquiry, or reference to the Maſter: but in *debt*, &c. for a ſum certain, the judgment is final, and there being no neceſſity for a rule for judgment (*d*), the plaintiff may immediately tax his coſts, and take out execution.

(*d*) 1 Str. 429.

2 Salk. 520. Gilb. C. P. 114, 15. 2 Str. 846. 1 Barnard. K. B. 213. 220. 2 Saund. 402. Indeed, the very intent of requiring miſtakes, in point of law, to be ſhewn for cauſe of demurrer, was, to give the party an opportunity of amending. And even where the proceedings are entered on record, and the demurrer has been argued, the court will give leave to amend, where the juſtice of the caſe requires it, and there is any thing to amend by. The court, however, will always take care, that if one party obtain leave to amend, the other party ſhall not be prejudiced or delayed thereby.

2 Str. 735. 954. 976. Ca. temp. Hardw 42. 1 Burr. 321. Dougl. 330. Barnes, 9. 21, 25. 2 Burr. 756.

Tidd's Pr, 450. Dougl, 385. 452. And leave hath been ſometimes given to a party to *withdraw* his demurrer, after it has been argued, and to plead or reply *de novo*, in order to let in a trial of the merits. Thus, after a demurrer to the defendant's plea had been argued, and the matter ſtood over for the judgment of the court, a rule was made to ſhew cauſe, why the plaintiff ſhould not have leave to withdraw his demurrer, and reply to the plea; which rule, no cauſe being ſhewn, was afterwards made abſolute. But this is altogether diſcretionary in the court. Therefore, where to an action of debt on a bail-bond the defendant pleaded there was no bill of *Middleſex*, and the plaintiff demurred, the court, after delivering their opinion in favour of the defendant, refuſed to give the plaintiff leave to withdraw his demurrer, and amend: And by *Wright*, J.—It is not uſual to amend, after a demurrer has been argued, and the opinion of the court is known: and it is certainly improper to give leave in the preſent caſe, it being an action againſt bail, whom the court is always inclined to favour.—So, where the defendant rejoined to ſeveral replications in treſpaſs, and demurred to others, and a verdict was found for him upon the iſſues in fact, and contingent damages were aſſeſſed upon the demurrers, which were afterwards over-ruled, the court refuſed to let the defendant withdraw his demurrers and plead to iſſue: And by *Denniſon*, J.—Where the demurrer is firſt argued, before any trial of the iſſues, the court will give leave to amend; as in the caſe of *Giddins* v. *Giddins* (*Say. Rep.* 316.): But this is an attempt to amend iſſues in law, after a verdict has been found on the iſſues in fact, and contingent damages aſſeſſed, of which there never was an inſtance. And we do not know where it would end, nor how the cauſe could be again carried down to trial. The court cannot help ſeeing that this is upon record, here

Robinſon v. Rayley, 1 Burr. 321.

here are verdicts, and contingent damages found. The cases of amendment cited are, where the whole is supposed to be in paper; else the court could not have done it. We have no authority to do this, after it is plainly upon record.

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(*Demurrer to*) The reason for demurring to evidence is that the jury if they please may refuse to find a special verdict, and then the facts never appear on the record. *Per* Buller, J. Doug. 134.

If a matter of *record*, or other matter in *writing*, be offered in evidence to maintain an issue joined between the parties, all the books agree, that the adverse party may insist upon the jury being discharged from giving a verdict by demurring to the evidence, and obliging the party offering the same to join in demurrer, or waive the evidence: and the reason given for it is, that there cannot be any variance of matter in writing. The books also agree, that if *parol* evidence be offered, and the adverse party demur; he who offers the evidence may join in demurrer if he will. But the language of the old books is very indistinct upon the question, whether the party offering *parol* evidence shall be *obliged* to join in demurrer. In a late case which came before the House of Lords, (*Gibson* and *Johnson* v. *Hunter* 2 *H. Bl.* 187.) it was observed, in delivering the opinion of the judges, that *parol* evidence is sometimes certain, and no more admitting of any variance, than a matter in writing; but it is also often loose and indeterminate, often circumstantial. The reason for *obliging* the party offering evidence in *writing*, to join in demurrer, applies to the first sort of parol evidence; but it does not apply to parol evidence that is loose and indeterminate, which may be urged with more or less effect to a jury; and last of all, will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. In such cases, however, if the party, who demurs, will admit the evidence of the fact, which evidence is loose and indeterminate, or, in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this parol evidence, than in a matter in writing; and in such case, the party shall be allowed to demur, and his adversary must join in demurrer. But on a demurrer to *circumstantial* evidence, unless the party demurring will distinctly admit, upon the record, every fact, and every conclusion, which the evidence offered conduces to prove, it is not competent to him to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering it to join in demurrer: though, if the party offering the evidence consent to waive the objection, and to join in demurrer, every fact is to be considered by the court as admitted, which the jury could infer in his favour, from the evidence demurred to: and the court will, if they can, give judgment upon such evidence; but otherwise, a *venire de novo* must be awarded.

Tidd's Pr. 582, 3, 4.

Dougl. 119. 2 H. Bl. 209.

The whole operation of entering the matter upon record, and conducting a demurrer to evidence, is and ought to be under the direction and controul of the court, upon a trial at bar, or of the judge at *nisi prius*: subject however, to an appeal, by bill of exceptions, if the demurrer be refused. And where a demurrer to evidence is admitted, it is usual for the court, or judge, to give orders to the associate, to take a note of the testimony, which is signed by the counsel on both sides, and the demurrer is affixed to the *poste a*.

2 H. Bl. 208. Cro. Car. 341. Bull. N. P. 313.

Dougl. 218. The queſtion upon a demurrer to evidence being, whether the evidence offered be ſufficient to maintain the iſſue, the party, on ſuch demurrer, cannot take advantage of any objection to the pleading.

(O) Plea at what Time to be put in, and the Ceremony requiſite therein.

Page 137 (*If the defendant*) When a ſummons is taken out, and made returnable, before the expiration of the time for pleading, it is a ſtay of proceedings, pending the application: but it is otherwiſe, when taken out, or made returnable, after the expiration of the time for pleading. Say Rep. 165. Barnes, 240. 252. Caſ. Pr. C. B. 137. Pr. Reg 292. S C. Barnes, 255. Caſ. Pr C. B. 144. S. C. Barnes, 254. Pr. Reg. 293. S. C. Nor will it operate as a ſtay of proceedings, where the object of it is collateral to the time for pleading, as, to diſcharge the defendant out of cuſtody upon common bail, &c. *Per Cur.* M 28 G. 3.

R. T. 5 & 6 G. 2. and ſee R. M. 10 G. 2. Reg. 2. In *B. R.*, if the plaintiff *amend* his declaration, the defendant ſhall have *two* days, excluſive of the day of amendment, to alter his firſt plea, or plead *de novo*.

R. T. 5 & 6 G. 2. In *B. R.*, where the defendant has appeared, or filed bail, upon any kind of proceſs, returnable the *firſt* or *ſecond* return of any term; if the plaintiff declare in *London* or *Middleſex*, and the defendant live within twenty miles of *London*, the declaration ſhould be delivered or filed *abſolutely*, with notice to plead within *four* days; or, in caſe the plaintiff declare in any other county, or the defendant live above twenty miles from *London*, within *eight* days *excluſive* after the delivery or filing thereof; and the defendant muſt plead accordingly without any imparlance.

R. T, 22 G. 3. Where the defendant has not appeared or filed bail, the rule in *B. R.* is that "upon all proceſs returnable before the *laſt* return of any term, where "no affidavit is made and filed of the cauſe of action, the plaintiff may file "or deliver the declaration *de bene eſſe*, at the return of ſuch proceſs, with "notice to plead in *eight* days excluſive, after the filing or delivery there-"of; and if the defendant do not file common bail, and plead within the "ſaid *eight* days, the plaintiff, having filed common bail for him, may 1 Burr. 56. Delatre v. Mango, M. 20 G. 3. "ſign judgment for want of a plea." But, if the declaration be not filed until *after* the return of the proceſs, the defendant has *eight* days to plead from the time of filing it, whenever it may be. And "upon all proceſs, Tidd's Pr. 244. "where an affidavit is made and filed of the cauſe of action, the declara-"tion may be filed or delivered *de bene eſſe*, at the return of ſuch proceſs, "with notice to plead in *four days* after the filing or delivery, if the action "be laid in *London* or *Middleſex*, and the defendant live within *twenty* "miles of *London*, and in eight days, if the action be laid in any other "county, or the defendant live above twenty miles from *London*; and if "the defendant put in bail, and do not plead within ſuch times as are re-"ſpectively before mentioned, judgment may be ſigned." But in all the foregoing caſes, the declaration ſhould be delivered, or filed, and notice thereof given, *four* days *excluſive* before the end of the term, a rule to plead duly entered, and a plea demanded, when neceſſary.

Tidd's Pr. 245. When the proceſs is returnable the *laſt* return of the term, or, where it is returnable before, but the declaration is not delivered, or filed, and notice thereof given, *four* days *excluſive* before the end of the term, the defendant is entitled to an imparlance, and muſt plead within the firſt *four* day

days of the next term, provided the declaration be delivered or filed, and notice thereof given, before the eſſoin-day of that term, otherwiſe the defendant will be allowed to imparl to a ſubſequent term.

If four terms have elapſed, ſince the delivery or filing of the declaration, the defendant ſhall have a whole term's notice to plead, before judgment can be entered againſt him, unleſs the cauſe have been ſtaid by injunction or privilege; and the notice in ſuch caſe muſt be given before the eſſoin-day of the term; but it does not extend beyond the term; and therefore a rule to plead may be entered, and judgment ſigned, in the vacation. R. T. 5 & 6 G. 2. 2 Burr. 660. Dougl. 71. 2 Bl. Rep. 2 Str. 115. 1 Str. 112. *contr.* 2 Term Rep. 40.

After a defendant in a *quo warranto* information has appeared, the proſecutor muſt give two four-day rules to plead, and after the expiration of the laſt, muſt alſo move in term-time for a peremptory rule to plead, otherwiſe the defendant has until the next term to plead. 6 Term Rep. 594. In all criminal proſecutions for miſdemeanors two four-day rules are given to plead, and a peremptory rule moved for; and then, if there be a demurrer, one four-day rule to join in demurrer, and a peremptory rule moved for. *Ibid.* Rex v. Sayer.

The time allowed perſons in confinement, charged with offences againſt the exciſe laws, is, in caſe ſuch perſons are confined in any gaol within the diſtance of *forty* miles from *London*, *ſix* days; if above *forty* miles, *eight* days, after the delivery of the copy of the indictment or information to ſuch perſons, or to the gaoler, keeper, or turnkey of the gaol, with a notice thereon indorſed. R. T. 35 G. 3.

A priſoner needs not give notice of a plea, unleſs he files it before the time when by the rules of the court he is compellable to plead. Ruſholm v. Chapman, 5 Term Rep. 473. Thomas v. Prichard, 4 Term Rep. 664.

A plaintiff muſt make a demand of a plea before he ſigns judgment, and he cannot ſign judgment until the expiration of twenty-four hours after the demand has been made. But the demand may be made at the time of delivering the declaration. Dyche v. Burgoyne, 1 Term Rep. 454. Bowles v. Edwards, 4 Term Rep. 118. Churchwardens of Edmonton v. Oſborne, 6 Term Rep. 689.

Time to plead under a judge's order, is reckoned *incluſive* of the day of the date of the order, but *excluſive* of the day on which it expires. Kaye v. Whitehead 2 H. Bl. 35.

If a rule to plead expire on a *dies non juridicus*, ſuppoſing ſuch day not to be *Sunday*, the defendant is bound to plead on or before that day; and if he do not, judgment may be ſigned on the next day; for the offices are open on all the other *dies non juridici* but *Sunday*. Meſure v. Britten, 2 H. Bl. 616.

(Q) Pleas *Puis darrein continuance.*

Discontinuance.

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(*What ſhall be*) The avowant cannot, though an actor. 1 Str. 112.

It ſeems dangerous to plead any matter *puis darrein continuance*, unleſs you be well adviſed, becauſe if that matter be determined againſt you, it is a confeſſion of the matter in iſſue, and no *niſi prius* ſhall be granted. And the plea put in cannot be amended after the aſſizes are over: but it may during the aſſizes be amended before the judge of *niſi prius*. Cro. Eliz. 49. Yelv. 187. Freem. 252

It

Ibid. 2 Mod. 307 It appears that the judge is bound to receive this plea, if verified by affidavit.

It is in the breaſt of the judge at *niſi prius* whether he will accept of ſuch plea or not, *i. e.* whether he will or will not proceed in the trial, therefore the party ought to make it appear to the judge that it is a true plea; yet the plaintiff is not to reply to this plea at the aſſizes, for the judge has no power to accept of ſuch replication, nor to try it, but only to return the plea as parcel of the record of *niſi prius*; and if the plaintiff demur, it cannot be argued there.

3 Term Rep. 554. 2 Wilſ. 137.

Pearſon v. Perkins, Hil. 3 G. 1. Bull. N. P. 310.

A plea *puis darrein continuance* may be pleaded after the jury are gone from the bar, but not after they have given their verdict.

Thel. Dig. 204.

There are ſome pleas which may be pleaded at *niſi prius* that cannot properly be termed pleas *puis darrein continuance* becauſe the matter pleaded need not to be expreſsly mentioned to have happened after the laſt continuance.

Br. Continuance, 57.

As in treſpaſs, after iſſue joined, the defendant may plead that the plaintiff was outlawed of felony, without ſaying after the laſt continuance. So, he may in like manner plead that the plaintiff was covert the day of the writ purchaſed, though he cannot plead that the plaintiff took baron pending the writ, without pleading it after the laſt continuance.—The diverſity ſeems to be between ſuch things as diſprove the writ in fact, and ſuch as diſprove it in law.

The laſt continuance where ſuch plea is pleaded at the aſſizes, is the day of the return of the *venire facias*, from whence the plea is continued by the award of the *diſtringas* or *habeas corpus* till the next term *niſi prius* &c.

Salk. 519.

If the matter of the plea ariſe by deed, it ought to be pleaded with a *profert*.

The form of the plea, if at the aſſizes, is as follows: "And now at "this day, that is to ſay, *&c.* comes the ſaid *C. D.* by *R. H.* his coun- "ſel, and ſays, that the ſaid *A. B.* ought not further to maintain his ac- "tion againſt him the ſaid *C. D.* becauſe he ſays that after the day "of laſt paſt, from which day until the day of in "*Mich.* term next, (unleſs the juſtices of our lord the king, aſſigned to "hold the aſſizes of our lord the king in and for the county of *C.*, ſhould "firſt come on the day of at *B.* in the ſaid county of *C.*) "the action aforeſaid is continued, to wit, on, *&c.* at, *&c.* the ſaid *A.* "*B.* by his deed dated, *&c.* did releaſe."—And to ſhew the particular matter, and conclude, "And this he is ready to verify, wherefore he "prays judgment if the ſaid *A. B.* ought further to maintain this action "againſt him," *&c.*

Freem. 252

Where a plea is certified on the back of the *poſtea*, and the plaintiff demurs, if the defendant on the expiration of a rule given for him to join in demurrer, refuſes to do ſo, the plaintiff may ſign judgment.

Præmunire.

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(A) What Offences come under the Notion of a Præmunire

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(*Ninthly*) But ſee ſt. 31 G. 3. c. 31.

By the ſtatute 1 & 2 *P. & M.* c. 8. to moleſt the poſſeſſors of abbey lands granted by parliament to *Henry* and *Edward* the ſixth, is a *præmunire*.

So likewiſe is the offence of acting as a broker or agent in any uſurious contract, where above ten *per cent.* intereſt is taken, by ſtat. 13 *Eliz.* c. 10.

To obtain any ſtay of proceedings, other than by arreſt of judgment or writ of error, in any ſuit for a monopoly, is likewiſe a *præmunire*, by ſtat. 21 *Ja.* 1. c. 3.

To obtain an excluſive patent for the ſole making or importation of gunpowder or arms, or to hinder others from importing them, is alſo a *præmunire* by two ſtatutes; the one 16 *Car* 1. c. 21. the other 1 *Ja.* 2. c. 8.

On the abolition, by ſtat. 12 *Car.* 2. c. 24. of purveyance, and the prerogative of pre-emption, or taking any victual, beaſts, or goods, for the king's uſe, at a ſtated price, without conſent of the proprietor, the exertion of any ſuch power for the future was declared to incur the penalties of *præmunire*.

To aſſert, maliciouſly or unadviſedly, by ſpeaking or writing, that both or either houſe of parliament have a legiſlative authority without the king, is declared a *præmunire* by ſtat. 13 *Car.* 2 c. 1.

By the *habeas corpus* act, 31 *Car.* 2 c. 2 it is a *præmunire*, and incapable of the king's pardon, beſides other heavy penalties, to ſend any ſubject of this realm a priſoner into parts beyond the ſeas.

By 6 *Ann.* c. 23. if the aſſembly of the peers in *Scotland*, aſſembled to elect their ſixteen repreſentatives in the *Britiſh* parliament, ſhall preſume to treat of any other matter ſave only the election, they incur the penalties of a *præmunire*.

The ſtatute 6 *G.* 1. c. 18. (enacted the year after the *South-Sea* project,) makes all unwarrantable undertakings by unlawful ſubſcriptions, then commonly known by the name of bubbles, ſubject to the penalties of a *præmunire*.

The ſtat. 12 *G.* 3. c. 11. ſubjects to the penalties of the ſtatute of *præmunire*, all ſuch as knowingly and wilfully ſolemnize, aſſiſt, or are preſent at, any forbidden marriage of ſuch of the deſcendants of the body of King *George* II. as are by that act prohibited to contract matrimony without the conſent of the crown.

It is ſaid, that if the biſhop take upon him to viſit a donative, and deprive the incumbent, he runs himſelf into the danger of a *præmunire*. And in ſuch caſe was *Barlow*, Biſhop of *Bath* and *Wells*, in the reign of *Edward* the 6th, who was forced to obtain a pardon for having deprived the Dean of *Wells*, the deanery being a donative by letters patent from the king. Degge, p. 1. c. 13. 3 Inſt. 122. Br. Præmunire, pl. 21.

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Prerogative.

(*Prerogative*) By the word prerogative we uſually underſtand that ſpecial pre-eminence which the King hath, over and above all other perſons, and out of the ordinary courſe of the common law, in right of his royal dignity. It ſignifies, (in its etymology from *præ* and *rogo*), ſomething that is required or demanded before, or in preference to, all others. And hence it follows, that it muſt be in its nature ſingular and eccentrical; that it can only be applied to thoſe rights and capacities which the King enjoys alone, in contradiſtinction to others, and not to thoſe which he enjoys in common with any of his ſubjects; for if once any one prerogative of the crown could be held in common with any ſubject, it would ceaſe to be prerogative any longer. And therefore Finch lays it down as a maxim (Finch's L. 85), that the prerogative is that law in caſe of the King, which is law in no caſe of the ſubject. 1 Bl. Com. 239.

(*Hence it hath*) This paſſage, which has been induſtriouſly foiſted into the work by the laſt editor, abounds throughout with the moſt dangerous political errors. It gives a falſe view of the nature of our government: it repreſents it as almoſt a pure republick. From the qualifications which the kingly power is ſubjected to, the editor would infer the non-exiſtence of the power itſelf: Becauſe the king acts with *advice* in *all* caſes, and with advice and *conſent* in *ſome* caſes, therefore he never acts *proprio jure*. Becauſe the law hath aſſigned him various counſellours to aid and adviſe him in the deliberative and executive parts of his government, therefore theſe counſellours are co-equal and co-ordinate with him.—But let us mark the ſeveral parts of this notable paſſage, and let us ſee how well they correſpond with the authorities we ſhall hereafter cite, authorities drawn from our records and ſtatute books, and from the writings and ſpeeches of men eminent for their knowledge of the law and conſtitution of their country, and not ſuſpected of any blind attachment to monarchy. "The king is not the ſovereign of the ſtate, but the people's executive magiſtrate."—"Sovereignty reſides where the conſtitution has placed the legiſlative power, viz. in kings, lords, "and commons, in parliament aſſembled—So that the king, in his political capacity, as one of "the ſtates of the realm, poſſeſſes a part, and only a part of the ſovereignty; but is not ſovereign "any more than a part is equal to the whole."—In the firſt place, this writer ſeems to ſuppoſe, that the ſovereign power of a ſtate conſiſts merely in legiſlation; whereas the power of a ſtate conſiſts equally in enforcing the execution of laws when made, as in the making of them.—"But," ſaith this writer, "the king is not the ſovereign of the ſtate, but the people's executive magiſtrate;"—if then the king is not the ſovereign of the ſtate, but the people's executive magiſtrate, the people are the ſovereign of the ſtate, for the king is *their* magiſtrate: but according to this writer, the ſovereignty is lodged not in the people only, but in king, lords, and commons; then, upon this writer's own hypotheſis, the people cannot be ſovereign, for, to uſe his own words, *a part cannot be equal to the whole*; but if they are not ſovereign, how can the king be the *people's* executive magiſtrate? whence is their authority to commiſſion this officer?—But ſo far from the king not being the ſovereign of the ſtate, it will appear from the following authorities, that the whole power of the ſtate, both legiſlative and executive, ſubject to certain limitations and qualifications, is veſted in the king alone; that he, with the advice and conſent of his great council, makes laws; and, with the advice of other councils, executes thoſe laws when made; that he is not one of the eſtates of the realm, as this writer ſuppoſeth him to be, but paramount thoſe eſtates. Lord Coke ſaith, in his 4 Inſt. pa. 3. that the king is *caput, principium et finis* of his court of parliament. In 22. E. 3. Hil. term, plea 25. it is laid down thus: *Et fuit dit, que le roy fait les lais par aſſent des peres et de la commune, et non pas les peres et la commune.*

According to Lord Hale, "Although that the Engliſh monarchy is not in all reſpects abſolute and unlimited, but hath certain qualifications of monarchical power, eſpecially in point of making laws, and impoſing taxes upon the people; yet, certainly, ſince the denomination of government is *ad plurimum*, the government is monarchical, and not ariſtocratical or democratical. And hence it is, that all juriſdiction in this realm, whether eccleſiaſtical or civil, is derived from the crown; and that the exerciſe thereof in the miniſters or judges, to whom it is ſo delegated by the crown, is in right of the crown, and by virtue of a delegation from it". *Id.* 190. And in a preceding part of this tract, Lord Hale, ſpeaking of the deliberative and executive parts of civil government, ſays, "In both which, though the king under God be ſupreme governor and fountain; yet it is neceſſary for him to call in others *in partem ſollicitudinis*, and, as to uſe their aſſiſtance in the executive part, ſo to have their advice and council in the deliberative part of his government. Hale's Juriſd. of the Lords' Houſe, pa. 4. Again, Whitelock in his comment on the parliamentary writ, ſays, "The making of ſtatutes is by the king with the aſſent of the lords and commons in parliament". Vol. 1. 406. And farther, the ſtyle of our acts of parliament is, "*Be it enacted by the King's moſt excellent Majeſty, by and with the advice and conſent of the Lords ſpiritual and temporal, and Commons in parliament aſſembled.*" Even in money bills, when the commons have granted the king their money, they pray that he will be graciouſly pleaſed to make it a law. "We your Ma-

jeſty's

" jeſty's moſt dutiful and loyal ſubjects, the Commons of Great Britain in parliament aſſembled, " having, &c. &c. Do beſeech your Majeſty that it may be enacted, and be it enacted by the " King's moſt excellent Majeſty, by and with the advice and conſent," &c. &c.

With reſpect to the king's not being one of the eſtates of the realm, read the words of Ld. Hale in another part of the tract above referred to. The nobility, clergy, and commonalty are the 3 eſtates of the kingdom. The king comes in upon a higher denomination and title, namely, the head of theſe three eſtates. And therefore they that have gone about to make the king one of the three eſtates, are miſtaken, as will eaſily appear to any that will but read the records fully, being, viz. *Rot. Parl.* 9 *H.* 5. *n.* 15. the concluſion of the peace between the kings of England and France by the king's command in parliament, 2 May, 9 H. 5. read *coram tribus ſtatibus regni*, viz. *prælatis et clero, nobilibus et magnatibus, et communitate regni Angliæ*, and by them aſſented to. *Rot. Parl.* 3 & 4 *E.* 4. *n.* 23 *le roy et les trois eſtates.* Rot. Parl. 13 E. 4. n. 16 & 17. *domino rege et tribus ſtatibus regni ſtatutis in eodem parliamento.* And in the firſt parliament of the uſurper R. 3. who would be ſure to want no formality to countenance his uſurpation, *Rot. Parl.* 1. *titulus Regius*, there is recited an inſtrument allowing him to be king before his coronation was declared in the name of the three eſtates of this realm of England, viz. the lords ſpiritual and temporal, and commons. " Bee it ordained," that " the tenour of the ſaid rolle, with all the contynue of the ſame, preſented as is " aboveſaid, and delivered to our beforeſaid ſouverain lord the king, in the name and on the be- " half of the ſayd three eſtates out of parliament, now by the ſame three eſtates aſſembled in this " preſent parlement, and by auctorite of the ſame, bee ratifyed, enrolled, recorded," &c. This though done in a time of uſurpation, yet ſufficiently evidenceth what the three eſtates were*. And the objections againſt it, 1. that two of thoſe eſtates are conſtituents of the lords' houſe, and ſo muſt outbalance the commons, which are but one of the three eſtates; and, 2. that the lords ſpiritual by this means ſhould have a negative voice upon the lords temporal and commons, and ſo no law could be made without the conſent of the major part of the ſpiritual lords and the major part of the temporal lords, as well as the moſt part of the commonalty; I ſay theſe objections are vain. For though it be true, that two of the three eſtates are conſtituents of the lords' houſe, yet they conſtitute but one houſe. And the laws and cuſtoms of the kingdom, which are the true meaſure of all bounds of power, have given a negative voice of either houſe upon the other, and of the king upon both; but have not given a negative voice of only one of the two eſtates conſtituting the lords' houſe unto the other, or to the commons being the third eſtate; *the legiſlative power being lodged in the king with the aſſent of the two houſes of parliament as ſuch*, and not with the aſſent of the three eſtates ſimply conſidered as ſuch; *for it is the ſettled conſtitution and cuſtom of the kingdom, that fixeth and defineth where the legiſlative power is lodged, not notions and fancies.*" Hales's Juriſdict. of the Lords' Houſe, &c. pa. 10, 11. And Lord Coke, before him, had begun his chapter on the High Court of Parliament in theſe words; " This court conſiſteth of the King's " Majeſty, ſitting there, as in his royal political capacity, and of *the three eſtates of the realm*, viz." &c. 4 Inſt. cap. 1. And after him, at the memorable æra of the Revolution, in the preamble to the Bill of rights, the Convention Parliament uſe theſe words; " Whereas the lords ſpiritual and " temporal, and commons, aſſembled at Weſtminſter, lawfully, fully, and freely repreſenting *all* " *the eſtates of the people of this realm*, did, upon, &c. preſent unto their Majeſties," &c. Stat. 1 W. & M. Seſſ. 2. c. 2.

But the theory of our government is ſketched with admirable ſpirit and correctneſs by the Attorney-General in his addreſs to the jury upon Hardy's trial. " The power of the ſtate, by which I mean the power of making laws, and enforcing the execution of them when made, is veſted in the king, enacting laws in the one caſe, that is, in his legiſlative character, by and with the advice and conſent of the lords ſpiritual and temporal and of the commons in parliament aſſembled, according to the law and conſtitutional cuſtom of England; in the other caſe, executing the laws, when made, in ſubſervience to the laws ſo made, and with the advice, which the law and the conſtitution hath aſſigned to him in almoſt every inſtance, in which it has called upon him to act for the benefit of the ſubject."—Hardy's Trial, by Gurney, pa. 32. Again, in a ſubſequent paſſage, after having ſtated the royal duties, he goes on thus: " To that king, upon whom theſe duties attach, the law and conſtitution, for the better execution of them, have aſſigned various counſellours, and reſponſible adviſers: it has clothed him, under various conſtitutional checks and reſtrictions, with various attributes and prerogatives, as neceſſary for the ſupport and maintenance of the civil liberties of the people: it aſcribes to him ſovereignty, imperial dignity, and perfection: and becauſe the rule and government, as eſtabliſhed in this kingdom, cannot exiſt *for a moment* without a perſon filling that office, and able to execute all the duties from time to time, which I have now ſtated, it aſcribes to him alſo that he never ceaſes to exiſt. In foreign affairs, the delegate and repreſentative of his people, he makes war and peace, leagues and treaties: in domeſtick concern, he has prerogatives, as a conſtituent part of the ſupreme legiſlature: the prerogative of raiſing fleets and armies: he is the fountain of juſtice, bound to adminiſter it to his people, becauſe it is due to them: the great conſervator of publick peace, bound to maintain and vindicate it;

* In addition to the above authorities collected by Lord Hale, ſee Rot. Parl. 13 R. 2. m. 9. 11 H. 6. m. 17.

every

every where preſent, that theſe duties may no where fail of being diſcharged: the fountain of honour, office, and privilege; the arbiter of domeſtick commerce, the head of the national church." *Id.* 35. And in the concluſion of this brilliant ſketch, he cloſes the whole with theſe emphatical words: "Gentlemen, I hope I ſhall not be thought to miſpend your time in ſtating thus much, becauſe it appears to me, that the fact that ſuch is the character, that ſuch are the duties, that ſuch are the attributes and prerogatives of the king in this country, (all exiſting for the protection, ſecurity, and happineſs of the people in an eſtabliſhed form of government,) accounts for the juſt anxiety, bordering upon jealouſy, with which the law watches over his perſon—accounts for the fact, that in every indictment, the compaſſing or imagining his deſtruction or depoſition, ſeems to be conſidered as neceſſarily co-exiſting with an intention to ſubvert the rule and government eſtabliſhed in the country: it is a purpoſe to deſtroy and to depoſe *him*, in whom the ſupreme power, rule, and government, under conſtitutional checks and limitations, is veſted, and by whom, with conſent and advice in ſome caſes, and with advice in all caſes, the exerciſe of this conſtitutional power is to be carried on." *Id.* 36.

With reſpect to the rule which is ſaid in the text to be eſtabliſhed, viz. "that all prerogatives muſt be for the advantage and good of the people, otherwiſe they ought not to be allowed by the law," it is neither expreſſed in terms ſufficiently clear and preciſe, nor will it hold in the extent to which, as there ſtated, it may be carried. It is not clear from the terms, whether it meant, that the prerogative or right itſelf ſhall be diſallowed, if found to be injurious to the publick, or only the act done by virtue and in exerciſe of that right or prerogative. If the former be the meaning, we may not heſitate to pronounce that there is no ſuch rule of law; for all the prerogatives of the crown are veſted in it for the protection and happineſs of the people, and cannot in law be wreſted from it without danger to both. If the latter be the meaning, then the rule will not hold univerſally and in all caſes. The higher prerogatives of the crown are not to be meaſured by the rules of law, or to be ſcanned by the reaſon of our judges; nor are acts done by virtue of any of theſe prerogatives to be ſet aſide on the ground, that they are not for the publick good. For inſtance, the king has the prerogative of making war and peace: inveſted with that prerogative, he makes a treaty of peace: that treaty is found to be injurious to the country: is the treaty therefore a nullity? is there any authority in any man, or body of men in this country, to vacate it, becauſe it is a bad treaty? The king has the prerogative of giving his *aſſent*, as it is called, to ſuch bills as his ſubjects, legally convened, may preſent to him, that is, of giving them the force and ſanction of a law: he withholds his aſſent to a bill evidently calculated to promote the intereſts of his people: does the bill, becauſe it is a good bill, therefore paſs into a law, though it want the royal *fiat*? or does the utility of the meaſure deprive the crown of its conſtitutional power of *rejecting*? The rule then ſeems to go no farther than this, that in the exerciſe of ſome of the prerogatives, the royal authority is ſubmitted to the control and direction of the courts of law, the judgment of the King is in ſome caſes committed to his judges. In thoſe caſes it is the duty of the judges to admeaſure the royal prerogatives as that they ſhall in no caſe be exerted ſo as to affect the inheritance of any one, to change the courſe of the law, or to work individual injury. Plowd 236. 487. Noy, 175. They will always remember the maxim of law, that the king can do no wrong: if they find that wrong has been done, the act cannot be the act of the king, and therefore ought not to be allowed.

(B) Of the King's Prerogative as univerſal Occupant: And herein,

10. Of his Prerogative in Ports and Havens.

(A) When the King commences his Reign, and the Ceremony requiſite therein.

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(*And herein*) But theſe are not the only exceptions in the caſe of the crown to the general rules of deſcent; for, among the females, the crown deſcends by right of primogeniture to the eldeſt daughter only, and her iſſue; and not, as in common inheritances, to all the daughters at once: the evident neceſſity of a ſole ſucceſſion to the throne having occaſioned the royal law of deſcent to depart from the common law in this reſpect: and therefore Queen Mary on the death of her brother ſucceeded to the crown alone, and not in partnerſhip with her ſiſter Elizabeth. 1 Bl. Com. 194.

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(*Alſo it is held*) Sir M. Foſter, ſpeaking of a king *de jure & de facto*, and contending that allegiance is due by the ſubject to the latter as well as the former, hath theſe remarkable words: "He

" He (the subject) hopeth for protection from the crown. and he payeth his allegiance to it, in the person of him whom he seeth in full and peaceable possession of it: he entereth not into the question of title, he having neither leisure, nor abilities, nor is he at liberty to enter into that question: but he seeth the fountain, from whence the blessings of government, liberty, peace, and plenty flow to him, and there he payeth his allegiance " Fost. Cr. L. 399.

But it ought to be considered, that it was first resolved by the same judges, that King *Charles* the Second was king *de facto* as well as *de jure* from his father's death; and it is apparent, that no other person was in possession of any sovereign power known to our laws. 1 Hawk. P. C. c 17. § 10. Hence the statutes passed in the first year after the restoration of King Charles II. are always called the acts in the twelfth year of his reign; and all the other legal proceedings of that reign are reckoned from the year 1648, and not from 1660.

(*The king.*) But it hath been usually thought prudent, when the heir apparent hath been very young, to appoint a protector, guardian, or regent, for a limited time: but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian. 1 Bl. Comm. 248.

(B) Of the King's Prerogative as universal Occupant: And herein,

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(*If an infant*) In the case of Burgess v. Wheate, the Master of the Rolls (Sir Thomas Clarke), and the Lord Keeper Henley, held, against my Lord Mansfield, that the crown could not in equity, upon a failure of the heirs of *cestui que trust*, claim against a trustee by escheat, if he had the legal estate in him, for that (among other reasons) the title by escheat could only arise, where there was a defect of a tenant; that where there was a feoffee, there was a tenant, whether he were beneficially entitled or not; so that the principle of escheat failed. 1 Bl Rep 123. The authority of this case, however, hath been somewhat shaken by the intimation of Lord Thurlowe's opinion in Middleton v. Spicer, 1 Br. Ch. Ca. 204.—Where the character of land is not imperatively and definitively fixed upon money by the terms of a will or other instrument, a court of equity will not order it to be laid out in land, in order to let in the crown claiming by escheat. Walker v Denne, 2 Vez. jun. 170.

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(*It is universally agreed*) In the narrow seas, that is, the seas which adjoin to the coasts of England, the king hath a double right, viz. a right of jurisdiction, which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. This right of propriety or ownership is evidenced, 1st, in the right of fishing in these seas and the arms and creeks thereof, which is originally lodged in the crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is owner of a private or inland river; and, 2d, from the king's right of propriety to the shore, and the *maritima incrementa*.—The shore as to this purpose, is the land lying between high-water and low-water mark in *ordinary* tides; and this land belongeth to the king *de jure communi* both in the shore of the sea, and the shore of the arms of the sea. And that is called an arm of the sea where the tide flows and reflows, and so far only as the tide flows and reflows. 29 Ass. 93.—The *maritima incrementa* are of three kinds—1 *Per projectionem vel alluvionem*—2. *per relictionem vel desertionem*—3. *per insulæ productionem*. The increase *per alluvionem* is, when the sea by casting up sand and earth doth by degrees increase the land, and shut itself out further than the ancient bounds went; and this is usual. The reason why this belongs to the crown is, because in truth the soil, where there is now dry land, was formerly part of the very *fundus maris*, and, consequently, belonged to the king. But indeed if such alluvion be so insensible, that it cannot be by any means found that the sea was there, *idem est non esse est non apparere*; the land thus increased belongs as a perquisite to the owner of the land adjacent.—As to the increase *per relictionem*, or recess of the sea, this doth *de jure communi* belong to the king; for as the sea is part of the waste or demesne, so of necessity the land that lies under it, and therefore it belongs to the king when left by the sea: and so also it regularly holds in lands deserted by a river, that is an arm of the sea or creek of the sea *primâ facie*, especially, if the creek or river be part of a port.—And as to islands arising *de novo* in the king's seas, or the king's arms thereof, these upon the same account and reason *prima facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king: for when islands *de novo* arise, it is either by the recess or sinking of the water, or by the exaggeration of sand and slah, which in process of time grow firm land invironed with water; and thus some places have arisen, and their original recorded, as about Ravesend in Yorkshire. Hale De Jure Maris, c. 4.

(*From*

(*From the king's*) The commiſſion enacted by ſt. 28 H. 8. c. 5. recites this part of the king's juriſdiction, viz. "We therefore, for that by reaſon of our royal dignity and prerogative royal "we are bound to provide for the ſafety and preſervation of our realm," &c. This prerogative of the crown Lord Hale calls an *intereſt of juriſdiction*, viz. in reference to common nuiſances. "And" he ſays, "another part of the king's juriſdiction in reformation of nuiſances, is to reform and puniſh nuiſances in all rivers, whether freſh or ſalt, that are a common paſſage, not only for ſhips and greater veſſels, but alſo for ſmaller, as barges or boats; to reform the obſtructions or annoyances that are therein to ſuch common paſſage: for as the common highways on the land are for the common land paſſage, ſo theſe kind of rivers, whether freſh or ſalt, that bear boats or barges, are highways by water; and as the highways by land are called *altæ viæ regiæ*, ſo theſe publick rivers for publick paſſage are called *fluvii regales*, and *haut ſtreames le roy*; not in reference to the propriety of the river, but to the publick uſe; all things of publick ſafety and convenience being in ſpecial manner under the king's care, ſupervifion, and protection. And therefore, the report in Sir John Davyes, of the Piſcary of Ban, miſtakes the reaſon of thoſe books, that called theſe *ſtreames le roy*, as if they were ſo called in reſpect of propriety, as 19 Aſſ. 6. Dy. 11. for they are called ſo, becauſe they are of publick uſe, and under the king's ſpecial care and protection, whether the ſoil be his or not. Hale De Jure Maris, by Hargrave, pa. 8.

(*But notwithſtanding*) Although *primâ facie* an arm of the ſea be in point of propriety the king's, and *primâ facie* it be common for every ſubject to fiſh there, yet a ſubject may have by uſage a ſeveral fiſhery there, excluſive of that common liberty which otherwiſe of common right belongs to all the king's ſubjects. See Hale De Jure Maris, cap. 5. and the ſeveral authorities there collected.

Hale De Jure Maris, c. 6. And as a ſubject may have a right of fiſhing in the ſea and the arms thereof, ſo the ſhore, that is, the land, which lies between high-water and low-water mark at ordinary neap-tides, may belong to a ſubject. The ſtatute of 7 *Ja.* 1. *c.* 18. ſuppoſeth it; for it provides, that thoſe of *Cornwall* and *Devon* may fetch ſea-ſand for the bettering of their lands, and ſhall not be hindered by thoſe that have their lands adjoining to the ſea-coaſts, which it appears by the ſtatute, they were formerly. Vide *Cartæ Antiquæ*, *D. D. n.* 24. the charter of *Alan de Percy* to the monks of *Whitby*, and the bounds thereof, *viz. totam marinam a portâ de* Whitby *uſque* Blowick, *&c. et uſque* Terdiſo, *et uſque in mare, et per marinam in* Whitby, confirmed by king *Henry* I. And the bounds of that abbey's poſſeſſions take in many creeks of the ſea, yet are given by a ſubject, *viz. Derwent, Muſe, Eſe*, &c.

Ibid. So agreed in Sir Henry Conſtable's caſe, 5 Co. 107. 5 E. 3. 3. Dy. 326. b. So in the Exchequer-chamber, P. 16 Car. inter l'Attorney General et Sir Samuel Rolls, Sir Richard Buller, and Sir Thomas Arundel, *per omnes barones.* The ſhore may not only belong to a ſubject in groſs, which poſſibly may ſuppoſe a grant before time of memory, but it may be parcel of a manor. And the evidences to prove this fact are commonly theſe, conſtant and uſual fetching gravel and ſea-weed and ſea-ſand between the high-water and low-water mark, and licenſing others to do ſo; incloſing and imbanking againſt the ſea, and enjoyment of what is ſo inned; enjoyment of wrecks happening upon the ſand; preſentment and puniſhment of purpreſtures there in the court of a manor, and ſuch like.

Hale, *ubi ſupra.* And as it may be parcel of a manor, ſo it may be parcel of a vill or pariſh. And the evidence for that will be uſual perambulations, common reputation, known metes and diviſions and the like. And upon this account the parſon of *Sutton*, about 14 *Car.* 1. had a verdict for the tithes of *Sutton-Marſh* in *Lincolnſhire*, upon a long and a great evidence; though it appeared, that within time of memory it was the mere ſhore of the ſea covered at ordinary tides, and without the old ſea-bank.

Hale, *ubi ſupra.* And it may not only be parcel of a manor, but *de facto* it many times is ſo, and perchance it is parcel of almoſt all ſuch manors as by preſcription have royal fiſh or wrecks of the ſea within their manor. For, for the moſt part, wrecks and royal fiſh are not, nor indeed cannot be well left above the

the high-water mark, unleſs it be at ſuch extraordinary tides as overflow the land: but theſe are perquiſites which happen between the high-water and law-water mark; for the ſea withdrawing at the ebb leaves the wrecks upon the ſhore, and alſo thoſe greater fiſh, which come under the denomination of royal fiſh.

And as the ſhore may thus belong to a ſubject, ſo in ſome inſtances may the *maritima incrementa*. Hence, cuſtom and preſcription may give the *jus alluvionis* to the land whereunto it accrues. But cuſtom cannot entitle the ſubject to *relicted* lands, or make them a parcel of a manor. For the ſoil from under the water muſt needs be of the ſame propriety as it is when covered with water. If the ſoil of the ſea, while it is covered with water, be the king's, it cannot become the ſubject's becauſe the water hath left it. But in the caſe of *alluvio maris*, it is otherwiſe; becauſe the acceſſion and addition of the land by the ſea to the dry land gradually is a kind of perquiſite, and an acceſſion to the land; and therefore in caſe of private rivers it ſeems by the very courſe of the common law, ſuch a gradual increaſe *cedit ſolo adjacenti*; and though it may be doubtful whether it be ſo *ex jure communi* in caſe of the king; yet, doubtleſs, it gives a reaſonableneſs and facility for ſuch right of *alluvio* to be acquired by cuſtom; for though in every acqueſt *per alluvionem* there be a reliction or rather excluſion of the ſea, yet it is not a receſs of the ſea, nor properly a reliction. Hale De Jure Maris c. 6.

But, though it be regularly true, that *terræ relictæ per mare* cannot be preſcribed, yet a creek, arm of the ſea, or *diſtrictus maris*, may be preſcribed in point of intereſt; and, by way of conſequence or concomitance, the land *relicted* there, according to the extent of ſuch a precinct as was ſo preſcribed, will belong to the former owner of ſuch *diſtrictus maris*. But otherwiſe it would be, if ſuch preſcription before the reliction extended only to a liberty, or *profit apprendre*, or juriſdiction only within that diſtrict; as liberty of free fiſhing, admiral juriſdiction, or the juriſdiction of a leet, hundred, or other court; for ſuch may extend to an arm of the ſea, as appears by 8 *E.* 2. *corone*; for theſe are not any acqueſts of the intereſt of the water and ſoil, but leave it as it found it. Therefore the diſcovery of the extent of the preſcription or uſage, whether it extends to the ſoil or not, reſts upon ſuch evidences of fact, as may juſtly ſatisfy the court and jury concerning the intereſt of the ſoil. Hale, *ubi ſupra*.

And the ſame rule, which hath been obſerved before touching acqueſts by the reliction or receſs of the ſea, or the arms or creeks thereof, holds with reſpect to iſlands ariſing within thoſe parts. Of common right and *primâ facie*, it is true, they belong to the crown: but, where the intereſt of a *diſtrictus maris*, or arm of the ſea, or creek, or haven, doth in point of propriety belong to a ſubject either by charter or preſcription, the iſlands that happen within the precincts of ſuch private propriety of a ſubject, will belong to the ſubject according to the limits and extent of ſuch propriety. And therefore, if the weſt ſide of an arm of the ſea belong to a manor of the weſt ſide, and an iſland happen to ariſe on the weſt ſide of *filum aquæ* inviroued with the water, the propriety of ſuch iſland will entirely belong to the lord of the manor of the weſt ſide: and if the eaſt ſide of an arm of the ſea belong to a manor of the eaſt ſide *uſque filum aquæ*, and ſuch an iſland happen between the eaſt ſide and ſuch a *filum aquæ*, it will belong to the lord on the eaſt ſide: and if the *filum aquæ* divide itſelf, and one part take the eaſt, and the other the weſt, and leave an iſland in the middle between both the *fila*, the one half will belong to the one lord, and the other to the other. Hale, *ubi ſupra*.

other. But this is to be understood of islands that are newly made; for if a part of an arm of the sea, by a new receſs from its ancient channel, encompaſs the land of another man, his propriety continues unaltered.

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(*The king ſhall*) To give the crown a right to ſuch fiſh, they muſt be taken within the ſeas parcel of the dominion and crown of England, or in the creeks or arms thereof; for, if taken in the wide ſeas, or out of the precinct of the ſeas belonging to the crown of England, they belong to the taker. 39 E. 3. 35. *per* Belknap.—A ſubject might and may unqueſtionably have this franchiſe or royal perquiſite, 1ſt, by grant; 2d. by preſcription within the ſhore between the high-water and low-water mark, or in a certain diſtinct *diſtrictus maris*, or in a port, or creek, or arm of the ſea; and this may be had in groſs, or as appurtenant to an honour, manor, or hundred. Hale De Jure Maris, c. 7.

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(*By the common law*) Declared by ſtat. *de prærogativa regis*, 17 E. 2. c. 11.—King R. 1, in the ſecond year of his reign releaſed wreck through all England, as Spelman in his Gloſſary, title Wreck, cites it out of Hoveden. But his ſucceſſor reſumed the prerogative, and that before the above ſtatute of 17 E. 2.; and frequent inſtances thereof are long before that ſtatute in the times of E. 1., H. 3. and King John., Hale De Jure Maris, c. 7. pa. 40.

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(*And indeed*) In this opinion Sir W. Blackſtone concurs with Lord Coke, 1 Bl. Com, 278.

10. Of his Prerogative in Ports and Havens.

Hale De Portibus Maris, c. 2. A port, ſaith my Lord *Hale*, is *quid aggregatum*, conſiſting of ſomething that is natural, *viz.* an acceſs of the ſea, whereby ſhips may conveniently come, ſafe ſituation againſt winds where they may ſafely lie, and a good ſhore where they may well unlade: ſomething that is artificial, as keys, and wharfs, and cranes, and warehouſes, and houſes of common receipt: and ſomething that is civil, *viz.* privileges and franchiſes, *viz. jus applicandi, jus mercati*, and divers other additaments given to it by civil authority.

Id. c. 3. To erect a publick port originally and *de novo*, is a part of the *jus regale* of the crown of *England*. And as it is not competent to a ſubject to inſtitute or erect a common port without the charter of the king, or a lawful preſcription, ſo neither is it competent to a ſubject without ſuch charter or preſcription to erect a port for the men of ſuch a fee or precinct, as for his own tenants. A lord of a county palatine, though he may have, and uſually had, ports by charter or preſcription, yet he cannot erect a common port within his palatine juriſdiction. For the concernment of a port muſt neceſſarily exceed the extent and limits of the *jura regalia* that are incident to a county palatine; for the ſafety of the kingdom, the commerce of the kingdom, and the king's revenue are concerned in it. Merchants and ſeamen of all parts and quarters of the world are let into the kingdom publickly, and under the publick protection, in a publick port: and, conſequently, it is not within the extent of a juriſdiction palatine *de novo* to erect a publick port.

Id. c. 5. In the erecting of a port the royal authority is not reſtrained, as in the grant of a market, by the vicinity of the new port to a former port. For though the old port may be greatly injured by the erection of the new port in its neighbourhood, yet that circumſtance will, of itſelf, be no objection to it, provided that the new port be not within the proper limits of the old port, and there be no obſtruction to the water or otherwiſe, but that ſhips may, if they will, arrive at the former port.

But

But, 1. it cannot be erected within the peculiar limits by charter or preſcription belonging to the former port, becauſe that is part of the intereſt of the lord of the former port. Neither can the firſt port be obſtructed or wholly defaced, or excluded for arrival of ſhips, but by act of parliament, as was done in the caſe of *Melcoombe* tranſlated to *Poole*. *Rot. Parl.* 11 *H.* 6 *n.* 30. And the reaſon is, becauſe a publick intereſt is concerned; *viz.* the intereſt of the merchant at large, and the intereſt of the traders and mariners in that particular place or port, who have a right ſettled in them for the application, lading, and unlading of ſhips there.

2. If the king have an ancient port at *A.*, and he erect another port hard by, with a general prohibition that no man ſhall bring his goods or merchandizes by ſea to any other port within five miles but to that which is newly erected, this prohibition is good, as againſt the king's intereſt in the former port, though the new port be erected within the precincts of the old; for he may derogate from his own ſimple intereſt by his own reſtriction. But this reſtriction is not good againſt the ſubjects of the port of *A.*, who by uſage had a right to come with their own ſhipping, and lade and unlade: and this, although the goods might be cuſtomable goods; for the inhabitants of *A.* had an eaſement acquired to themſelves by preſcription.

3. But if the king erect by his own proclamation a port at *A.* where there was no arrival of ſhips before, and doth not grant it to another perſon, but keeps the intereſt in himſelf of this franchiſe; there, it ſeems the king may diſſolve this port, or erect another port, with a prohibition that no ſhip ſhall arrive within ſuch a diſtance, but at the new port; for there was no right of arrivage of any ſhips at the former harbour lodged in the inhabitants nor any other ſubject, but only permiſſive at the king's pleaſure, and he may derogate from his own right.

4. But if a ſubject hath a port and arrival of ſhips at *B.* by preſcription or charter, and afterwards the king erect a new port, within three or five miles within or without the precincts of the port of *B.*, with a prohibition that no ſhips ſhall arrive within five miles of the new-erected port elſewhere; this prohibition or reſtriction is void, as againſt the intereſt of the owner of the port of *B*, or the inhabitants of *B.*, becauſe there was a former intereſt lodged in the owner and inhabitants of the port of *B.*, which cannot be taken from them without their own conſent, or by act of parliament.

5. But if a ſubject, or the king's fee-farmer, hath a port at *R.* by preſcription or charter, and the king grants that no ſhips ſhall arrive within five miles or ſuch like compaſs, the king cannot within that precinct erect *de novo* a port to the prejudice of that port to which he had precedently granted this privilege. For the grant is good as againſt the king, and any intereſt derived from him after this grant: and although, as hath been ſaid, without this reſtrictive clauſe, the king might have erected a port near to the former, which would have had this concurrent power or franchiſe, yet the king hath bound up his hands by his own charter; and by this inhibition, the precinct, to which this inhibition extends, is become as it were, parcel of the precinct of the port.

The right in ports, according to Lord *Hale*, is threefold:—The *jus privatum*, or the intereſt of propriety or franchiſe. The *jus publicum*, or the common intereſt that all perſons have to reſort to or from publick ports, as publick ſea-marts or markets, with their goods, wares, and merchandizes. The *jus regium*, or the right of ſuperintendency and prerogative, which the king hath for the ſafety of the realm, or benefit of commerce, or ſecurity *Id.* c. 6.

ſecurity of his cuſtoms. The firſt, *viz.* the *jus privatum* divides itſelf into the ownerſhip of propriety, and the ownerſhip of franchiſe. The ownerſhip of propriety is, where the king, or a common perſon by charter or preſcription, is the owner of the ſoil of a creek or haven, where ſhips may ſafely arrive and come to the ſhore. This intereſt of propriety is *prima facie* in the king, but may belong to a ſubject. But the ſubject hath not thereby the franchiſe of a port, nor may he ſo uſe or employ it, unleſs he hath had that liberty time out of mind, or by royal charter. Indeed he may bring thither for his own private uſe his own boats and veſſels to carry off and bring in his own goods that are not cuſtomable, as fiſh, *&c.*; but he may not uſe it as a publick port or admit foreigners, unleſs in caſe of neceſſity, nor take toll or anchorage there; for that is fineable, either by preſentment, or in a *quo warranto*.—The ownerſhip of franchiſe is that which gives the formality or denomination of a publick or lawful port, and becomes a free arrival of ſhips to lade and unlade their merchandizes, and this may be acquired by preſcription, or by creation by the king either by proclamation or by charter.

Before any port is legally ſettled, although the propriety of the ſoil of a creek or harbour may belong to a ſubject or a private perſon, yet the king hath his *jus regium* in that creek or harbour; and there is alſo a common liberty for any one to come thither with boats and veſſels as againſt all but the king. And upon this account, though *A* may have the propriety of a creek or harbour, or navigable river, yet the king may grant there the liberty of a port to *B*-, and ſo the intereſt of propriety and the intereſt of franchiſe ſeveral and divided. And in this no injury is at all done to *A*., for he hath what he had before, *viz.* the intereſt of the ſoil, and conſequently, the improvement of the ſhore, and the liberty of fiſhing; and as the creek was free for any one to paſs in it againſt all but the king, for it was *publici juris* as to that matter before, ſo now the king takes off that reſtraint, and by licence and charter makes it free for all to come and unlade.

But if *A*. hath the *ripa* or bank of the port, the king may not grant a liberty to unlade upon that bank or *ripa*, without his conſent, unleſs cuſtom hath made the liberty thereof free to all, as in many places it is; for that would be a prejudice to the private intereſt of *A*., which may not be taken from him without ſuch conſent. And therefore in the creation of a new port either by proclamation or charter, it hath been the courſe to ſecure the intereſt of the ſhore beforehand, for the building of wharfs and keys for the application of merchandize, and for the building of houſes. So, that it is poſſible, though not ordinary, that the intereſt of propriety and the intereſt of franchiſe may be divided: but it is uſual and beſt in conjunction.

Id. c. 8. Though the queſtion of nuiſance be a queſtion of fact, and therefore proper for the cognizance of a jury, yet where the

But, though the dominion either of franchiſe or propriety be lodged by preſcription or charter in a ſubject, yet it is charged or affected with that *jus publicum* that belongs to all men; and ſo it is charged or affected with that *jus regium*, or right of prerogative of the king, ſo far as the ſame is by law inveſted in the king. It is only with the *jus regium*, that we have to do at preſent, obſerving by the way, that the patronage and protection of all *jura publica* being intruſted by the common law to the king; the care of preventing and reforming publick nuiſances in ports is left to him, and his courts of juſtice, the proſecutions for them are in his nam

ſame, and the fines for the defects or annoyances in them are part of his revenue. king claims, and proves a

right to the ſoil, where a purpreſture and nuiſance have been committed, he may proceed by information in equity, and have a decree to debate it. Caſe of the City of Briſtol v. Morgan, Trin. 11 Car. 1. cited in Ld. Hale De Portibus Maris, pa. 81. and Attorney-General v. Richards, Anſtr. 603.

The *jus regium*, or prerogative of the king in the ports of the ſea, branches itſelf into three parts, as it relates firſt to the preſervation of the ſafety and peace of the kingdom; ſecond, to the trade and commerce of the kingdom: or, third, to the improvement and due anſwering of the ſhip's cuſtoms and ſubſidies ariſing by merchandize imported or exported. From the firſt ariſeth his power of inhibiting perſons to come into the realm, or of inhibiting perſons to go out of the realm, of both which ſee hereafter (C. 3. 4). From the ſecond ariſeth the power claimed by him of opening or ſhutting the ports in reference to goods exported or imported, of which we ſhall treat under this diviſion of the ſubject. With reſpect to his power in the laſt, it will be treated of under title (*Smuggling*).

As to his power of opening and ſhutting the ports in reference to goods exported or imported, we ſhall tranſcribe the words of Lord *Hale* upon this delicate point.

Concerning importation of foreign goods, and the prohibition of the importation of them, we may find *de facto* that ſuch inhibitions have been of two ſorts, *viz.* general inhibitions that ſuch or ſuch merchandizes ſhall not at all be imported, under pain of confiſcation or forfeiture; or elſe they have been inhibitions or reſtraints *ſub modo*; as, namely, they ſhall be imported only at ſuch ports or in ſuch ſhips.

Firſt, For general prohibitions of merchandizes of any particular kind. Theſe were ſometimes made, but very rarely; neither indeed could they be lawful without the help of an act of parliament, becauſe there have been in all times ſeveral ſtatutes made for the liberty and encouragement of merchant ſtrangers eſpecially to come into the kingdom and trade, which could not be derogated by a proclamation. *Magna Charta*, *c.* 30. 2 *E.* 3. *c.* 4. 9 *E.* 3. *c.* 1. 14 *E.* 3. *c.* 2. 25 *E.* 3. *c.* 2. and divers other ſtatutes.

And therefore, if at any time there were ſuch inhibitions by proclamation, they were commonly temporary upon an exigence of ſtate, and not perpetual, nor of any certain continuance. But when there were perpetual, or long reſtraints of this nature, they were always done by parliament. 3 *E.* 4. *c.* 4. 1 *R.* 3. *c.* 12. 19 *H.* 7. *c.* 21. againſt importation of foreign manufactures therein ſpecified; 4 *E.* 4. *c.* 1. againſt importation of foreign clothes; 5 *Eliz. c.* 7. againſt importation of daggers, *&c.*; 27 *H.* 6. *c.* 1. an inhibition of the wares of *Brabant* and *Holland*, becauſe they there had made reſtraint of importation of *Engliſh* cloth; 23 *H.* 8. *c.* 7. an inhibition by act of parliament of the importation of *French* wines between *Michaelmas* and *Candlemas*; and very many more of the like kind. And the reaſon of theſe interpoſings of acts of parliament was, becauſe that proclamations proved very ineffectual to that purpoſe, partly becauſe it was at beſt doubtful whether they could at all be effectual againſt ſo many acts of parliament; but doubtleſs they could not without an act of parliament induce a forfeiture of the goods ſo imported, as hath been often reſolved; whereof more hereafter. See the reſolution of the caſe of monopolies, 11 *Rep.* 88. the grant of the ſole importation of foreign cards, though prohibited by act of parliament, ruled to be againſt law, and a mo-

nopoly. Much more were the things not prohibited by law to be imported. *Vide Peeth*'s caſe, *Rot. Parl.* 50 *E.* 3.

The only act of parliament, that ſeems to give a countenance to theſe kinds of inhibitions, is that of 3 *Ja. c.* 6 The king granted a charter to the merchants, that no *Spaniſh* wines ſhould be imported but by them. This act repealed that charter in a great meaſure, whereby ſome would infer that the patent was good, ſince nothing but an act of parliament ſeemed neceſſary to repeal it. But the conſequence is miſtaken. *In majorem cautelam*, an act of parliament was uſed in this caſe as the moſt ſafe and effectual means: but if any man conſider thoſe acts of parliament, that enact the ſea to be open, or the reſolutions of court in caſes of this nature, or the very preamble of the act itſelf, he will eaſily find that ſuch inhibitions cannot be without an act of parliament.

Secondly, as touching particular reſtraints; as, for inſtance, that malmſeys ſhall not be imported, but into the port of *Southampton*; ſuch a grant is againſt law, and was accordingly reſolved in the caſe of *Southampton*, T. 1 *Eliz. Rot.* 73. cited in *Cooke*'s comment upon *Magna Charta*, *c.* 30. and therefore there was a ſpecial act of parliament made the 5 *Eliz.* for the making good of that charter; and the like courſe hath been uſed to make good thoſe reſtrictions of foreign trade to particular companies; as, for inſtance, the *Muſcovy* Company, and ſome others.

1. Concerning exportation, and how far forth the ports may be ſhut in reference to goods and merchandizes exported, both the *quid facti* and the *quid juris* therein. Theſe prohibitions of exportation were never generally for all goods; for that were to deſtroy trade, but of ſome particular goods and merchandizes. And thoſe reſtraints were of two kinds, *viz.* general reſtraints, that they ſhould not be at all exported; or ſpecial and qualified reſtraints, that they ſhould not be exported, but in ſuch ſhips, or at ſuch places. Touching both theſe briefly: and firſt, touching the general inhibitions.

It is certain, that inhibitions of this nature were very frequent by proclamation; and when they carried with them the apparent reaſonableneſs and fitneſs of the inhibition, they were not much diſputed. Thoſe inhibitions were for the moſt part touching ſuch commodities whereby the kingdom might be weakened, or ſcarcity occaſioned, by the exportation: as arms, ammunition, corn, victuals, gold, ſilver, horſes, timber, thread of yarn or woollen, and ſometimes of falcons *Vide Clauſ.* 10 *E.* 2. *m.* 13. *dorſo. Clauſ* 38 *E.* 3. *m.* 29. *Clauſ.* 41 *E.* 3. *m.* 24. *dorſo. Clauſ.* 43 *E.* 3. *m.* 3. *dorſo. Clauſ.* 45 *E.* 3. *m.* 4. *dorſo.* And ſometimes in the proclamation there was annexed a clauſe of impriſonment of offenders; ſometimes the forfeiture of the things imported; ſometimes the forfeiture of all their goods and lands. But theſe clauſes of forfeiture were only *in terrorem*; for, as we have before obſerved, a proclamation barely cannot induce a forfeiture of goods. But yet ſometimes the ſearchers and other officers did ſeize the goods; and when they had ſo done, they were compelled to account for the goods ſo ſeized in the Exchequer; and the parties, whoſe goods were ſo ſeized, were put to much trouble, before they could have their goods again. But the moſt uſual way to puniſh offenders againſt ſuch proclamations was by fine and impriſonment; for where the king may by law prohibit, the proclamation doth increaſe the offence. And theſe proceedings were by information at the king's ſuit, ſometimes in the King's Bench, as *H.* 1 *E.* 2. *B. R. Rot.* 38, againſt ſuch as exported horſes, arms, money, and plate, againſt the king's proclamation; ſometimes

ſometimes in the Exchequer, *Communia Trin.* 16 *E.* 3 *Rot. Mich.* 19 *E.* 3. *Rot. clauſ.* 64. *m.* 29. and ſometimes *coram concilio*, viz. in Chancery.

How far theſe proclamations might be warrantable by law in theſe particular caſes, I ſhall not poſitively determine; only thus far I ſhall ſay,

Firſt, That if it were admitted, that in theſe particular caſes of arms, ammunition, victuals, and money, ſuch proclamation might be made, and thereby the offenders might be ſubject to fine and impriſonment; yet it could not be extended to other things, neither ought or might this inhibition be an engine to gain money for licences. For if the proclamation had any ſtrength, it was becauſe of the inconveniences of the exportation of theſe things. If it were not a publick inconveniency, it could not be inhibited barely by proclamation; and if it were a publick inconveniency, it might not be licenſed for private profit. If it might, the ſtrength of the proclamation would conſequently ceaſe.

Secondly, If theſe proclamations were admitted lawful; yet they could not induce any forfeiture of lands or goods, or of the very goods ſo exported againſt that inhibition; becauſe that lies not within the ſtrength of any thing but a law.

Thirdly, Though poſſibly in the time of hoſtility, or publick danger, or common ſcarcity, ſuch prohibitions by proclamation of exportation of victuals and arms, might have a temporary effect and uſe; yet we may eaſily gueſs that they were not effectual for perpetuity, nor indeed ſufficient proviſions *pro tempore*; for the king and his council thought not fit to reſt upon ſuch ineffectual means, but acts of parliament have ſucceſſively paſſed for the inhibition of exportation of theſe very things, with penalties of forfeitures added to them. See 1 *E.* 4. *c.* 5. for horſes; 1 *E.* 2. *P. M. c.* 5. of corn, herring, butter, cheeſe, and wood; 25 *H.* 8. *c.* 5. of victuals of all ſorts; 9 *E.* 3. *c.* 1. 19 *H.* 7. *c.* 15. of bullion or money. The like might be inſtanced in divers other things.

Let us now come to particulars, or qualified reſtraints; and they are of two kinds:

Firſt, The reſtraints of exportation in any but *Engliſh* bottoms. This hath been attempted to be done by proclamation, as a good expedient for the encreaſe of ſhipping and mariners, and the encouragement of trade and navigation. *Vide inde clauſ.* 41 *E.* 3. *m.* 25. of a proclamation to that purpoſe; but it proved ineffectual, till proviſion was made for it by acts of parliament, *viz* 5 *R.* 2. *c.* 3.—6 *R.* 2. *c.* 8.—14 *R.* 2. *c.* 6.—4 *H.* 7. *c.* 10. But becauſe it provoked foreign princes to do the like, it was repealed by the ſtatute 1 *Eliz. c.* 13. with certain proviſions made in the caſe by that ſtatute and the ſtatutes of 5 *Eliz. c.* 5. and 13 *Eliz c.* 15. But now, by a late act of parliament, 12 *Car.* 2. entitled, "An act for encouraging of navigation," the uſe of foreign ſhips is in a great meaſure reſtrained.

And upon the whole matter, it will appear from the ſeveral acts of parliament that have been made for the ſupport and encreaſe of trade, and for the keeping of the ſea open to foreign and *Engliſh* merchants and merchandize, that there is now no other means for the reſtraint of exportation or importation of goods and merchandizes in times of peace, but only when and where an act of parliament puts any reſtraint. Several acts of parliament having provided, *que la mere ſoit overt*, it may not be regularly ſhut againſt the merchandize of *Engliſh*, or foreigners in amity with this

crown, unleſs an act of parliament ſhut it out, as it hath been done in ſome particular caſes, and may be done in others.

Pref. to Hargrave, Hale's Tracts, v. 1. p. xxx. 38 E. 3. c. 3.

In another place Lord *Hale* hath theſe words: "Touching the prohibitions of exportations and importations of commodities.—It is true, that by divers graunts in parliaments the ſea ought to be open for exportation and importation of merchandize. *Rot. Parl.* 18 *E.* 3. *n.* 17. 22 *E.* 3. *n.* 8. *Item que paſſage de leines et d'autres merchandiſes ſoient overts ſans faire apreſtes ouſter la cuſtome a les merchaunts, que ont les cuſtumes du roi par un certain, quele apreſt turne al profit des dits merchaunts et outrageouſe grevance & nuſchancea votre comun.* Reſp. *Soit le paſſage overt, et que cheſcun poit paſſer fraunchement, ſavant au roi ſe que lui eſt due.* Yet clerely the kinges of this realme always exerciſed a power in reſtraint of the free paſſage of ſome commodityes of this realme by their own power, as well before as after 22 *E.* 3. And though complaints were made of it, yet the crown retained the power. *Vide* 25 *E.* 3. *n.* 22. 1 *H.* 5. *n.* 41.

"Some inſtances of the particulars.

"(1.) For exportation prohibited.

Vide clauſ. 41 E. 3. m. 21. dorſ. B. 15. Clauſ. 48 E. 3. m. 11. dorſ. B. 159. Clauſ. 46 E. 3. m. 21. dorſ. B. 118. Clauſ. 47 E. 3. m. 12. dorſ B. 127. Of wools and woolfels, 49 E. 3. m. 21. dorſ. B. 170.

"1. The kinges have uſually before the ſtat. of 1 & 2 *P.* & *M. c.* 4. & 13 *Eliz. c.* 15. prohibited the exportation of corne and graine; becauſe the neceſſary ſuſtenance of the realme. And this is in effect admitted legal, *Rot. Parl.* 17. *R.* 2. *n.* 39. Upon a petition for a repeal of ſuch a reſtraint, the anſwer was, *Le roi le voet a preſent, proviſo que bien liſe a ſon counſel a reſtrainer le paſſage quant il ſemble beſoignable.* For ſuch reſtraints *vide clauſ.* 5 *E.* 3. *parte* 1. *m.* 21. *dorſ. Rot. Parl.* 50. *E.* 3 *n.* 156.

"2. The kinges of this realme have uſually prohibited the exportation of coigne and bullion before any act to reſtrain it, becauſe it is the riches and wealth of the realme. *Clauſ.* 30 *H.* 3. *m.* 11.

Clauſ. 43 E. 3. m. 3 dorſ. B. 50.

"3. The kinges of this realme have uſually prohibited the exportation of armes, or ſuch other thinges as are for the neceſſary defence or ſtrength of the realme. *Vide clauſ.* 10 *E.* 3. *m.* 31. *dorſ.* a proclamation inhibiting the exportation of boards or timber for ſhips. *Clauſ.* 38 *E.* 3. *m.* 29 a prohibition of exportation of horſes, falchons, thread, bowes, arrowes, bowſtringes, and arms, and to arreſt the ſhip and goods. The like prohibition of commerce with enemies.

Now ſettled by the act of 1 Eliz. c. 11.

"4. The kinges have uſually reſtrained the paſſage of cuſtomable goods to ſome particular ports for the better preventinge of defraudinge of cuſtomes, and at theſe ports the cockets kept. Thus did *E.* 3. *clauſ.* 5 *E.* 3. *parte* 1. *m.* 12. *dorſ.*

Vide the penalty for breaking ſuch an arreſt, clauſ. 46. E. 3. m. 28. B 110

"And in theſe caſes prohibitions of this nature were legall, and for the moſt part the cohertion was by ſtay of the ſhip or goods prohibited; for no proclamation could induce a forfeiture; and for that cauſe moſt of theſe thinges were provided for by act of parliament, which ſubjected the party to a forfeiture or other penalty.

"(2) Now for an inſtance of a reſtraint of foren trade or importation.—Upon this the acts of *Magna Carta, c.* 30. 9 *E.* 3. *c.* 1. 25 *E.* 3. *ſtat.* 4 *c.* 2. 2 *R.* 2 *c.* 1. lye heavy; and it hath been ſeldom practiſed. *Vide* a reſtraint of foren trade in *Ireland*, 3 *R.* 2. *n.* 44.

"Thus

" Thus much for the kinge's power of ſhutting the ports; which, " though it was ſometymes uſeful and profitable for the kingdom, yet " oftentymes was made a means of great damage and oppreſſion, which " did ariſe by lettinge looſe the reſtraint to particular men for profitt.

" And ſo ariſeth the next conſideration of the kinge's power of open- " inge the ports.

" The kinge might open the paſſage, which either by his own procla- *Vide* Clauſ. " mation he had reſtrained, or which by act of parliament were reſtrain- 46 E. 3. " ed, either in reſpect of this or that particular commodity; as when ex- m. 22. dorſ. " portation of ſome particular wares were reſtrained in reſpect of the place, B. 118. " as the tranſportation of wools to the ſtaple. This is cleere and without " queſtion, whereof before. Theſe licences were alſo complained of, " and often enacted againſt, but could never be remedied. *Vide* 21 *R.* 2. " *n* 82. and the procurers of ſuch licences puniſhed. 51 *E.* 3. *n.* 17. *Vi-* " *de* 27 *H* 6. *n.* 29. 9 *H.* 6. *n.* 37."

In a former part of this work we have ſatisfied ourſelves with ſtating Vol. 5. my Lord *Hale*'s opinion with reſpect to the power of the crown in opening p. 507. or ſhutting the ports. Other authorities, however, are not wanted in ſup- port of this prerogative. It is admitted by Mr. *St. John*, one of the coun- ſel for Mr. *Hampden*, in the caſe of ſhip-money. " The law (he ſays) 1 St. Tr. " doth entruſt the king only with that, which being done, is moſt for his 540. " own loſs, as in reſpect of the cuſtoms, this of prohibiting foreign trade " would be. But," he adds, " this cannot be done, but in time of war " and imminent danger." And Mr. *Holborne*, the other counſel for Mr. *Hampden*, in the ſame caſe, ſays, " For the ſhutting of the ports, there is *Id.* 586. " more difference in point of prejudice of the king than of the ſubject. " The king cannot ſhut the ports but to his own prejudice. Again, the " ſhutting of the ports without caſe of neceſſity, the king hath the loſs as " well as we; for by that he loſeth his cuſtoms, and by ſhutting them he " can gain nothing at all. And beſides, there is no law at all that hin- " ders him from it." In a caſe prior in point of time, the great caſe of impoſitions in the 4th of *James* the Firſt, Mr. *Hakewill*, in anſwer to the 11 Str. Tr. arguments that had been uſed by the ſervants of the crown, ſaid, " For 504. " my part, I think that the king cannot reſtrain the paſſage of merchants, " but for ſome ſpecial cauſe; wherein to define certainly and reſolutely " for what cauſes he may, and for what not, I will not undertake. Only " let me inform you, that there is not one of thoſe precedents vouched by " them to prove the king's power to reſtrain, but they are upon ſpecial " reaſons; as by reaſon of enmity with ſuch a nation from which they are " reſtrained, or becauſe ſuch a commodity may not be ſhared within the " kingdom. Beſides, they are not reſtraints from all places, and of all " manner of merchandizes, but from certain places only, and for certain " ſorts of merchandizes. And for my part I think that reſtraints in all " theſe caſes, and of like nature, are by the common law left to the king's " abſolute power; for if it ſhould be otherwiſe, it ſhould be in the power " of a merchant for a little private lucre to enrich the king's enemies, or " to furniſh them with munition to be employed againſt the ſtate, or ut- " terly ruin the commonwealth, by carrying out a commodity which may " not be ſpared, or by bringing in ſome that may be hurtful. Nay, " which is more, ſuch may be the occaſon, that the king may, I doubt " not, ſtop the paſſages of all merchants from all places for a ſhort time,

" as

" as upon the death of the late queen, it was put in practice to prevent " intelligence. There may likewiſe be ſuch neceſſary uſe of their ſhips, " as the want of them upon ſome ſudden attempts may be the cauſe of the " overthrow of the whole ſtate. In ſuch caſes as theſe, if the common " law did not give the king leave to reſtrain their paſſage by his abſolute " power, it were very improvident in the higheſt points, which cannot be " imagined of ſo wiſe a law. And yet the kings of this realm have al- " ways been ſparing in the practice of their abſolute power in this point; " for there are little leſs than thirty acts of parliament, touching the open- " ing and ſhutting up of the paſſage of merchants, moſt of which, as I con- " ceive, were made rather for the increaſe of puniſhment, than for want of " power in the king: for the breach of a reſtraint by abſolute command- " ment is puniſhable, as all other contempts, only by fine and impriſon- " ment, and not by forfeiture of the merchandizes."—Mr. *Yelverton* in his argument upon the ſame occaſion doth not ſo diſtinctly admit this prerogative, but refers the power rather to acts of parliament, at leaſt ſince the death of *E.* III. He ſaith, indeed, in one part, He (the king) hath pow- " er to open and ſhut upon conſideration of publick good to the people and " ſtate."—" The ports in their own nature are publick, free for all to go " in and out; yet for the common good this liberty is reſtrainable by the " wiſdom and policy of the prince, who is put in truſt to diſcern the times " when this natural liberty ſhall be reſtrained." Yet in a ſubſequent part, he adds, " Though it be admitted that the king may reſtrain perſons " and goods, yet it may well be denied that he hath power of himſelf " alone without aſſent of parliament ſimply and indefinitely to reſtrain all " traffick in general, or to ſhut up all the havens and ports, and to bar " the vent and iſſuing of wares and merchandizes of the whole kingdom; " as it appeareth plainly, that this hath been done this three hundred years, " or thereabouts, by act of parliament only, and that the kingdom of *England* " made this matter of traffick ſo tender a caſe to deal in, as that it hath ever " held it a matter fit for the conſultation of the great council of the king- " dom, and for no other." He then adduces acts of parliament paſſed in every ſucceſſive reign from the time of *E.* III. for the purpoſe of impoſing theſe reſtraints, whence he infers that the crown cannot do it of its proper authority. But it may be obſerved of all the ſtatutes which he has referred to, that they were paſſed, not where the neceſſity of the times called for immediate interpoſition, but where it was found politick to impoſe reſtraints upon particular branches of traffick, or with particular countries *for a conſiderable length of time;* and the fair inference from them ſhould ſeem to be, rather that the prerogative in this reſpect is not illimitable in its exerciſe, than that there is no ſuch prerogative at all. The ſafety of the ſtate is the ground upon which the king is intruſted with the power of ſhutting the ports, or laying embargoes: *det operam rex, ne quid detrimenti capiat reſpublica;* where therefore the danger is not imminent, the power ought not to be exerciſed: but, if the power is confined to times of imminent danger, legiſlative acts giving ſuch a power at other times imply no negative upon it. It may be added, that the legality of embargoes by the crown ſeems to be admitted by two very profound modern lawyers.

See Mr. Hargrave's Preface to the 11 th volume of the *State Trials*, and to the 1ſt volume of his *Collection of Tracts relative to the Laws of* England.

(C) Of

(C) Of his Prerogative over the Persons of his Subjects: And herein,

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The allegiance) For the misapplication of their allegiance to the regal capacity or crown, exclusive of the person of the king, (among other things,) were the Spencers banished in the reign of Edward the second. Hal, Hist. P. C. 67.

Natural allegiance cannot be forfeited, cancelled, or altered by any change of place, time, or circumstances, nor by any thing but the united concurrence of the legislature. For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsick, and primitive, and antecedent to the other; and cannot be devested without the concurrent act of that prince to whom it was due. Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands, by which he is connected to his natural prince. 1 Bl. Comm. 369. Sir M. Foster observes, that "the well-known maxim which the writers of our law have adopted and applied to this case, *nemo potest exuere patriam*,

"comprehendeth the whole doctrine of natural allegiance." Fost. Cr. L. 184. This is exemplified by a strong instance in the report which that learned Judge hath given of Æneas Macdonald's case. He was a native of Great Britain, but had received his education from his early infancy in France, had spent his riper years in a profitable employment in that kingdom, and had accepted a commission in the service of the French king: acting under that commission, he was taken in arms against the king of England, for which he was indicted and convicted of high treason; but was pardoned upon condition of his leaving the kingdom, and continuing abroad during his life. *Id.* 59.—By st. 26 G. 3. c. 60. it is enacted, that no registry of any ship or vessel shall thenceforth be made, until the owner or owners of such ship or vessel shall have taken an oath therein set forth in manner therein directed, containing, among others, the words following: "That I the said *A. B.* (and the said other owners, *if any*) am (or are) truly and *bonâ fide* a subject (or subjects) of Great Britain, and that I the said *A. B.* have not, nor have any of the other "owners, to the best of my knowledge and belief) taken an oath of allegiance to any foreign "state whatever, except under the terms of some capitulation (*describing the particulars thereof*)." And by st. 27 G. 3. c. 19. § 4. reciting the above clause, it is enacted, that any oath which shall have been, or may be taken, for the sole purpose of acquiring the rights of a citizen or burgher in any foreign city or town in Europe, to be enjoyed during the time that the person or persons taking such oath shall reside in such city or town, and for a limited time after such residence shall have expired, shall not be deemed an oath of allegiance to a foreign state, within the true intent and meaning of the above act.

(*By the* 2 *Geo.* 2. *c.* 31.) By the 9 G. 2. c. 26. the time is enlarged to six calendar months after such admittance, &c. And statutes are annually passed for the purpose of enlarging the time and indemnifying those who have omitted to qualify.

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(*A solicitor's bill*) But it hath been since determined, that this writ cannot be granted but *on bill filed*. *Ex parte* Brunker, 3 P. Wms. 312.

(*A motion*) So, Read v. Read, 1 Ch. Ca. 715. Anon. 2 Atk. 410. Pearne v. Lisle, Ambl. 76.

It hath been determined, that this writ shall not issue on a mere legal demand, for which the defendant might have been holden to bail. *Ex parte* Brunker, 3 P. Wms. 312.

Anon. 2 Atk. 410. Pearne v. Lisle, Ambl. 76. Atkinson v. Leonard, 3 Br. Ch. Rep. 218. Parker v. Appleton, *Id.* 427. But from the case of Atkinson v. Leonard it seems, that it *will* issue in matters where the courts of law and equity have *concurrent* jurisdiction.

Nor

Anon. 1 Atk. 421. Nor ſhall it iſſue on a demand which is not certain.

Shearman v. Shearman, 3 Br. Ch. Rep. 370. Anon. 1 Br. Ch. Rep. 376.

Rico v. Gualtier, 3 Atk. 501. In general, the application for it muſt be ſupported by an affidavit, ſwearing poſitively to the debt; but on a bill for an account, it is ſuffici-
Anon. 2 Vez. 489. ent for the plaintiff to ſwear to the balance *as to his belief.*

Anon. 2 Vez. 489. Where the demand is againſt an adminiſtrator, &c., the plaintiff ſhould alſo ſwear to his belief of aſſets come to the defendant's hands.

Jerningham v. Glaſs, 3 Atk. 409. This writ may iſſue againſt a feme covert executrix, whoſe huſband is out of the juriſdiction.

Ambl. 62. S. C. and Moor v. Melliſh, therein cited.

Baker v. Dumareſque, 2 Atk. 66. As the real object of the writ, when applied to private concerns, is to compel the defendant to abide the event of the ſuit, the court always inclines to diſcharge the writ upon ſuch ſecurity being given.

Jerningham v. Glaſs, 3 Atk. 409. Ambl. 62. S. C. Robertſon v. Wilkin, Ambl. 177. Atkinſon v. Leonard, 3 Br. Ch. Rep. 218.

Whether the writ ſhall iſſue againſt a foreigner or perſon uſually reſident *out* of the juriſdiction, in reſpect of a demand which originated *abroad*, and is *there* ſuable, *vide Pearne* v. *Liſle*, *Robertſon* v. *Wilkie*, *Atkinſon* v. *Leonard*, *ubi ſupra*.

Page 171 (D) Of the King as the Fountain of Juſtice, and intruſted with the Execution of the Laws: And herein,

2. Of the King's Prerogative in Eccleſiaſtical Matters.

Gibſ. Cod. 763. The king is patron paramount of all the benefices in *England*. In virtue of which, the right and care of filling all ſuch churches as are not regularly filled by other patrons belongs to the crown; whether it happen through the neglect of others, (as, in the caſe of lapſe,) or through incapacity to preſent, as, if the patron be attainted, or outlawed, or an alien, or have been guilty of ſimony, or the like.

Ibid. Watſ. c. 9. Upon which ground, the king hath right to preſent to all dignities and benefices of the advowſon of biſhopricks and archbiſhopricks during the vacation of the reſpective ſees. Not only to ſuch as ſhall become void after the ſeizure of the temporalties, but to all ſuch as ſhall become void after the death of the biſhop, though before actual ſeizure. And becauſe it is a maxim in law, that the church is not full againſt the king, till induction; therefore, though the biſhop hath collated, or hath preſented, and the clerk is inſtituted upon that preſentation, yet will not ſuch collation or inſtitution avail the clerk, but the right of preſenting devolves to the king.

Watſ. c. 9. 2 R. Ab. 343. And it is ſaid, that this privilege which the king hath of preſenting by reaſon of temporalties of a biſhoprick being in his hands, ſhall be extended unto ſuch preferments, to which the biſhop of common right might preſent, though by his compoſition he hath transferred his power to others. And therefore when the temporalties of the archbiſhop of *York* are in the king's

king's hands, the king ſhall preſent to the deanery of *York*, although by compoſition between the archbiſhop and the chapter there, the chapter are to elect him: and this, becauſe the patronage thereof *de jure* doth belong to the archbiſhop, and his compoſition cannot bind the king, who comes in paramount, as ſupreme patron: for of the whole biſhoprick the king is ſupreme patron, although it be diſmembered into divers branches, as deans, and other dignities; and of ancient time all the biſhopricks were of the king's gift, but afterwards the king gave leave to the chapter to elect; yet the patronage notwithſtanding remains in the king.

Upon promotion of any perſon to a biſhoprick, the king hath a right to preſent to ſuch benefices or dignities as the perſon was poſſeſſed of before ſuch promotion; though the advowſon belongeth to a common perſon (*a*). This right of preſenting upon promotion by the king, as making the avoidance which would not otherwiſe happen, did ſpring from the practice of the popes, and is now an unconteſted right of the crown; and hath been eſtabliſhed not only by long practice, but by many judgments upon full and ſolemn hearings; and that, whether the churches are new or old, and how often ſoever this happens ſucceſſively by promotions to biſhopricks from the ſame benefice or dignity: as was adjudged in the caſe of *St. Martin's* and *St. James's* (*a*). Of late, the great queſtion hath been, on ſuppoſition of the right, how far it is anſwered, and the term of the crown ſatisfied, by the grant of a *commendam* to retain ſuch promotions, or any part of them, together with a biſhoprick. Of which queſtion the ſolution hath been, that by a *commendam* for life, and for the time of continuing in ſuch a biſhoprick, the turn of the crown is anſwered, and in ſuch caſe the proper patron ſhall preſent, upon death or tranſlation; but that the right of the crown ſhall not be defeated by a *commendam* granted for a term of months or years, certain and limited. Gibſ. Cod. 763.

(*a*) Lord Chief Juſtice De Grey, ſpeaking of this right, ſaith, It appears in Bro. Preſentment, 61. to be as old as Edw. the 3d's time. It was exerciſed under H. 8., and Q. Eliz. The law concerning it was doubted in Car. 2d's time, and ſince, but finally determined in favour of the crown in King William's time, K. v. Bp. of London, 4 Mod. 202. This is not a right of patronage in the king; nor is it a right of eviction, for it ejects nobody: nor an uſurpation; for it is a rightful act. But it is a contingent, caſual right, ariſing upon a particular event, the incumbent's becoming a biſhop. 2 Bl. Rep. 773. —(*a*) 4 Mod. 200. 3 Lev. 377. S. C. Lev. Intr 344. S. C. 1 Show, 413. 441. 493. S. C. 1 Ld Raym 23. S C, Show. P. C. 164. S. C. Carth. 313. S. C.

But in *Ireland*, the law is, that a man ſhall not be promoted to a biſhoprick there, until he hath reſigned all the preferments which he hath in *England*: which preferments being void before the acceptance of the biſhoprick, it ſeemeth, that in ſuch caſe the king ſhall loſe the preſentation, Burn's E. L. title Benefice, 128. title Biſhops, 192. But in Woodley, v. Bp. of Exeter, Cro. Jac. 691. it is holden, that this prerogative right of preſenting accrues as well where the incumbent is promoted to an Iriſh, as an Engliſh Biſhoprick. But, as the report of this caſe hath been lately conſidered in other reſpects as rather apocryphal, it may not be ſafe to rely upon its authority in this particular.

It hath been determined, that where the advowſon is in common, ſo that the patrons are to preſent by turns, the prerogative preſentation doth not paſs for the turn of the otherwiſe rightful patron; for the prerogative right doth not ſupply, but only ſuſpends or poſtpones the turn of the patron, and of all the patrons, if more than one, and doth not take away the right of the one, and leave the reſt entire; for that would be rank injuſtice, and this, being the act of law, *nemini facit injuriam*. Grocers' Company v. Archbiſhop of Canterbury, 2 Bl. Rep. 770. 3 Wilſ. 214. S. C.

And

Cailland v. Troward, 2 H. Bl. 324. Judgment affirmed in B. R.

And as the intervention of the prerogative preſentation doth not ſatisfy or diſappoint the turn of the otherwiſe rightful patron, neither doth it deſtroy the effect of a prior grant of the next preſentation by the owner of the advowſon.

6 Term Rep. 439. and afterwards in the Houſe of Lords, May 16, 1796. According to the report of the caſe of Woodley v. Biſhop of Exeter, Cro. Ja. 691. and Winch. Rep. 94. it was holden, that the right of the crown in this caſe defeats the right of a grantee who hath the next avoidance, for his right is only to the next, and the next he cannot have, and therefore ſhall have none. But this report we have already obſerved is of very doubtful authority. Lord Hobart, though at that time one of the judges by whom it was determined, takes no notice of it in his Reports. Lord Chief Juſtice De Grey ſaith, (2 Bl. Rep 774.) That caſe is not clearly ſettled to be law. And in an anonymous note in the margin of Dyer, 228. b. (which is apparently the ſame caſe) it is ſtated, that the court reſolved, "that the grantee ſhould have the next avoidance "after the prerogative preſentation, becauſe that was the act of law, and the prerogative of the "king, which excluded him from the firſt preſentation, injures no one." But admitting ſuch a determination to have been made, the court have gone upon the peculiar terms of the deviſe, which in Winch's Entries, p. 877. are, "*Dedit et legavit cuidam Johanni Baſſett, filio ſuo primam et proxi-*"*mam advocationem prædictæ eccleſiæ de L. quæ primo et proximè contingeret poſt mortem ipſius Arthuri;*" and which ſeem expreſsly to confine the power of preſenting to the firſt turn.

Agreed *per cur.* 4 Mod. 213.

But, if the incumbent of a *donative* is made a biſhop, the king ſhall not preſent to the donative, becauſe ſuch a promotion doth not make an avoidance by *ceſſion*, for the incumbent is the creature of the founder, and is not ſubject to ordinary and epiſcopal viſitation.

3. Of his Prerogative in creating Officers.

By ſtat. 22 *G.* 3. *c.* 82. if any office of the name, nature, deſcription, or purpoſe of the offices thereby aboliſhed, ſhall be eſtabliſhed hereafter, the ſame ſhall be deemed and taken as a new office.

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(1. *Bellum ſolemniter denunciatum*) Cro. Eliz, 142. Freem. 41,

1 Vez. 162.

We have ſeen before, that the ſtate of war may ſubſiſt otherwiſe than by ſolemn proclamation: that there may be an actual, though not a formal war. A war therefore may begin under letters of marque and repriſal, provided they be *general;* and in truth the late wars in *England* have uſually begun in that manner: for *general* letters of marque are for general injuries to the king's ſubjects, which is the cauſe of war; and the prizes taken under them accrue to the crown, which is a proof that it is a kind of war. But particular letters of marque will not create the ſtate of war, ſuch letters being granted for individual injuries, and the prizes taken under them becoming the property of thoſe to whom they are granted.

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(*By the* 1 *W. & M.*) It is remarkable, that the convention ſummoned by the Prince of Orange, did not even when they had the making of their own terms *in the Declaration of Rights*, venture to condemn the diſpenſing power in general, which had been uniformly exerciſed by the former kings of England. They only condemned it ſo far, *as it had been aſſumed and exerciſed of late.* But in *the Bill of Rights*, which paſſed about a twelvemonth after, the parliament took care to ſecure themſelves more effectually againſt a branch of prerogative, incompatible with all legal liberty and limitations; and they excluded, in poſitive terms, all diſpenſing power in the crown; yet, even then, the Houſe of Lords rejected that clauſe of the bill, which condemned the exerciſe of this power in former kings, and obliged the Commons to reſt contented with aboliſhing it for the future. There needs no other proof of the irregular nature of the old Engliſh government, than the ſubſiſtence of ſuch a prerogative, always exerciſed and never queſtioned, till the acquiſition of real liberty diſcovered, at laſt, the danger of it. Hume's Hiſt. vol. 8. p. 241, 2. See alſo the Journals.

(The

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(*The king by proclamation may legitimate*) This value, Sir W. Blackſtone thinks, ought to be by compariſon with the ſtandard of our own coin; otherwiſe the conſent of parliament will be neceſſary. 1 Bl. Com 278. By ſtat. 14 G. 3. c. 70. all officers of the revenue are required to cut every piece of gold coin tendered to them, if it is not of the current weight according to the king's proclamation.

The king by proclamation may authoriſe the lords of the admiralty to grant letters of marque and repriſal, as was done in the commencement of the late war againſt the *Dutch*. Dec. 1780.

(E) How the Rules of Law differ with reſpect to the King and a private Perſon: And herein,

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(*Not bound*) Though the crown is not bound by the ſtatute of limitations, yet a grant may be preſumed from great length of poſſeſſion. It was ſo done in the caſe of the corporation of Hull v. Horner, Cowp. 102.: not that, in ſuch caſes, the court really think a grant has been made, becauſe it is not probable a grant ſhould have exiſted, without its being upon record; but they preſume the fact, for the purpoſe and from a principle of quieting the poſſeſſion. *Per* Lord Mansfield, Cowp. 215.

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(*If the king*) But to free the ſecond preſentation of all ſuſpicion of being obtained by fraud in deceit of the king, it is proper that it ſhould make expreſs mention of the firſt preſentation.—Gibſ. 795. Watſ. c. 20.

(*But, though the*) And preſcription is now pleadable againſt the crown even in the caſe of franchiſes and offices; for by ſtat. 32 Geo. 3. c. 58. ſix years' poſſeſſion of a corporate office gives the corporator a preſcriptive title upon an information in the nature of a *quo warranto*, exhibited by the attorney-general or other officer on the behalf of the crown, by virtue of any royal prerogative, or otherwiſe. Neither is it competent to the crown to queſtion any derivative title, where the perſon from whom it is derived was in exerciſe *de facto* of the office or franchiſe, in virtue of which he communicated the title for a like period of ſix years.

7. Of his Prerogative in his Suits and Proceedings in Courts of Juſtice.

The king, though the chief and head of the kingdom, may redreſs any injuries he may receive from his ſubjects by ſuch uſual common law actions as are conſiſtent with the royal prerogative and dignity. He may too ſue in Chancery for a matter in equity. Thel. Dig. l. 1. c. 3. 3 Inſt. 136 1 Roll. Abr 373.

A declaration for the king ought regularly to be in the name of his attorney-general; though where it was in the name of the king himſelf, *viz.* *coram domino rege venit dominus rex*, it was, upon demurrer for this cauſe, adjudged good. 2 Lev. 82.

But the more effectual means of aſſerting the rights of the crown, and redreſſing its injuries, are thoſe which are obtained by the prerogative modes of proceſs. Such is that by inquiſition or inqueſt of office: which is an inquiry made by the king's officer, his ſheriff, coroner, or eſcheator, *virtute officii*, or by writ ſent to them for that purpoſe, or by commiſſioners ſpecially appointed, concerning any matter that entitles the king to the poſſeſſion of lands or tenements, goods or chattels. This is done by a jury of no determinate number; being either twelve, or leſs, or more. 3 Bl. Com. 258.

Stamford lays it down, that in all caſes where a ſubject ſhall not have poſſeſſion, in deed or in law, without entry, the king will not be entitled without office found, or other matter of reord. Stamf. Pr. 55. b.

As,

Ibid. As, if the king's tenant aliens in mortmain, or without licence, the king's title muſt be found by office.

Sembl Iæv. 1 R. Cro. Car. 173. Sir W. Jon. 78. 217. So, if the king claims upon a forfeiture, or (*b*) a condition broken.

(*b*) Sav. 70. 2 Ro. 215.

Stamf. *ubi ſupra.* So, if the king claims the lands of an idiot, lunatick, &c., the perſon ought to be found an idiot, &c. by office.

Ibid. So, if he claims the year, day, and waſte, of a felon attainted, or the temporalities of a biſhop for a contempt.

Sav. 8. So, if he claims a freehold or inheritance as forfeited for a contempt.

Attorney-General v. Wheeden, Park. 267. So, if he claims as forfeited to the crown, *choſes en action*, which belonged to an alien enemy. And in ſuch caſe, a peace before the inquiſition taken, diſcharges the forfeiture.

3 Bl. Com. 259. (*a*) St. 2 & 3 E. 6. c. 8. (*b*) Stat. 34 E. 3. c. 13. 36 E. 3. c. 13. 23 H. 6. c. 16. 1 H. 8. c. 8. 3 H. 8. c. 2. These inqueſts of office were deviſed by law, as an authentick means to give the king his right by ſolemn matter of record; without which he in general can neither take, nor part from any thing. For it is part of the liberties of *England*, and greatly for the ſafety of the ſubject, that the king may not enter upon, nor ſeize any man's poſſeſſions, upon bare ſurmiſes without the intervention of a jury. And although a defendant is now permitted to traverſe theſe inqueſts (*a*), and therefore they are not concluſive evidence, yet, as the legiſlature has directed (*b*), that inquiſitions ſhall be taken publickly and in an open place, and has empowered every one to give evidence openly before the inqueſt, the court will (*c*), in ſome caſes, order reaſonable notice to be given of the iſſuing of ſuch commiſſion.

(*c*) The King v. Daly, 1 Vez. 269.

Attorney-General v. Dupleſſis, Park. 144. Where an eſtate is given to an alien, or in truſt for an alien, though ſuch eſtate doth not actually veſt in the king, until an office is found, yet he hath before office found ſuch a right to it, as will entitle him to the aſſiſtance of a court of equity to enforce a diſcovery of the fact of alienage.

Stoughter's caſe, 8 Co. 168. Knight *ex parte* Dupleſſis, 2 Vez. 553. If the office be found againſt the king, a *melius inquirendum*, or farther inquiry under the former commiſſion, may be awarded. But in good diſcretion no *melius inquirendum* ſhall be awarded in ſuch caſe, without ſight of ſome record, or other pregnant matter for the king, to ſhew the former was miſtaken. And by pregnant matter for the king, is meant matter pregnant with evidence of the king's right.

The *melius inquirendum* is grantable only on the part of the crown, and is given, becauſe the crown cannot traverſe, as the ſubject can. 3 Atk. 6.

Stoughter's caſe, *ubi ſupra.* But, if the *melius inquirendum* be found againſt the king, he is thereby precluded from having another *melius inquirendum*; for if this were allowed, it would lead to infinity, for by the ſame reaſon that he might have a ſecond, he might have them without end. However, if the firſt writ of *melius inquirendum* were repugnant in itſelf, if it did not give authority to find ſuch an office as was found, as, where the writ was to inquire, whether at the time of the death of a perſon who died in the reign of Queen *Elizabeth*, the manor of *O.* was holden of the lord the king that now is, another writ of *melius inquirendum* may be awarded.

Stamf. Pr. 53, 54. 9 Co. 95. b. If the king's title be found to lands and tenements, the king ſhall be in poſſeſſion by the office only without ſeizure, if the poſſeſſion be vacant, or if

if the title be found to a local office, or of which continual profit may be taken. 4 Co. 58. a.

But, if the king's title be found by office to an incorporeal inheritance, (as, an advowſon, &c.) the king ſhall not be in poſſeſſion before ſeizure: for if the king, after office, preſents, the defendant in a *quare impedit* may traverſe the king's title without traverſing the office. 9 Co 95. b.

And in all caſes where a common perſon is put to his action, there, upon an office found, the king is put to his *ſcire facias*; for an office entitles the king to an action only, and not to an entry. But, where a common perſon may enter or ſeize, there, an office without a *ſcire facias* ſhall ſuffice for the king. 9 Co. 26. b. Stamf. Pr. 55. a.

If the king do not ſeize within a year and a day after office found, he ought to have a *ſcire facias* before ſeizure. Stamf. Pr. 54. b.

But no office is neceſſary, if the king's title appears by other matter of record. *Id.* 56. a.

So, if a poſſeſſion in law be caſt upon the king, no office is neceſſary, but the king may ſeize without it. As, if the king has a title by deſcent in remainder or reverter; for the freehold is caſt upon him by law. So, if he is entitled by eſcheat; or is entitled to the temporalties of a biſhop in the time of vacation. *Id* 54. a. 4 Co. 58. Sav. 7. 9 Co. 95. b.

So, where the king ought to have chattels or profits of lands for a contempt, he may ſeize without office; as, upon an outlawry the goods of a prior alien. So, in the caſe of ſimony the king ſhall preſent without office. So, he ſhall nominate to an office void by *ſt.* 5 & 6 *Ed.* 6. *c.* 16. Sav. 8. 2 Ventr. 270.

And by *ſt.* 33 *H.* 8. *c.* 20. in caſe of attainder for high treaſon, the king ſhall have the forfeiture inſtantly, without any inquiſition of office.

Another prerogative proceſs is an information, filed in the Exchequer by the Attorney-General. This is a method of ſuit for recovering money or other chattels, or for obtaining ſatisfaction in damages for any perſonal wrong committed in the lands or other poſſeſſions of the crown. It differs from an information filed in the court of King's Bench, in that *this* is inſtituted to redreſs a private wrong, by which the property of the crown is affected, *that* is calculated to puniſh ſome publick wrong, or heinous miſdemeanour in the defendant. 2 Bl. Com. 261.

The moſt uſual informations are thoſe of *intruſion* and *debt*: *intruſion*, for any treſpaſs committed on the lands of the crown, as, by entering thereon without title, holding over after a leaſe is determined, taking the profits, cutting down timber, or the like; and *debt*, upon any contract for monies due to the king, or for any forfeiture due to the crown upon the breach of a penal ſtatute.

There is alſo an information *in rem*, when any goods are ſuppoſed to become the property of the crown, and no man appears to claim them, or to diſpute the title of the king. As antiently in the caſe of treaſure-trove, wrecks, waifs, and eſtrays, ſeized by the king's officer for his uſe. Upon ſuch ſeizure an information was filed in the Exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects; and at the ſame time there iſſued a commiſſion of *appraiſement* to value the goods in the officer's hands: after the return of which, and a ſecond proclamation had, if no claimant appeared, the goods were ſuppoſed derelict, and condemned to the uſe of the crown. And when, in later times, forfeitures of the goods themſelves, as well as perſonal penalties

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on the parties, were inflicted by act of parliament for tranſgreſſions againſt the laws of the cuſtoms, and exciſe, the ſame proceſs was adopted in order to ſecure ſuch forfeited goods for the publick uſe, though the offender himſelf had eſcaped the hand of juſtice.

Sav. 48. An information of *intruſion* is in the nature of a treſpaſs *quare clauſum fregit*. It may be general therefore, that the king was ſeiſed of certain lands, without deſcribing the particular ſpecies or quantity. So, on the other hand, it is ſufficient for the defendant to plead only ſo much as ſhews that he has title to the poſſeſſion: as, where the defendant ſhewed, that ſhe had a jointure of a third part, without anſwering to the reſidue; for by that ſhe had the poſſeſſion of the whole in common with the king.

Semb. Mo. 370. 376.

Dy. 238. b. 4 Inſt. 116. *Not guilty* pleaded. Sav. 68. At common law, upon an information for *intruſion*, the king by his prerogative might put the defendant upon ſhewing his title ſpecially. And, if he pleaded *not guilty*, he ſhould be immediately put out of his poſſeſſion: for that, regularly, the king's title appeareth of record, and therefore the defendant may take knowledge thereof, and the rather, for that in every information of *intruſion* it is ſpecified of whoſe poſſeſſions the lands, &c. were.

Dy. 238, b. If the defendant ſhews an inſufficient title in form, the attorney-general may demur: but if the attorney-general in ſuch caſe do not demur, but join iſſue on a fact alleged, which is found againſt him, he ſhall not afterwards take advantage of the defect.

By *ſt.* 21 *Ja.* 1. *c.* 14. if the king, or thoſe claiming under him, or thoſe under whoſe title the king claims, have not been in poſſeſſion, or received the profits within twenty years, the defendant may plead the general iſſue, and ſhall not be ouſted of his poſſeſſion, till the title be found or adjudged for the king.

Sav. 19. If the plea allege ſeveral facts, the king by his prerogative may traverſe them all, though a common perſon ought to traverſe but one.

Sav. 61. So, if the plea allege a title, which avoids the poſſeſſion in the king ſuppoſed by the information, the king needs not maintain the information, but may traverſe the title alleged by the plea.

Ibid. And it is ſufficient, if the king, by his replication, traverſes ſo much of the title as encounters the information, without anſwering the whole title alleged by the defendant: as, if to an information for intruſion in the moiety of a manor, the defendant ſays, *A.* was ſeiſed of the whole, and died ſeiſed, by which there was a deſcent to the defendant; it is ſufficient to traverſe, *abſque hoc*, that he died ſeiſed of ſuch moiety.

Sav. 35. Hardr. 460. 462. After judgment in an information for *intruſion*, execution ſhall be ſometimes by injunction; or it may be by *amoveas manum*: and thereupon every party to the information, or claiming under him, ſhall be removed from the poſſeſſion. But a ſtranger to the information ſhall not be debarred of his entry; for no judgment of ſeiſin is given, nor does an *habere facias ſeiſinam* go.

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(*It is a rule*) And in an information upon a ſtatute, the king's prerogative to lay it in a county cannot be taken away without expreſs negative words in the ſtatute. 4 Inſt. 172. Car. 525. 2 Str. 749. Parker, 182.

Lamb v. Gunman, Parker, 145. Where the king's revenue is concerned in the event of a cauſe, it ſhall be removed from any other court where the action is brought, into the office of pleas of the Exchequer.

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Thus, in an action between the Duke of *Cleveland*'s bailiff and ſome other perſons of the town of *Rye*, upon demand of priſage of wine, an iſſue was joined upon this queſtion, whether the town of *Rye* was entitled by charter to be exempted from this claim of priſage? The king had a reverſionary intereſt in this priſage, becauſe it was granted to the Duke of *Cleveland* in tail; and in reſpect of this intereſt it was holden, that the king had a right to deſire that the cauſe might be removed into the Exchequer; and the cauſe was accordingly removed.

Again, an action was brought againſt a Mr. *Pennington*, who was the collector at *Briſtol*, for money had and received by him, and it appeared that the action was brought for money received by him on account of the duties on glaſs, whereupon the court of Exchequer removed it, and ordered it to be tried in the Exchequer, and not in any other court; the queſtion being, whether Mr. *Pennington* was entitled to retain that money ſo received as duties on glaſs, or not? Jan. 29. 1754. Anſtr. 214.

So, an action brought by Mr. *Baring* againſt *Sutlin*, one of the principal officers in the port of *London*, in order to get back monies which had been charged to him for duties upon ſome goods which he thought he was not liable to pay, was removed into the court of Exchequer. An. 1777. *Ibid.*

So, in an earlier period, in the year 1702, two actions were removed. One was an action of treſpaſs, the other of trover: one was for entering a ſhip and ſeizing goods for non-payment of duties, and the other was trover for the ſhip itſelf. Both theſe actions were removed; and the minute only ſays, "there being an information for the duties." Now an information for the duties is nothing more than the king's action of debt; and therefore there was nothing properly of prerogative in that, except merely the form of ſuing by information, inſtead of the common action of debt: but the ground of removal muſt have been, that a part of the queſtion in thoſe actions would be, whether the duties were payable or no. If the duties were payable, then it might follow, that the party might have a right to enter the ſhip and look for the goods, and might have a right to ſtop the ſhip and the goods till the duties were paid. If no duties were payable, this juſtification failed. *Ibid.* *Per* Eyre, C. B.

An action of treſpaſs for taking goods by colour of a warrant to levy a penalty of 100*l.* forfeited by the plaintiff, he having been convicted on an information before the commiſſioners of exciſe, for not making due entries of teas ſold by him, was removed into the court of Exchequer, for that the action propoſed to draw into queſtion elſewhere that debt or forfeiture, wherein the king had an intereſt, a moiety thereof, as ſoon as it was fixed and veſted by judgment, becoming a regular debt to the crown. Cawthorne v. Campbell, Anſtr. 205.

Again, an ejectment was brought in 1710, in the court of King's Bench; and it was, as to part of it at leaſt, for lands which were part of the queen's eſtate. There was an application to the court of Exchequer to ſtay the proceedings, and the parties were heard upon it. The attorney-general attended, and after the hearing, it was put off for a day or two; at length the entry is, that an injunction iſſued *pro dominâ reginâ*. So that the action was not removed, but, ſimply an injunction went to ſtay proceedings. And the reaſon was, if the action had been removed, the queſtion could not have been tried, even in the office of Pleas, becauſe the queen's title cannot be tried in an ejectment. The queen was in poſſeſſion; her hands muſt be removed by ſome other courſe of proceeding than an ejectment; and therefore it was fruitleſs to think of removing it, and it remain- Anſtr. 215.

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ed under an injunction. It may be ſaid, that it might be as well left to the Queen's Bench to determine, that the queen's lands could not be recovered in ejectment. To be ſure they might, if the prerogative of the queen had not been, that the queen had a right to prevent that queſtion from being diſcuſſed there.

Vaugh. 65. R. 13, E. 4. 8. a. The king may amend his declaration in the ſame term, but not in another term.

2 Ro. 41. The king may waive his replication in another term, when the defendant is ready to rejoin.

Cro. Car. 347. Vaugh, 65. Hardr. 455. And in an information he may waive his demurrer to the defendant's plea, and reply to iſſue. pl. 322. a.

Cro. Car. 347. A defendant cannot waive his plea, and plead the general iſſue without the conſent of the attorney-general.

Stamf. 65. b. Vaugh. 65. Hardr. 459. pl. 322. a. 13 E. 4. 8. a. But, after iſſue joined, the king may, in the ſame term, waive the iſſue and demur, or take another iſſue.

Semb. Vaugh. 64. 1 Mod. 276. R. 13. E. 4. 8. a. But, if the king joins iſſue upon his title he cannot afterwards waive it, to traverſe the title of the defendant.

Vaugh. 62. Where the king's title appears to be no more than a bare ſuggeſtion, the king can, no more than a common perſon, (and for the ſame reaſons,) forſake his own title, and endeavour only the deſtroying of the defendant's title; for the weakening of the defendant's title without more, can no more make a good title to the king, than it can to a common perſon.

Rex v. Muſters, Parker, 50. Where a defendant pleads a title againſt the crown, and the attorney-general will not reply or demur in a reaſonable time, the court will order judgment to be entered for the defendant, unleſs the attorney-general, upon being attended, will either enter a *nolle proſequi*, or proceed.

Rex v. Hare, 1 Str. 266. If upon a *ſcire facias* out of the petty-bag office to repeal letters patent, one defendant pleads to iſſue, and as to the other demurrer is joined, the king may bring on either the trial or the demurrer firſt, as he pleaſes.

Sav. v. In the Exchequer, no *niſi prius* ſhall be granted where the king is a party, unleſs the attorney-general conſents to it.

Cro. Car. 348. So, the trial ſhall be at *niſi prius*, and not in bank, if the king requires it, though it be upon an indictment removed by *certiorari*.

Cro. Car. 5, 0. If a title appears upon record for the king, the court *ex officio* ſhall adjudge it for him.

Semb. Hardr. 170. If the attorney-general confeſſes the plea of the party, and thereupon he is diſcharged, where the plea is no bar in law, the king ſhall not be bound; for though a confeſſion by the attorney-general in a matter of fact binds the king, yet it is not ſo in a matter of law.

Lake's caſe, 4 Leon 32. It ſeems queſtionable, whether, after a *diſtringas* and a jury returned upon it, the attorney general can at his pleaſure ſtay trial.

Hardr. 455. He cannot waive the iſſue after verdict.

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The king cannot be ſued by his ſubjects by writ, for he cannot iſſue a command to himſelf; though it is ſaid in ſome books (*a*), that before the time of *Edw.* I. the king might be ſued as a common perſon, the form being, "*Præcipe Henrico Regi Angliæ.*" Thel. Dig. l. 4. c. 1. (*a*) 22 E. 3. 3 b. pl. 25. 24 E. 3. 55. b. pl. 40.

43 E. 3. 22. *Sed vide* Stamf. Pr. Reg. 42

Neither can any one vouch the king, for that is in nature of an action. So, if a fine is to be levied by the king of lands, it muſt be by render, and not by writ of covenant. H. 9 H. 6. 3 & 4. Thel. Dig. l. 4. c. 2. § 2. Cro. Car. 96-7.

The common law methods of obtaining redreſs or reſtitution from the crown of either real or perſonal property, are, 1. By *petition de droit*, or petition of right. 2. By *monſtrans de droit*, manifeſtation or plea of right; both of which may be preferred or proſecuted either in the Chancery or Exchequer. 3 Bl. Com. 256. Though Sir W. Blackſtone calls the *Monſtrans de droit* a common law remedy, yet Stamford's opinion is expreſsly, that the *monſtrans de droit* was given by 36 E. 13, and did not lie at common law, and in Anderſon's report of the Sadler's caſe (1 And. 181.) it is affirmed by the court, that *the traverſe and monſtrans de droit* are both given by that ſtatute And of the ſame opinion is the Lord Keeper Sommers in his argument in the Banker's caſe. 11 St. Tr. 154.—It is ſaid, that at this day a *monſtrans de droit* lies only in the Chancery or Exchequer, except in a ſpecial caſe, as in Lady Broughton's caſe, where the *monſtrans de droit* was brought in B. R. becauſe the record of the conviction and ſeizure were there Skin, 610.—A ſuit by petition may be to the king in parliament, or, according to Comyns (Dig. tit. Prerogative, D. 80.), in any other court. If it be in parliament, it may be eſtabliſhed by act of parliament, or purſued as in other caſes. Stamf. Pr. 72. 6.

There is alſo a remedy given by ſtatute 2 *E.* 6. *c.* 8. and that is by way of traverſe to the king's title.

At common law, when the king was ſeiſed of any eſtate of inheritance or freehold by any matter of record, were his title by matter of record judicial, as, attainder; miniſterial, as, by office; or by conveyance of record, as, by fine, deed, enrolled, *&c*; or by matter in fact, and found by office of record on oath, as by alienation in mortmain, purchaſe by alien born, *&c.*, he who had right was put to his petition of right in nature of a real action to be reſtored to his freehold and inheritance. 4 Co. 55. a.

And this method of proceeding by petition is proper, where the king ſeizes the goods or lands of a ſubject without due order of law, or enters into the lands of another without title or office found. Stamf. Pr. 72. a. b.

So, if he does not pay an annuity granted by him, or iſſuing out of lands in his hands; or does not pay a debt, wages, *&c.* Lord Sommers's Argument, 11 St. Tr. 154, 5.

So, if the king be entitled by a record not traverſable, as, by a recovery in the kings court, by aſſent, without title; or by an erroneous judgment; for error ſhall not be allowed without a petition. Stamf Pr. 74. a.

And in all caſes where the entry would be tolled, if the land were in the hands of a common perſon; or, where the party controverts the king's title, the proceeding is by petition. Stamf. Pr. 74. b. *Per* Holt, 608.

And where a traverſe or *monſtrans de droit* does not lie, ſuit ought to be to the king by petition: as, if the king be entitled by double matter of record. But, if *A.* be attainted in *B. R.* and it be found by inquiſition in the Exchequer, that he was ſeiſed of the manor of *D.* this will not be in judgment Stamf. Pr. 74. a. Br. tit, Petition, pl. 35, 36. Lane, 58.

judgment of law a double matter of record; ſo as to force the owner of the land to his petition, the record of the attainder not being in the ſame court with the inquiſition.

Sir W. Jon. 78. Where an eſtate is forfeited by attainder, *&c.* none can ſue by petition before office found, for till office, the eſtate is not veſted in the king.

Finch's L. 256. The party muſt be careful to ſtate truly in the petition the whole title of the king, elſe the petition will abate. For upon an iſſue in the petition found againſt the king, he ſhall be concluded for ever to claim by any of the points contained in the petition.

Lord Somers's Arg. 11 St. Tr. 149. The manner of anſwering petitions, it ſhould ſeem, was formerly very various: which variety did ſometimes ariſe from the concluſion of the party's petition, ſometimes from the nature of the thing; and ſometimes from favour to the party; and according as the indorſement was, the party was ſent into the Chancery, or the other courts. If the indorſement is general, *ſoit droit fait al partie*, which is now the uſual indorſement, the petition muſt be delivered to the chancellour of *England*, and then a commiſſion (*a*) iſſues to inquire of the truth of the ſuggeſtion; and that being found, ſo that there is a record for him, thus warranted, he is let in to interplead with the king: but, if the indorſement is ſpecial, then the proceeding is to be according to the indorſement in any other court. The caſe *Mich.* 10 *H.* 4. 4. is full as to this matter. The king recovers in a *quare impedit* by default againſt one who has never ſummoned, the party cannot have *a writ of deceit* without a petition. If then, ſays the book, he conclude his petition generally, *que le roy lui face droit*, and the anſwer be general, it muſt go into the Chancery, that the right may be inquired of by commiſſion; and upon the inqueſt found, an original writ muſt go directed to the juſtices to examine the *deceit;* otherwiſe the juſtices, before whom the ſuit was, cannot meddle: but, if he conclude his petition eſpecially, *that it may pleaſe his highneſs to command his juſtices to proceed to the examination*, and the indorſement be accordingly, *that* will give the juſtices a juriſdiction.

(*a*) This not neceſſary if the Attorney-General confeſſes the ſuggeſtion. Skin. 608.

Fitzh. tit. Traverſe, pl. 51. Br. tit. Petition, pl. 34.

Menvile's caſe Moor. 639. But, where no office is found to entitle the king, the party may purſue a petition without an inquiſition for him.

Stamf. Pr. 73. b. After a commiſſion whereon a title is found for the party, before he can interplead with the king, there ought to be a writ to inquire of the king's title; and this, in all caſes, where land is in the king's hands, or granted to another: and in this laſt caſe, there ſhould be a *ſcire facias* alſo againſt the patentee.

Menvile's caſe, Moor, 639. The writs of ſearch iſſue upon the ſuggeſtion of the Attorney-General, that there are in the Treaſury ſeveral records, charters, deeds, muniments, &c. touching the king's right to the eſtate in queſtion. Raſt. Entr. 462. a Where a petition diſaffirms the king's poſſeſſion, there ought to be four writs of ſearch directed to the treaſurer and chamberlains of the Exchequer: but, writs of ſearch are not neceſſary, where the petition affirms the king's poſſeſſion: as, upon a petition of right of dower.

4 Co. 55. a. b. Where the right of the party, as well as the right of the crown, appeared upon the ſame record, or the right of the party appeared by another record of as high a nature as that upon which the right of the crown appeared, the party was entitled by the common law to have a *monſtrans de droit*. Thus, if a conveyance be to the king, upon condition to be void, if a fine be levied, or a recognizance given, or other matter performed which

which must be upon record; he who has made the conveyance, levied the fine, given the recognizance, &c. may have a *monstrans de droit* by the common law; for the recognizance appears by a record as high as the conveyance. So he may, though the performance of the condition be not upon record, if it be afterwards found by office.

So, if the title of the party be not found by the same or another record, whereupon he sues to the king by petition, and an inquisition is granted upon the petition finding his right, he afterwards may have a *monstrans de droit* by the common law. 4 Co. 57. b

But, if the title of the party did not appear by the same record, which found a title for the king, or by a record of as high a nature, he could not have a *monstrans de droit* by the common law, but was forced to sue by petition. And this, though it appeared by the return of the sheriff, mayor, &c. to a *diem clausit extremum*, or other writ; for the return, though filed of record, is not so high as an office found *per sacramentum proborum hominum*. 4 Co. 55. b.

But by stat. 36 *E.* 3. *c.* 13. where lands are seised by inquest of office before the escheator, and any man will make claim to them, the escheator shall send the inquest, within a month, into the Chancery, and a writ shall be delivered to him to certify the cause of seisure; and then the claimant shall be heard to traverse the office, *and shew his right*. And therefore, where an office is found, which is traversable by that statute, the party may have a *monstrans de droit;* and this, though he be not put out of possession by the office, or, though the king be entitled by matter *in pais* found by record; as, by alienation in mortmain, &c. 4 Co. 59. a.

So, if the king be entitled by office, or matter of record, which is traversable, but, being true, cannot be traversed, the party may have a *monstrans de droit.* Stamf. Pr. 71. a.

But, where the king was entitled by double matter of record, the party could not have a *monstrans de droit* till it was given by the statute of 2 & 3 *E.* 6. *c.* 8.

The *monstrans de droit* recites the inquisition found for the king, and then shews the right of the party, which it offers to verify, and concludes with praying judgment, and an *amoveas manum*, and restitution of the land and tenements, and of the profits from the time of taking the inquisition. Co. Entr. 402.

If the Attorney-General confesses the title of the party, or, if he replies and afterwards confesses, or, if it be found for the party after verdict, or upon demurrer, the judgment is *quod manus domini regis amoveantur*, and that the party be restored to the possession of the premises, with the appurtenances, together with the mesne profits from the time of the caption of the inquisition not answered to the crown, *salvo jure domini regis;* which last clause is always added to judgments against the king, and is expressly required by *stat.* 2 & 3 *E.* 6. *c.* 8. And by this judgment the king is instantly out of possession. Co. Entr. 404 406. b. Finch's L. 460 2 Inst. 695. Finch's L. 459. The *amoveas manum* is the end of every suit, where a man comes to interplead with the king; for without that judgment, the land will still remain in the king's possession. Keilw. 158. a.

But the party cannot have judgment in a *monstrans de droit*, though the king have no title, unless he can shew a title in himself. 2 Salk. 448.

It is said, that the party who sues a *monstrans de droit* is a plaintiff, and may be nonsuit, 4 *H.* 6. 11. and if he fails in his own title, he is gone as effectually *Ibid.* If the party suing the

monſtrans de droit may be nonſuited, the whole of this proceeding is quite anomalous. For the party certainly appears upon the record in the character of a defendant: he ſhews his right in the form of a plea; the Attorney-General replies; and the other party when he takes the iſſue *ponit ſe ſuper patriam*, as on the other hand the Attorney-General in that caſe *petit quod inquiratur per patriam*. And Lord Sommers in his argument 11 St. Tr. 154 ſays, "I take it to be generally true, that in all caſes where the ſubject is in nature of a *plaintiff*, to recover any thing from the king, his only remedy, at common law, is to ſue by *petition* to the perſon of the king. I ſay when the ſubject comes as a *plaintiff*. For, when upon a title found for the king by *office* the ſubject comes in to traverſe the king's title, or *to ſhew his own right*, he comes in the nature of *a defendant*; and is admitted to interplead in that caſe with the king in defence of his title, which otherwiſe would be defeated by finding the *office*." And in another part he ſays explicitly—"In this ſort of proceeding (*viz. a monſtrans de droit*) the ſubject is in the nature of a *defendant*, and comes in and pleads to a title found for the king." And note farther, that the caſe referred to from the Year-book (4 H. 6. 11.) is of a *traverſe* to an inquiſition. Now it has been expreſsly determined in the King v. Roberts, 2 Str. 1208. that the traverſer of an inquiſition for the king is properly to be conſidered as a defendant, who oppoſes the title found for the crown, without ſetting up any title in himſelf, as he might do in a petition of right. And indeed it would be abſurd, ſay the court, to conſtrue the liberty of traverſing, to give a power of delaying the crown; which muſt be, if the party is conſidered as having the common right of *a plaintiff*. The court therefore held in that caſe, that the record was well made up and carried down for trial by the proſecutor of the commiſſion.

effectually as if he were nonſuit, and no judgment need be given for the crown; and accordingly in *The Queen* v. *Maſon*, the judgment was, *quod nil capiat per billam ſuam de monſtratione prædicta.*

Co. Entr. 405. The proceedings upon a *monſtrans de droit* are had in the Petty-bag office in the court of Chancery, and are not enrolled as in other courts, but remain upon files in that office.

4 Co. 56. a. Stamf. Pr. 60. b. 13 E. 4. 8. a. At common law, where the king was entitled by office, though untruly found, the party could not have a traverſe to the office, nor could he avoid it without petition.

4 Co. 55. a. 6. a. Nor, where the king was entitled by any matter of record, judicial or miniſterial, conveyance of record, or matter of fact found by office of record, notwithſtanding the office concerned only a chattel real.

4 Co. 56. b. But, where the office did not give a ſeiſin or poſſeſſion to the king, but only entitled him to an action for the recovery of the land, in ſuch action the party might traverſe the office by the common law. As, if an office finds, that the king's tenant has ceaſed for two years, or made a feoffment by colluſion, *&c.* whereby the king is entitled only to his action of *ſcire facias* againſt his tenant, in which the tenant may traverſe the *ceſſer*, waſte, colluſion, *&c.*

Stamf. Pr. 60. a. 13 E. 4. 8. a. 4 E. 4. 24. a. So, by the common law, an office or inquiſition for goods and chattels perſonal might be traverſed. As, if *A.* be attainted of treaſon, or felony, or outlawed in debt, treſpaſs, *&c.* and an inquiſition find, that he had ſuch goods at the time of the felony or outlawry, a ſtranger, who has the property, may traverſe it.

Sav. 130. There were two ſorts of offices, one of *intituling*, and another of *inſtruction*. The office of *intituling* was always by inquiſition found by commiſſion under the broad ſea, for the king could no take but by matter of record: and this was a part of the liberty of England, that the king's officers might not enter upon other men's poſſeſſions, till the jury had found the king's title; therefore where the king's title appeared on record, his officers might enter without any office found; as, where the lands are held of the crown, and the tenant dies without heirs, the officers of the king may enter, becauſe the tenure whereby the king's title appears, is upon record; ſo, by the common law, where lands belong to no body, the king's officers may enter, becauſe by the law the land is in the crown; for the law entitles the king, where the property is in no man: but if any body elſe were in poſſeſſion, the land

So, offices of inſtruction only were traverſable by the common law, as, all offices under the Exchequer ſeal.

lands cannot be diveſted without matter of record. But notwithſtanding where the king is entitled by matter of record there is no need of an office to entitle him; yet, there were always offices of *inſtruction* found, (that is to ſay,) the eſcheator was bound, *virtute officii*, to hold an inqueſt, *by way of inſtruction*, and to return the ſame into the Exchequer: and this is by 34 E. 3. c. 13. as likewiſe 10 H 6. c. 7.; and by that laſt ſtatute ſuch offices are to be returned either into the Chancery or Exchequer, within one month after the taking of the ſame, under the penalty of 40l. and by 1 H. 8. c. 8. the eſcheators were to ſit in open places, and the ſheriffs were to return jurors, and the inquiſition was to be taken by indenture, whereof one part was to remain with the foreman of the jury, and the other part was to be returned into the Chancery or Exchequer, within one month; and from the Chancery it was to be tranſcribed into the Exchequer. The reaſon why it was returned into Chancery, was, becauſe that was a court that was always open, ſince the Chancellour was always an itinerant with the prince. The office of *inſtruction* might either be taken by the eſcheator, *virtute officii*, or it might be taken *by vérit* from the court of Exchequer, and both were equally offices of *inſtruction*: but by 33 H. 8. c. 22. the eſcheator was not to ſit *virtute officii*, where the lands were 5*l. per annum*, or above on pain of 5*l.*, which ſtatute was made, to hinder eſcheators from ſeizing lands by virtue of their office, without a writ directed out of the Chancery or Exchequer: and it ſeems, that the office to *entitle* the crown muſt be by writ out of Chancery. But, if the freehold was caſt upon the crown, though the eſcheator could not ſeize, *virtute officii*, after the ſtatute; yet he might have a writ of ſeizure from the Exchequer, and thereby take an office of inſtruction; becauſe ſuch lands, being in the king without office, were within the ſurvey of the court of Exchequer.—Theſe offices of *inſtruction* ſettled the annual value of the lands, and by that value the eſcheators accounted; unleſs the court, upon putting them up to auction, found any perſon that would give more for the lands, and then they let them by leaſe under the Exchequer ſeal. Gilb. Exchq. 109.

By ſtat. 34 *E.* 3. *c.* 14. where lands or tenements were ſeiſed into the king's hands by office of the eſcheator, on account of alienation without licence, or the tenant *in capite* dying, and leaving his heir within age, it was to be returned into Chancery; and if the tenant would *traverſe the office* ſo taken by the king's commands, and ſay, that the lands were not ſeizable, he was to be received ſo to do, and proceſs was to be ſent into the King's Bench to try it according to law.

But this act extended only to offices found *virtute brevis*, or *commiſſionis*; for the words are (taken by the king's command) ſo that an office taken *virtute officii*, was out of the act 4 Co. 57. a.

It alſo extended only to the two caſes above-mentioned of alienation without licence and ward.

And farther, it extended only to a traverſe, and not to a *monſtrans de droit*, by which although on the traverſe, the iſſue was found for the party, yet the judges could not proceed to judgment without a writ *de procedendo ad judicium*.

To remedy theſe inconveniences the ſtatute of 36 *E.* 3 *c.* 13, was made, by which it is provided, that if land be ſeized by an office before the eſcheator, returned into Chancery, any one, who challenges the land ſeized, ſhall be heard without delay to traverſe the office, or otherwiſe to ſhew his right, and from thence ſent before the king to make a final diſcuſſion without attending other commandment.

This laſt ſtatute allows a traverſe to all offices found before the eſcheator, or before commiſſioners. 4 Co. 57. b. Stamf. Pr. 61. a.

And by ſtat. 8 *H.* 6. *c.* 16. it is extended to all aggrieved by the inqueſt, though not put out of poſſeſſion by the eſcheator.

But, notwithſtanding theſe ſtatutes, perſons were ſtill liable to be precluded of their rights, by the untrue finding of offices. As, for inſtance, perſons holding terms for years, or by copy of court-roll, were often put out of their poſſeſſion by reaſon of inquiſitions, or offices found before eſcheators, commiſſioners, and others, entitling the king to the wardſhip or cuſtody of lands, or upon attainders for treaſon, felony, or otherwiſe, and this, becauſe ſuch terms for years, and intereſts in copyhold were not found:

found: after which they had no remedy, during the king's poſſeſſion either by traverſe or *monſtrans de droit*, becauſe ſuch intereſts were only chattels in cuſtomary hold and not freehold. In like manner perſons having any rent, common, office, fee, or other profit *apprendre*, if ſuch intereſt were not found in the office entitling the king, they had no remedy by traverſe, or other ſpeedy means, without great and exceſſive charges, during the king's right therein. To redreſs theſe hardſhips on the ſubject, it is declared by ſtat. 2 & 3 *E.* 6. *c.* 8. that all perſons in the above caſes ſhall enjoy their rights and intereſts, the ſame as if no office or inquiſition had been found, or as they might if theirin tereſt had been regularly found at the ſame time in ſuch inquiſition or office. Remedy was given where a perſon was found, untruly heir of the king's tenant, and the like. And where a perſon is untruly found lunatick, idiot, or dead, and in ſome other caſes, it is enacted, that the party grieved ſhall have a traverſe, and proceed to trial therein; and have like advantages as in other caſes of traverſe upon untrue inquiſitions and offices. The ſame of untrue finding, where a perſon is attainted of treaſon, felony, or *præmunire*, the party grieved may have a traverſe or *monſtrans de droit*, without being driven to a petition of right. And in all traverſes taken upon this act, it is directed, that the perſon purſuing his traverſe ſhall ſue out a writ of *ſcire facias*, one or more, as the caſe ſhall require, againſt ſuch perſon as ſhall have an intereſt either by the king or by his patentee, in like manner as upon traverſes and petitions in other caſes, with like pleas to the defendants in the *ſcire facias*.

Rex. v. Blunt. Bunb. 104. If a term for years is found and ſold on an inquiſition on an outlawry, a mortgagee not in poſſeſſion ſhall be allowed to plead to the inquiſition.

Rex v. Toller, *Id.* 123. Upon outlawry, inquiſition thereon returned, *levari* iſſued, and money levied, he who has a ſtatute-merchant, and is in poſſeſſion of the land, may, on motion, have time to plead to the outlawry and inquiſition; and, on giving ſecurity, have the money in the ſheriff's hands repaid to him.

Watts v. Robinſon, *Id.* 220. Where on an inquiſition a man was found poſſeſſed of a term *jure uxoris*, and after his death it was ſold on a *venditioni exponas*, the widow was permitted to plead to the inquiſition, though ſhe had defended an ejectment brought by the purchaſer, and filed a bill in Chancery.

Per Baron Montague. *Id.* 25. If a man traverſes an inquiſition, the uſual courſe of the court is to take ſecurity to the value of two years' profits of the land, becauſe in that time it is intended the right of the crown and party will be determined.

Rex v. Barnfield, *Id.* 102. To an inquiſition on an extent on an outlawry, the defendant as terre-tenant, may plead, that the party outlawed is dead, without ſetting forth a ſpecial title; for, upon affidavit of the fact, the attorney-general uſually allows the plea, there being after the party's death no title ſubſiſting in the crown.

Linch v. Coote, 2 Salk. 469. Where by office, or ſtatute without office, a particular eſtate is veſted in the king, he in reverſion or remainder dependant upon that eſtate may upon the determination of it, enter upon the king without traverſe, or *amoveas manum*.

Stamf. Pr. 57. So, if it be found by inquiſition that a perſon outlawed in a perſonal action was ſeiſed of lands, which *B.* claims, and the eſcheator take the profits by this falſe office; *B.* may diſturb him without traverſe.

Notwith

Notwithſtanding what is ſaid in another part of this work, that the king cannot be ſeiſed to a uſe, becauſe there is no means to compel him to perform it; yet, if an eſtate liable to a truſt come to the king, the land will in equity be equally bound by the truſt in the hands of the king, as of a common perſon. Burgeſs v. Wheate, 1 Bl. Rep. 103.

In the private relations of life, the rules of law differ very widely in many points with reſpect to the king and a private perſon. The queen *conſort* or the wife of the reigning king, is participant of divers prerogatives above other women. She is of ability to purchaſe lands, and to convey them, to make leaſes, to grant copyholds, and do any other act of ownerſhip without the concurrence of her lord. She is capable of taking a grant from the king; ſhe may ſue and be ſued alone, without being joined with him: ſhe may have a ſeparate property in goods as well as lands, and has a right to diſpoſe of them by will; ſhe pays no toll; nor is ſhe liable to any amercement in any court. Though an alien born, yet from the time of her marriage ſhe is, by operation of the law of the crown, (which is part of the common law,) to be deemed a natural-born ſubject, ſo as not to be diſabled by the act of the 12th *William* III. or by any other act, from holding or enjoying any office or place of truſt, or from having any grant of lands, tenements, or hereditaments from the crown. In point of the ſecurity of her life and perſon, ſhe is put on the ſame footing with the king It is equally treaſon (by the ſtatute 25 *E.* 3.) to compaſs or imagine the death of our lady the king's companion, as of the king himſelf: and to violate or defile her amounts to the ſame high crime; as well in the perſon committing the fact, as in the queen herſelf, if conſenting. 1 Bl. Com. c. 4. Lords' Journ. May 24, 1765.

On the death of her lord, the law in ſome reſpects differs; it is no longer high treaſon to conſpire her death, or to violate her chaſtity. Yet ſtill *pro dignitate regali*, no man can marry a queen dowager without ſpecial licence from the king, on pain of forfeiting his lands and goods: and though an alien born, ſhe is entitled to dower: and if ſhe be married again to a ſubject, ſhe does not loſe her regal dignity, as peereſſes dowager do their peerage when they marry commoners

The heir apparent to the crown is uſually made Prince of *Wales* and Earl of *Cheſter*, by ſpecial creation and inveſtiture: but being the king's *eldeſt* ſon, he is by inheritance Duke of *Cornwall*, without any new creation. The earldom of *Cheſter* was alſo once limited like the duchy of *Cornwall* to the king's eldeſt ſon; this was by 21 *R.* 2. *c.* 9. by which this earldom was erected into a principality. But that whole parliament was repealed by 1 *H.* 4. *c.* 3. 1 Bl. Comm. c. 4. Whether, during the minority of the duke, his majeſty is entitled to the revenues of the duchy, is a queſtion which has lately been diſcuſſed in parliament, but upon which there has been no parliamentary or judicial deciſion. Two little pamphlets, the one written by C. Watkins, the author of the *Law of Deſcents*, and a *Treatiſe on Copyholds*; and the other by John Nicholls, Eſq. one of the repreſentatives in the preſent parliament for the borough of *Tregony*, will be found of great aſſiſtance in the examination of this point.

The prince of *Wales*, and his royal conſort, and the princeſs royal, or eldeſt daughter of the king, are under the peculiar protection of the laws. For it is high treaſon by the ſtatute 25 *E.* 3. to compaſs or conſpire the death of the former, or to violate the chaſtity of either of the latter.

Upon a queſtion referred to all the judges in 1718, by King *George* I. it was reſolved by the opinion of ten againſt the other two, that the education and care of all the king's grandchildren, while minors, did belong of right to

to his majeſty as king of this realm, even during their father's life. But they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges have more recently concurred in opinion, that this care and approbation extend alſo to the preſumptive heir of the crown; though to what other branches of the royal family the ſame did extend they did not find preciſely determined. The moſt frequent inſtances of the crown's interpoſition go no further than nephews and nieces; but examples are not wanting of its reaching to more diſtant collaterals. By ſtatute 12 *G.* 3. *c.* 11. no deſcendant of the body of King *George* II. (other than the iſſue of princeſſes married into foreign families) is capable of contracting matrimony, without the previous conſent of the king ſignified under the great ſeal; and any marriage contracted without ſuch conſent is void. Provided, that ſuch of the ſaid deſcendants as are above the age of twenty-five, may, after a twelvemonth's notice given to the king's privy council, contract and ſolemnize marriage without the conſent of the crown; unleſs both houſes of parliament ſhall, before the expiration of the ſaid year, expreſsly declare their diſapprobation of ſuch intended marriage.

See 1 Bl. Comm. c. 4. notes *t*, *m*.

(F) Of the King's Grants and Letters Patent: And herein,

1. What Things the King may grant; and therein,

1. Of Grants ariſing from his Prerogative of Power, and which are inſeparably annexed to the Crown.

A grant by the king within time of legal memory to a town of the right of ſending repreſentatives to parliament is good without firſt incorporating ſuch town. Thus the city of *Weſtminſter*, which hath never been incorporated, firſt ſent members to parliament in the reign of *Edward* 6.

Harg. Co. Lit. 109. b. note 2.

2. Of Grants ariſing from his Intereſt.

It ſhould ſeem, that before the Revolution there was properly no publick revenue, but that all the revenues both ordinary and extraordinary were the king's only, and wholly diſpoſable at his pleaſure. Upon the introduction of the funding ſyſtem at the Revolution, appropriations became neceſſary, and therefore a certain portion only of the revenues hath been ſince that period ſubject to the immediate diſpoſition of the crown, for the ſupport of its honour and dignity. This, in the late reigns, conſiſted of an annuity granted by parliament, and the hereditary revenues of the crown, that is, the produce of certain branches of the exciſe, the poſt-office, the duty on wine licences, the revenues of the remaining crown lands, the profits ariſing from courts of juſtice, and in King *William*'s reign, the 4½ half *per cent.* duties ariſing from *Barbadoes* and the *Leeward Iſlands*. But his preſent Majeſty having, ſoon after his acceſſion, ſignified his conſent that his own hereditary revenues might be ſo diſpoſed of as might beſt conduce to the utility and ſatisfaction of the publick; and having graciouſly accepted the limited ſum of 800,000*l.* *per annum* for the ſupport of his civil liſt; the hereditary and other revenues were carried into and made a part of the

the aggregate fund; and the aggregate fund was charged with the payment of the whole annuity to the crown of 800,000*l.* which being found inſufficient, was increaſed in 1777 to 900,000*l. per annum*.

The power of the crown with reſpect to grants out of the civil liſt was till lately wholly unlimited, that part of it, called the penſion liſt, being totally diſcretionary in its amount. This occaſioned great diſorders in the adminiſtration of the civil liſt, and by exhauſting too great a part of the revenues, diſappointed the juſt claims of thoſe who had liens upon them, and reduced the crown to the painful neceſſity of making application to parliament to ſupply the deficiencies. His preſent Majeſty having therefore been graciouſly pleaſed to expreſs to his parliament his deſire to diſcharge the debt on his civil liſt, without any new burden upon the publick, and to introduce a better order and economy in the civil liſt eſtabliſhment, it was propoſed to reduce the penſion liſt, both in its groſs quantity, and in its larger individual proportions, to a certainty. It is therefore enacted by ſtat. 22 *G.* 3. *c.* 82. § 17. that "for the better regulation of the granting of penſions," (that is, of penſions chargeable upon the civil liſt, for this act affects only to regulate and reform the civil liſt eſtabliſhment,) "and the "prevention of abuſe or exceſs therein, no penſion exceeding the ſum of "three hundred pounds a-year ſhall be granted to or for the uſe of any one "perſon; and that the whole amount of the penſions granted in any one "year, ſhall not exceed five hundred pounds; a liſt of which, together "with the names of the perſons to whom the ſame are granted, ſhall be "laid before parliament in twenty days after the beginning of each ſeſſion, "until the whole penſion liſt ſhall be reduced to ninety thouſand pounds; "which ſum it ſhall not be lawful to exceed by more than five thouſand "pounds in the whole of all the grants: nor ſhall any penſion, to be grant-"ed after the ſaid reduction, to or for the uſe of any one perſon, exceed "the ſum of one thouſand two hundred pounds yearly, except to his "Majeſty's Royal family, or on an addreſs of either houſe of parlia-"ment."

And by § 18. reciting that "it had been uſual that perſons who have "ſerved the crown in foreign courts, had, after the expiration of their "ſervice, at his Majeſty's pleaſure, received ſuch proportion of their for-"mer appointments, as to his Majeſty hath ſeemed expedient, it is enact-"ed, That nothing in this act contained relative to penſions ſhall be con-"ſtrued to extend to ſuch allowance, either in preſent or in future, pro-"vided that the ſaid perſons do not ſeverally enjoy ſome place or other "profit from the crown, to the amount of the penſion uſually allowed in "ſuch caſes; provided that the liſt of the ſaid penſions ſhall be laid, in "the manner before mentioned, before parliament."

By § 19. reciting that "much confuſion and expence had ariſen from "having penſions paid at various places, and by various perſons; and that "a cuſtom had prevailed of granting penſions on a private liſt during his "Majeſty's pleaſure, upon a ſuppoſition that in ſome caſes it may not be "expedient for the publick good to divulge the names of the perſons in "the ſaid liſt, or that it may be diſagreeable to the perſons receiving "ſuch payments to have it known that their diſtreſſes are ſo relieved, or "for ſaving the expence of fees and taxes on ſmall penſions; by means of "which uſage, ſecret and dangerous corruption may hereafter be practiſed" Reciting further, that "it is no diſparagement for any perſons to be reliev-"ed by royal bounty in their diſtreſs, or for their deſert, but, on the con-"trary, it is honourable, on juſt cauſe, to be thought worthy of reward,

"it

By ſt. 25 G. 3. c. 61. certain ſmall bounties of the crown therein mentioned payable to perſons in low and indigent circumſtances, are exempt from the operation of this clauſe, and the ſame are allowed to be paid as they formerly had been.

"it is enacted, That no penſion whatever, on the civil eſtabliſhment, "ſhall thereafter be paid but at the Exchequer, and in the ſame manner "as thoſe penſions which were then paid and entered at the Exchequer, "under the head, title, and deſcription of *Penſions*, and with the name "of the perſon to whom, or in truſt for whom, the ſaid penſion is grant-"ed; and that thoſe which are transferred thither by this act ſhall be ſub-"ject to no taxes or fees whatever, except the taxes and fees to which "before this act they were ſubject; any ſtatute, law, or uſage to the con-"trary notwithſtanding: Nor ſhall any penſion hereafter to be granted be "charged at the Exchequer with further or other fees than were hereto-"fore paid on penſions to the paymaſter of the penſions." It is, however by § 21. permitted to the high treaſurer, or firſt commiſſioner of the treaſury for the time being, to return into the Exchequer any penſion or annuity, without the name of the perſon to whom it is made payable, on his taking an oath, that according to the beſt of his knowledge, belief, and information, the penſion or annuity ſo returned without a name by him into the Exchequer, is not, directly or indirectly, for the benefit, uſe, or behoof of any member of the Houſe of Commons, or, ſo far as he is concerned, applicable, directly or indirectly, to the purpoſe of ſupporting or procuring an intereſt in any place returning members to parliament: upon taking which oath, it is enacted by § 22. that the penſion or annuity ſhall be paid at the Exchequer to the order of the high treaſurer, or firſt commiſſioner, whoſe receipt ſhall be accepted and taken as an acquittance for the ſame. But by § 23. if any ſuch ſecret penſion ſhall continue in the liſt for more than five years, the high treaſurer, or firſt commiſſioner of the treaſury, or one of the ſecretaries, or one of the chief clerks of the treaſury, for the time being, ſhall make oath before ſuch penſion ſhall be paid at the Exchequer, that he believes that the perſon for whoſe uſe the ſaid penſion or annuity hath been granted is living.

In order to prevent, as much as may be, all abuſes in the diſpoſal of monies iſſued under the head of ſecret ſervice money, or money for ſpecial ſervice, the ſum to be iſſued or paid from the civil liſt revenues for the purpoſe of ſecret ſervice within this kingdom ſhall not exceed the ſum of ten thouſand pounds in any one year: And as to foreign ſecret ſervice money, it is enacted, that when it ſhall be deemed expedient by the Treaſury to iſſue, or in any manner to direct the payment of any money from the civil liſt revenues for that purpoſe, the ſame ſhall be iſſued and paid to one of his Majeſty's principal ſecretaries of ſtate, or to the firſt commiſſioner of the admiralty, who ſhall for his diſcharge at the Exchequer, within three years from the iſſuing of ſuch money, produce the receipt of his Majeſty's miniſter, commiſſioner, or conſul in foreign parts, or of any commander in chief, or other commander of his Majeſty's navy or land forces, to whom the ſaid money ſhall have been ſent or given, that the ſame hath been received for the purpoſe for which the ſame hath been iſſued; which receipt ſhall be filed in the Exchequer to charge the ſaid miniſter, commiſſioner, *&c.*, with the ſame; and the ſaid receipt, on proof of the handwriting, ſhall be ſufficient to acquit and diſcharge the ſaid ſecretary, *&c.*, in their accounts at the Exchequer. And by § 26. any foreign miniſter, *&c.* charged at the Exchequer with the receipt of any ſecret ſervice money ſhall ſtand acquitted thereof, if within one year after his arrival in *Great Britain*, he ſhall either return the ſaid money into the Exchequer, or make oath before the barons of the Exchequer, or one of them, that he has diſburſed the money intruſted to him for foreign ſecret ſervice, faithfully, according

cording to the intent and purpoſe for which it was given, according to his beſt judgment for his Majeſty's ſervice. And by § 27. whenever it ſhall be neceſſary for the ſecretary or ſecretaries of ſtate, or firſt commiſſioner of the admiralty, to pay any money iſſued for foreign ſecret ſervice, or for ſecret ſervice in detecting, preventing, or defeating treaſonable or other dangerous conſpiracies againſt the ſtate in any place within this kingdom, then it ſhall be ſufficient to acquit and diſcharge ſuch ſecretary, &c. or ſuch ſecretary or ſecretaries, or the under-ſecretary of ſtate in the office to which ſuch ſecret ſervice money hath been paid, or for the firſt commiſſioner of the admiralty, or the ſecretary of the admiralty, to make oath, that the money paid to him for foreign ſecret ſervice, or for ſecret ſervice in detecting, preventing, or defeating treaſonable or other dangerous conſpiracies againſt the ſtate (*mutatis mutandis, as the caſe may be*), has been *bonâ fide* applied to the ſaid purpoſe or purpoſes, and to no other; and that it hath not appeared to him convenient that the ſame ſhould be paid abroad. By § 28. it is enacted, that no certain or ſtated ſum ſhall be given or allowed out of the civil liſt revenues, under the name of ſecret ſervice money, as had been theretofore the practice; but when any monies for ſecret ſervice ſhall be deemed neceſſary by the commiſſioners of the treaſury, the ſame ſhall be iſſued by their direction, as the occaſion ſhall require, in the manner therein before directed. And by § 29. whenever any money ſhall be iſſued for the purpoſe of any ſpecial ſervice, or ſhall be given without proviſion of annual or other ſtated payment, but in a groſs ſum or ſums, as to any ſecretary or ſecretaries of the treaſury, or others, to be paid over to or for the uſe of any perſon or perſons for ſpecial ſervice, or as of royal bounty, the ſaid money, together with the ſpecial ſervice or ſervices, or as of royal bounty, to which the ſame is applied, as alſo the name of the perſon or perſons to whom it is paid, ſhall be entered in a book to be kept for that purpoſe in the treaſury, in order to be produced to either houſe of parliament, if required. And for the better prevention of all practice by which ſuch grants as of bounty may be made a colour under which penſions may be ſubſtantially granted, it is enacted by § 30. that any money ſo given as of royal bounty, to any perſon more than once in three years, the ſame is and ſhall be reputed a penſion to all intents and purpoſes whatſoever.

The act next divides the payments of the civil liſt revenues into ſeveral diſtinct claſſes, and directs that no ſalary or penſion ſhall be paid but in the order there preſcribed. And it farther provides, that if any ſalary, fee, or penſion, or any part thereof, remain in arrear at the uſual time of payment, at the end of a period of two years, from want of caſh belonging to the civil liſt revenues to pay and diſcharge the ſame, ſuch arrear ſhall not be carried as a debt to the account of the year following, but ſhall be wholly lapſed and extinguiſhed, as if the ſame had not been payable.

The ſtatute of 1 *Ann. c.* 7. which provides for the civil liſt eſtabliſhment of that reign, reſtrains the power of the crown in the diſpoſal of its land revenue, and enacts that no grant ſhall be made by the crown of any manors, meſſuages, lands, tenements, rents, tithes, woods, or other hereditaments (advowſons of churches and vicarages only excepted), whether belonging to the crown in right of the crown of *England*, or as part of the principality of *Wales*, or of the duchy or county palatine of *Lancaſter*, or otherwiſe howſoever, for any longer term than one and thirty years or three lives, or ſome term determinable upon one, two, or three lives, and unleſs

leſs it bo made to commence from the date or making thereof; and if to take effect in reverſion, it do not, together with the eſtate in poſſeſſion, exceed three lives or the term of one and thirty years in the whole; unleſs the tenant be puniſhable for waſte, and unleſs the ancient rent, or more, that hath been paid for the greater part of 20 years prior to the grant, be reſerved upon it; and if no rent hath been paid before the grant, then unleſs there be reſerved a reaſonable rent, not under the 3d part of the clear yearly value of the eſtates compriſed in the grant; and alſo ſuch rents be made payable to the queen, her heirs or ſucceſſors who ſhall make ſuch grant, and to her or their heirs or ſucceſſors, during the whole term of the continuance thereof. But, where the greateſt part of the yearly value of any tenements or hereditaments belonging to the crown ſhall, at the time of making any leaſe or grant thereof, conſiſt of buildings thereon, which may want to be repaired or re-edified, in ſuch caſe, to encourage the re-building or reparation thereof, it is provided that the crown may grant ſuch tenements or hereditaments, for a term not exceeding fifty years or three lives, ſo as ſuch grant be made to commence from the date or making thereof, or if in reverſion, that it do not with the eſtate in poſſeſſion exceed fifty years or three lives from the date or making thereof, and that it be under the other reſtrictions required in the grants of one and thirty years. But this proviſo is repealed by ſtat. 34 *G.* 3 *c.* 75. except as to grants under the ſeals of the duchy and county palatine of *Lancaſter;* and it is enacted, that where any land or ground belonging to the crown ſhall be deemed proper by the treaſury for the erection of houſes or other buildings thereon, or for neceſſary gardens, yards, curtilages, and other appurtenances to be enjoyed therewith, and ſhall be by their order directed to be appropriated to that uſe, and where the leſſee ſhall agree and covenant to erect buildings thereon of greater yearly value than the land or ground ſo to be leaſed or granted, or where the greateſt part of the yearly value of any tenements or hereditaments belonging to the crown doth or ſhall, at the time of making any grant thereof, conſiſt of any buildings thereon, in any of thoſe caſes, the crown may grant the land or ground ſo directed to be ſet apart, or the tenements or hereditaments of the above deſcription, for any term not exceeding ninety-nine years, or three lives to be computed from the date of the grant, or if in reverſion, not exceeding, together with the eſtate in poſſeſſion, the like term of ninety-nine years, or three lives, to be computed in like manner from the date of the grant, ſo as when there ſhall happen to be any ſubſtantial building upon the ground to be demiſed, or that the buildings thereupon ſhall not require, or not be intended and agreed to be rebuilt, there be reſerved an annual rent not leſs than two-thirds of ſuch annual ſum as ſhall be deemed by the treaſury a reaſonable rent or conſideration for ſuch buildings and ground reſpectively, for the term intended to be granted, and ſo as there be paid to the uſe of the crown a fine to the amount of the remaining part of ſuch annual ſum, ſubject to a diſcount, which ſhall not be computed at a higher rate than the higheſt legal rate of intereſt at the time of making ſuch grant; and when there ſhall happen to be no ſubſtantial building on ſuch ground as the buildings thereon require, or ſhall be intended and agreed to be rebuilt, or other new buildings to be erected thereon, in that caſe there ſhall be reſerved ſuch annual rent as ſhall be deemed by the treaſury a reaſonable rent or conſideration for ſuch land and old buildings for the term intended to be granted, without taking any fine for the ſame; ſo as in every leaſe of land and buildings of this laſt deſcription, there be contained a covenant or condition on the part of the grantee, for the erecting of proper and ſubſtantial houſes and buildings thereon, within a reaſonable time, to be in each caſe limited

limited for that purpoſe, and ſuch other covenants for keeping buildings in repair, and doing all ſuch other acts as the treaſury ſhall think reaſonable; and ſo as all ſuch rents be reſerved to be paid free of all taxes and aſſeſſments during the whole term, except ſuch rent or ſuch part thereof, during ſuch part of the term as the treaſury ſhall think fit to be allowed, not exceeding in any caſe the term of three years: and ſo as every ſuch grantee or leſſee ſign, ſeal, and deliver a counterpart of his grant or leaſe, which counterpart ſhall not be ſubject to any ſtamp duty.

§ 4. And it is further enacted, that on every grant, leaſe, or other aſſurance by the crown under the great ſeal, or ſeal of the Exchequer, of any manors, meſſuages, lands, tenements, rents, tithes, woods, or other hereditaments, (advowſons of churches and vicarages, and ſuch tenements and grounds, with buildings erected thereon, as are hereby authoriſed to be granted for any term not exceeding ninety-nine years or three lives, and whereon any fine or fines ſhall be payable as aforeſaid only excepted) whereby any eſtate or intereſt whatever at law or in equity ſhall paſs from the crown, there be reſerved ſuch clear annual rent as by the treaſury ſhall be deemed reaſonable, without taking any fine for the ſame; which rent ſhall be made payable to the crown during the whole term of the continuance thereof; but no ſuch grant ſhall be good unleſs the grantee execute a counterpart thereof, ſuch counterpart however not to be ſubject to any ſtamp duty.

§ 5. With reſpect to the renewal of the crown leaſes, it is enacted, that no leaſe or grant of any manors, meſſuages, lands, tenements, tithes, woods, or other hereditaments belonging to the crown, within the ordering and ſurvey of the Exchequer in *England*, ſhall be renewed, until within five years of the period of the expiration thereof, except ſuch tenements and hereditaments as are authoriſed by this act to be granted for any term not exceeding ninety-nine years, nor ſhall any grant of any ſuch tenements and hereditaments ſo authoriſed to be granted be renewed, until within twenty years of the period of the expiration thereof, nor any grant for lives, ſo long as there ſhall be more than one of ſuch lives in being. However, where it ſhall appear to the ſatisfaction of the Treaſury, that any perſon has, at any time before the paſſing of this act, entered into any covenants or engagements to obtain renewals at earlier periods, in confidence that the ſame could be renewed according to the ordinary practice in ſuch caſes, in that caſe, a renewal may be made at a greater diſtance of time from the expiration of the leaſe, ſo as to enable ſuch perſon to perform his engagements: In like manner, where any perſon ſhall be the leſſee of any tithes of any land, or any profits iſſuing out of any lands, and ſhall be the owner of, or intereſted in ſuch lands, the Treaſury may order a renewal of ſuch leaſe at ſuch times as ſhall appear to them convenient for the moſt beneficial enjoyment of ſuch tithes or other profits, together with ſuch lands: and where it ſhall appear to the ſatisfaction of the Treaſury, that any leſſee of lands belonging to the crown, has, before the paſſing of this act, demiſed, or agreed to demiſe the ſame, for the purpoſe of improving them by building, and has entered into any covenants or engagements, in conſequence whereof ſuch perſon would, by reaſon of the improvements ſo made, be bound to pay, upon the renewal of any leaſe or grant of ſuch lands, more than he would be entitled to receive from the under-leſſees or leſſee thereof; in ſuch caſe, the Treaſury may make an abatement in the rent and fine to be reſerved and paid to the crown in conſequence of ſuch improvements, and ſuch leaſe or grant as ſhall be made (regard being had to ſuch circumſtances) ſhall be

good

§ 7. good and effectual. It is alſo provided, that where any waſtes belonging to the crown ſhall be incloſed by authority of parliament, or where any lands or grounds belonging to and held under any leaſe or grant from the crown under the great ſeal, or ſeal of the Exchequer, ſhall be deemed by the Treaſury fit to be planted and appropriated to the growth of wood or timber, or any farm-houſe, or other ſubſtantial building, to be erected for the better management and improvement of any lands or grounds, or any pits, ſhafts, levels, watercourſes, engines, or other works, to be made for the better working of any mines, quarries, or collieries belonging to the crown, and holden as aforeſaid, and where the term or eſtate in poſſeſſion therein ſhall be deemed by the Treaſury to be inſufficient to repay the coſts and charges of ſuch works and improvements, with reaſonable profit and advantage to the parties making or cauſing the ſame to be made, or to their repreſentatives or aſſigns, in all ſuch caſes, it ſhall be lawful at any time hereafter to grant any further leaſe of any ſuch houſes or other buildings, land, or ground, for any term not exceeding the term hereby authoriſed to be granted; provided that there be reſerved and made payable to the crown the rents above required, and that covenants or conditions be inſerted therein on the part of the leſſees, for erecting ſuch new houſes or other buildings, and performing ſuch reſpective works and improvements, at the coſts and charges of ſuch leſſees, within a reaſonable time to be in each caſe limited

§ 8. and appointed for that purpoſe, where ſuch houſes or buildings, or works and improvements, ſhall not have been previouſly erected or made. But no grant ſhall be made of any lands capable of ſurvey until a ſurvey ſhall be had, and eſtimate be made of the improved annual value of the eſtate propoſed to be granted by a ſurveyor to be appointed by the Treaſury or ſurveyor-general of the land revenue, which ſurveyor is to certify the ſame oath, and is alſo to ſtate for what term of years it ſhall appear to him moſt beneficial for the intereſt of the crown, to grant ſuch holding or ground, regard being had to the quality and condition of the building then ſtanding upon ſuch ground,

§ 9. and of the buildings propoſed to be erected thereon. But where the tenements propoſed to be leaſed, are of a fixed and unimprovable value, or where they are incapable of valuation by means of a ſurvey or inſpection, or where they are of ſuch ſmall value, as not to be worth the expence of a ſurvey, a leaſe of them may be granted or renewed, under the direction of the Treaſury, without any previous ſurvey or eſtimate.

§ 21. The act further provides, that the ſurveyor-general ſhall every three years, within thirty days after the commencement of the ſeſſion of parliament, certify under his hand and ſeal to the king and both houſes of parliament, what leaſes or grants of any part of the land-revenue of the crown ſhall have been made within that time, for what terms, and alſo the annual value of the tenements and hereditaments compriſed in ſuch leaſes, as returned on oath by the ſurveyors employed to ſurvey the ſame, and the annual value by the laſt preceding ſurvey thereof, (where there ſhall happen to be a former ſurvey or valuation thereof in the cuſtody or power of the ſurveyor-general,) what rents ſhall have been reſerved upon, and what fines paid for every ſuch leaſe, and the conſiderations for making them; and alſo, ſo far as the ſame can be done, the rents and fines which were reſerved and paid upon or for the laſt preceding leaſe or grant of ſuch tenements or hereditaments.

Although the above ſtatute of 1 *Ann. c.* 7. § 7. reſtrains the crown from alienating the hereditary revenues and duties thereby granted for the

§ 8. ſupport of the civil liſt, yet it does not diſable it from making ſuch grants

or leaſes of lands and hereditaments parcel of the duchy of *Cornwall* as it was authoriſed to make by ſtat. 12 *W.* 3. *c.* 13. or from granting away or reſtoring eſtates forfeited for treaſon or felony, ſeized upon outlawry, or taken in execution, or from making cuſtomary grants or admittances of copyhold eſtates. And the ſtatute of 1 *G.* 3. *c.* 1. which carries the hereditary duties to the aggregate fund, confirms and eſtabliſhes the above clauſes of the ſtatute of Queen *Anne*.

The duty of 4 1-half *per centum* ariſing from *Barbadoes* and the *Leeward Iſlands*, was a perpetual and irrevocable revenue granted to King *Charles* II. his heirs and ſucceſſors, originally by an act of the aſſembly of *Barbadoes*, and afterwards by ſimilar acts of the aſſemblies of the other *Britiſh Leeward Iſlands*, charged upon all dead commodities the growth of the iſlands, ſhipped to any part of the world. It appears to have been granted in exchange for an acknowledgment of forty pounds of cotton *per* head, and all other duties, rents, and arrears of rent due to the proprietor or grantee of the above iſlands, for quieting the poſſeſſions of the inhabitants of the iſlands, for a full confirmation of their eſtates and tenures, for holding their ſeveral plantations to them and their heirs for ever in free and common ſocage, and in conſideration of the great charges neceſſary for maintaining the honour and dignity of his Majeſty's authority there, the publick meetings of the ſeſſions, the often attendance of the council, and the reparations of the forts and other publick charges incumbent upon the government. Theſe duties were, during part of King *William*'s reign, appropriated with the other hereditary revenues of the crown for the ſupport of the civil liſt, but were diſappropriated in the commencement of the ſucceeding reign. This diſappropriation ſeems to have taken place in conſequence of an addreſs from the Houſe of Commons to the queen, grounded upon a petition to that Houſe from the merchants and planters of *Barbadoes*, praying that the duties may be applied to the local purpoſes of the iſlands, with which, as it may be ſuppoſed, the queen promiſed a compliance. But notwithſtanding this reſolution and addreſs of the Houſe of Commons, and conſequent declaration from the throne, theſe duties have not in fact been, or been conſidered to be, appropriated merely to the ſervice of the iſlands, but are holden to be an entirely open fund, applicable to any purpoſes, which the bounty of the crown may direct, or its neceſſities may require.

The act in Barbadoes was paſſed the 12th of Sept. 1663. *Vide* ſtat. 1 Ann. c. 7. Comm. Journ. 30th March 1702 See debates in the Houſe of Lords in March 1795 upon the penſions granted out of this fund to Lord Auckland and Mr. Burke.—The right of the crown to levy theſe duties, by virtue of the prerogative only in the newly ceded iſlands upon the peace of 1763 was very fully diſcuſſed in the caſe of

Campbell and Hall, Cowp. 204. That caſe was as follows:—The iſland of Grenada ſurrendered by capitulation in 1762, and, with its dependencies was finally ceded to Great Britain by the definitive treaty of peace at Paris on the 10th of February 1763. The chief ſtipulation material to the preſent purpoſe in favour of the inhabitants, as well by the treaty as by the articles of capitulation, was this—That, as they would become, by their ſurrender, ſubjects of Great Britain, they ſhould enjoy their properties and privileges, and pay taxes, in like manner as the reſt of his Majeſty's ſubjects of the other Britiſh Leeward Iſlands. The iſland and its dependencies being thus become a Britiſh colony, one of the firſt meaſures of government was to iſſue a proclamation under the great ſeal, bearing date the 7th day of October 1763, wherein, amongſt other things, it is declared, "That the king, by letters patent under the great ſeal, had given expreſs power and direction to the governor, as ſoon as the ſtate and circumſtances of the colony would admit thereof, with the advice and conſent of the council, and the repreſentatives of the people, to make, conſtitute, and ordain laws, ſtatutes, and ordinances, for the good government thereof, as near as may be agreeably to the laws of England, and under ſuch regulations and reſtrictions as are uſed in the other Britiſh colonies." This proclamation was followed by another, dated the 26th of March 1764, inviting purchaſers upon certain terms and conditions. The governor who is ſaid to have been appointed, was General Melville, whoſe commiſſion however did not bear date until the 9th of April 1764, and the aſſembly which he was directed to ſummon, met for the firſt time in 1765. But before that time, indeed before the departure of the governor from England, letters patent were iſſued under the Great Seal, bearing date the 20th of July 1764, which after

after reciting, that the above duty of 4 1-half *per centum* was payable in Barbadoes, and in all the British Leeward islands; and the expediency and importance to the other islands that the like duty should take place in Grenada, orders and directs, by virtue of the prerogative royal, that from and after the 29th day of September then next, the duty of 4 1-half *per centum* in specie should be raised and paid to the king, his heirs and successors, upon all dead commodities, the growth and produce of Grenada, that should be shipped off from the same, in lieu of all customs formerly paid to the French king. The question therefore submitted to the court was, Whether it was competent to the crown, under the above circumstances, to levy this duty merely by virtue of the prerogative royal? The determination of the court was against the crown, but it rested solely on the circumstance of the proclamations of October 1763, and March 1764, being of prior date to the letters patent, by which means the king had precluded himself from the exercise of legislative authority over Grenada, before the letters patent were issued. "Through inattention," said Lord Mansfield, "of the king's servants, in inverting the order in which the instruments should have "passed, and been notoriously published, the last act is contradictory to, and a violation of the "first, and is therefore void; and the duty can only now be levied, by an act of the assembly of "the island, or by an act of the parliament of Great Britain." But, although the question in this case was immediately determined upon the inversion of the order of the instruments, yet the noble and learned Judge, in delivering the judgment of the court, went very fully into the law upon the subject. His Lordship stated these six propositions as clear, and in which the counsel on both sides were perfectly agreed: 1st, A country conquered by the British arms becomes a dominion of the king in right of his crown; and therefore necessarily subject to the legislature, the parliament of Great Britain. 2d, The conquered inhabitants once received under the king's protection become subjects, and are to be universally considered in that light, not as enemies or aliens. 3d, The articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable, according to their true intent and meaning. 4th, The law and legislative government of every dominion equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, *Minorca* the Isle of Man, or the Plantations, has no privilege distinct from the natives. 5th, The laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to Pagans, mentioned in Calvin's case, shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian æra, and in all probability arose from the mad enthusiasm of the Crusades. 6th, If the king, that is, the king without the concurrence of parliament, has a power to alter the old and introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles; he cannot exempt an inhabitant from that particular dominion; as, for instance, from the laws of trade, or from the power of parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put. As to the question, Whether the king had *of himself* the power to substitute the present duties instead of the imposts formerly paid to the French king, between the 10th February 1763, the day the treaty of peace was signed, and the 7th of October 1763, the day on which the first proclamation bears date, his Lordship said, "It is left by the constitution to "the king's authority to grant or refuse a capitulation; if he refuses, and puts the inhabitants to "the sword, or exterminates them, all the lands belong to him. If he receives the inhabitants "under his protection, and grants them their property, he has a power to fix such terms and "conditions as he thinks proper. He is intrusted with making the treaty of peace: he may yield "up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed; "neither has it hitherto been controverted, that the king may change part or the whole of the "law or political form of government of a conquered dominion." His Lordship then went into the history of the conquests made by the crown of England, and in the course of his inquiry took notice of the opinion delivered by Sir Philip Yorke and Sir Clement Wearge respecting Jamaica. In 1722 the assembly of that island being refractory, it was referred to those two great law-officers to know, "what could be done if the assembly should obstinately continue to withhold all the usu-"al supplies." They reported thus: If jamaica was still to be considered as a *conquered island*, the "*king* had a *right* to *levy taxes* upon the inhabitants; but, if it was to be considered in the "*light* as the *other colonies*, no tax could be imposed on the inhabitants, but *by an assembly of the island*, or *by an act of parliament*."

The forfeited estates in *Scotland*, which were annexed to the crown by the statute of 25 *Geo.* 2. *c.* 41. are disannexed therefrom by the statute of 24 *G.* 3. *sess.* 2. *c.* 57. for the purpose of enabling his Majesty to grant them to the heirs of the former proprietors.

(There

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(*There are three*) Grants of the crown lands are now reſtrained by ſtat. Ann. c. 7. *ſupra*,

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(*That no new*) But quære of this, for where the queſtion was, Whether an addition to the old ſtocking-frame was the ſubject of a patent? Lord Mansfield ſaid, that if the general queſtion of law, viz. that there can be *no patent for an addition*, be with the defendant, that was open on the record, and he might move in arreſt of judgment; but that the objection would go to repeal almoſt every patent that was ever granted: there was a verdict for the plaintiff, and 500*l.* damages; which was acquieſced in. Morris v. Branſom, Sitt. Weſt. E. 1776. Bull. N. P. 76. And ſince that caſe, it hath been the generally received opinion in Weſtminſter-Hall, that a patent for an *addition* is good. But then it muſt be for the *addition* only, and not for the machine too. 2 H. Bl 489. and Rex v. Eſſex, Sitt. Weſt. Mich. 1785, *coram* Buller, J. Bull. N. P. 75. laſt edition.

(*It is held*) This notion is now exploded.

(*If the invention*) 2 H. Bl. 491. S. C. cited by Eyre, C. J.

(*If a man invent*) It will not be void, if the perſon who has learnt it, has not diſcloſed it.

(*If a Perſon*) Where a patentee brings an action on his patent, if the novelty or effect of the invention be diſputed, he muſt ſhew in what his invention conſiſts, and that he produced the effect propoſed by the patent in the manner ſpecified. Slight evidence of this on his part is ſufficient, and it is then incumbent on the defendant to falſify the ſpecification. *Per* Buller, J. 1 Term Rep. 607.

It will not impeach the validity of a patent that another perſon firſt made the diſcovery which is the ſubject of it, if in truth the patentee were the firſt who made it publick, for it was the diſcloſure of new inventions which the ſtatute meant to encourage. It is therefore a proviſion, and indiſpenſable condition in all patents, that the patentee ſhall aſcertain the nature of his invention, and in what manner it is to be performed. The ſpecification is the price which the patentee is to pay for his monopoly. It hath been laid down, therefore, that the patentee muſt diſcloſe the ſecret and ſpecify the invention in ſuch a way, that other artiſts of the ſame trade may be taught to do the thing for which the patent is granted, by following the directions of the ſpecification, without any new addition or invention of their own. He muſt deſcribe it ſo that the publick may, after the expiration of the term, have the uſe of the invention in as cheap and beneficial a way as the patentee himſelf uſes it, and therefore, if the ſpecification deſcribes many parts of an inſtrument or machine, and the patentee uſes only a few of them, or does not ſtate how they are to be put together and uſed, the patent is void. And if the ſpecification be in any part materially falſe or defective, if there be any ambiguity affectedly introduced into it, or any thing which tends to miſlead the publick, if the patentee ſay, that by one proceſs he can produce three things, and fail in any one; or the ſpecification direct the ſame thing to be produced ſeveral ways, or by ſeveral different ingredients, and any one of them fail, in theſe caſes the patent is againſt the law, and cannot be ſupported. In a caſe before Lord *Mansfield* for infringing a patent for ſteel truſſes, it appeared that the patentee, in tempering the ſteel, rubbed it with tallow, which was of ſome uſe in the operation; and becauſe this was omitted, the ſpecification was holden to be inſufficient, and the patent was avoided. So, in an action for infringing the plaintiff's patent for making patent yellow; three objections were made to the patent: 1*ſt*, That after directing that lead ſhould be calcined, it directed another ingredient, namely, *minium* to be taken, which would not anſwer the purpoſe, as it did not ſay whether it was to be calcined or fuſed, and by reference to the preceding

2 H. Bl. 470.

Rex v. Arkwright, Sitt. Weſt. Trin. 1785. Bull. N. P. 78. laſt edit.

Liardet v. Johnſon, Sitt. Weſt. Hil. 1778. Bull. N. P. 79. Turner v. Winter, 1 Term Rep. 602.

ding words it would be to be calcined, which would not anſwer, as fuſion was neceſſary. 2*dly*, That it directed any kind of foſil-ſalt to be taken, whereas only one kind of foſil-ſalt, namely, *ſal gem*, would anſwer the purpoſe, becauſe it muſt be a marine ſalt. 3*dly*, That all the things together did not produce the effect; for the patent was to do three things, but this produced but one only. Theſe were allowed to be deciſive objections to the patent, and that it was void.

The above act of parliament having excepted only patents of the ſole working or making any manner of *new manufactures*, it hath been ſaid that the foundation of all patents muſt be the *manufacture* itſelf; that there can be no patent for a mere principle, nor for the mere application or mode of doing a thing, for a method only, without having carried it into effect, and produced ſome new ſubſtance. On the other hand it hath been ſaid, that though there can be no patent for a mere principle, yet for a principle ſo far embodied and connected with corporal ſubſtances, as to be in a condition to act, and to produce effects in any art, trade, myſtery, or manual occupation, there may be a patent; that a *method* may of itſelf be the ſubject of a patent: that Mr. *Hartley*'s patent was ſolely for a *method* of ſecuring buildings from fire: that it was not for making the plates of iron, for thoſe were in uſe before: that it was not for the effect produced, for that was merely negative; but it was for his *method* of diſpoſing the plates of iron ſo as to produce the propoſed effect: that new methods of manufacturing articles in common uſe, for which a variety of patents have been granted, where the ſole merit and the whole effect produced, are the ſaving of time and expence, and thereby lowering the price of the article, and introducing it into more general uſe, may be ſaid to be *manufactures* in one of the common acceptations of the word, as we ſpeak of the manufactory of glaſs, or any other thing of that kind: that the patents in theſe caſes cannot be for the effect produced, for it is either no ſubſtance at all, or, what is exactly the ſame thing, as to the queſtion upon a patent, no new ſubſtance, but an old one produced advantageouſly for the publick: that it cannot be for the mechaniſm, for there is no new mechaniſm employed: it muſt then be for the *method*; that is, in the words of Lord *Mansfield*, for *method* detached *from all phyſical exiſtence* whatever. Such were ſome of the topicks of argument diſcuſſed in the court of Common Pleas in the following caſe, upon which the judges of that court were equally divided.

Boulton and Watt v. Bull, 2 H. Bl. 463. In conſequence of the difference of opinion in the court of Common Pleas upon this caſe, it was afterwards moved to diſſolve the injunction which had

A patent was granted to the plaintiff *Watt* for *a new invented method* of leſſening the conſumption of ſteam and fuel in fire-engines. The ſpecification ſtated, that the *method* conſiſted of certain *principles*, and deſcribed the mode of applying thoſe principles to the purpoſes of the invention. And an act of parliament, reciting the patent to have been for the making and vending of *certain engines* invented by *Watt*, extended to him for a longer term than fourteen years, the privilege of *making*, *conſtructing*, and ſelling the *ſaid engines*. The jury found that this invention was a new and uſeful invention, and that the privilege veſted in *Watt* and his aſſigns by the act of parliament was infringed by the defendant as charged in the declaration. They alſo found that the ſpecification was of itſelf ſufficient to enable a mechanick acquainted with the fire engines previouſly in uſe, to conſtruct fire-engines producing the effect of leſſening the conſumption of fire and ſteam in fire-engines, upon the principle invented by the plaintiff *Watt*. The queſtions propoſed for the opinion of the court were, 1ſt, Whether the

the patent was good in law, and continued by the act of parliament? 2d, Whether the ſpecification was in point of law ſufficient to ſupport the patent?

been obtained for the purpoſe of trying the validity of the patent in an action; but the Chancellour ſaid, that there muſt be another action, and that the injunction in the mean time muſt be continued, and that he could not impoſe any terms upon the patentees in bringing the action. 3 Vez. jun. 140. Accordingly, another action was brought in the court of Common Pleas, which came on to be tried at the ſittings in London Dec. 16th, 1796, before the Lord Chief Juſtice Eyre, when a verdict was found for the plaintiff with nominal damages.

(*It ſeems agreed*) But, if there was no certain author, the property would not be the king's, but common. 4 Burr. 2402. Page 208

(*In the 15 year*) It was this Colonel Atkins, who upon this occaſion invented the fiction that printing was a flower of the crown acquired by H. 6. by purchaſe, the firſt printer in England having been brought to Oxford by Archbiſhop Bourchier, at that king's expence. 1 Bl. Rep. 113.

But, notwithſtanding the above deciſions, this prerogative right to the printing of almanacks was ſtrongly inclined againſt by the court of King's Bench in the caſe of the Stationers Company againſt *Partridge*. No judgment indeed was given in that caſe, but it ſtood over, that the company might ſee if they could make it like the caſe of the Common Prayer Book, whether they could ſhew that the right of the crown had any foundation in property; and it was never moved afterwards. However, in a later caſe of the Stationers' Company againſt *Carnan*, the queſtion hath been again brought forward, and the right of the crown to make ſuch excluſive grant to the company hath been expreſsly denied by the court of Common Pleas on a caſe ſent out of Chancery for their opinion. 10 Mod. 105. 4 Burr. 2402. 2 Bl. Rep. 1004. In conſequence of this deciſion, an act was paſſed, which, after reciting, "that the "power of "granting a liberty to print almanacks and other books was heretofore ſuppoſed to be an inherent "right in the crown; and that the crown had, by different charters under the great ſeal, granted to "the Univerſities of Oxford and Cambridge, among other things, the privilege of printing alma-"nacks; and that the Univerſities had demiſed to the Company of Stationers of the city of Lon-"don, their privileges of vending almanacks and calendars, and had received an annual ſum of "one thouſand pounds and upwards, a conſideration for ſuch privilege; and that the ſum ſo "received by them had been laid out and expended in promoting different branches of literature "and ſcience, to the great increaſe of religion and learning, and the general benefit and advan-"tage of theſe realms; and that the privilege or right of printing almanacks had been by a late "deciſion at law, found to have been a common right, over which the crown had no controul, "and conſequently the Univerſities no power to demiſe the ſame to any particular perſon or body "of men, whereby the payment ſo made to them by the Company of Stationers had ceaſed and "been diſcontinued;" enacts, that 500*l.* a year ſhall be paid to each of the Univerſities, out of the monies ariſing by the duties upon almanacks. Stat. 21 G. 3. c. 56. § 10.

In the caſe of *Baſkett* v Univerſity of *Cambridge*, the prerogative right of printing acts of parliament was ſanctioned by a deciſion of the court of King's Bench. That caſe aroſe upon a bill filed by the plaintiffs for an injunction to reſtrain the defendants from printing or ſelling a book, entitled "An exact Abridgment of all the Acts of Parliament relating to the Exciſe on Beer," &c. Both parties claimed under letters patent from the crown, the plaintiffs as the king's printers. The court were of opinion, that during the term granted by the letters patent to the plaintiffs, they were entitled to the right of printing acts of parliament, and abridgments of acts of parliament, excluſive of all other perſons, not authoriſed to print the ſame by prior grants from the crown. But they thought that by the letters patent granted to the Univerſity they were INTRUSTED *with a concurrent* 1 Bl. Rep. 105. 2 Burr. 661.

authority to print acts of parliament, and abridgments of acts of parliament, within the Univerſity, upon the terms in thoſe letters patent.

And the following caſe eſtabliſhes the excluſive right of the crown to print acts of parliament and books of divine ſervice beyond all controverſy. We are enabled to lay before our readers the judgment of the court as delivered by the Lord Chief Baron *Skinner*.

Eyre and Strahan v. Carnan, in the Exchequer, May 7th, 1781.

This is a caſe in which *Charles Eyre* and *William Strahan* are plaintiffs, and *Thomas Carnan* is the defendant.

This bill was brought to reſtrain the defendant from printing and publiſhing a Form of Prayer, which had been ordered by his Majeſty to be read in all churches; and for an account of the profits which have ariſen from his ſale of it.

The bill ſtates, that the plaintiffs held the office of king's printer, which was granted the 19th of *December*, the 2d of King *George* the Firſt, to *John Baſkett* for 30 years in reverſion after two terms which were then exiſting, the laſt of which expired the 21ſt of *January* 1770, when the grant to *Baſkett* took effect in poſſeſſion. The grant, which was read, imports to be a grant to *John Baſkett* of the office of Printer to his Majeſty, and his ſucceſſors, of (among other things) all Bibles and Teſtaments in the *Engliſh* language; and all Books of Common Prayer and Adminiſtrations of the Sacraments, and other Rites and Ceremonies of the Church of *England*, in all volumes whatſoever heretofore printed by the king's printer, or to be printed by his command; and of all other books which he, his heirs or ſucceſſors, ſhould order to be uſed for the ſervice of God in the Church of *England*.

The intereſt in this grant was aſſigned by *Baſkett* to *John Eyre*, under whom the plaintiffs claim the benefit of it; the plaintiff *Eyre* in two-thirds, and the plaintiff *Strahan* in the other third.

The bill ſtates, that in *December* 1779 a Form of Prayer was ordered by his Majeſty to be uſed in all churches and chapels throughout *England* and *Wales* upon the 14th *Feb.* 1780; that it was printed by the plaintiffs, and a ſufficient number thereof circulated for ſale at ſixpence each, which was a reaſonable price, and at which they had been formerly ſold.

That the defendant *Carnan* had printed and ſold a great number of them; and upon this ground the plaintiffs pray an injunction and account. The defendant *Carnan*, in his anſwer, admitted the printing and ſelling, and he ſubmitted to an account if the plaintiffs had the excluſive right of printing ſuch Form of Prayer.

An injunction was granted upon filing the bill to ſtop the publication.

The queſtion now is, Whether the court ought to direct the account which is prayed by the bill, for as to the continuance of the injunction in ſuch a caſe, it is a mere matter of form?

Two objections are made by the defendant to this part of the relief: One is, that the price for which the plaintiffs have ſold it was not a reaſonable price; the ſecond, that the right is doubtful.

As to the price, though it is proved that it might be afforded at a cheaper rate, yet it is likewiſe in proof that the price which has been taken by the plaintiffs is the ſame which had been uſed to be taken for like Forms of Prayer ſo printed; and therefore we think this not a ſufficient ground for denying the account.

The

The next objection is to the plaintiffs' right. It has been ſaid that courts of equity never proceed in ſuch caſes to decree accounts but upon clear and undoubted rights.

That the preſent right, if it be one, has never received the ſanction of any legal determination. That though in the great queſtion concerning literary property the Judges conſidered and treated the excluſive right of the crown to print acts of ſtate and books of divine ſervice as an acknowledged right, yet they put it upon different grounds, ſome upon the grounds of prerogative, others upon the ground of property; and as it is now determined that property cannot be the ground of ſuch a right, the right itſelf conſequently becomes doubtful. In the argument of the queſtion reſpecting literary property in the Houſe of Lords, in the caſe of *Millar* and *Taylor*, it was aſſumed by all the Judges that the king's copy-right continued after publication, and from thence ſome of them drew arguments in ſupport of that right of an author after publication, inſiſting that property in the compoſition was the foundation of both; others denied that property, in the ſtrict legal ſenſe of the word, was the foundation of the right of the crown; but they all agreed that the crown had this right. The right therefore ſeemed to have been in effect recognized and eſtabliſhed in this memorable caſe by the unanimous opinion of the Judges, though they differed reſpecting the origin of it. This is certain reſpecting ſuch origin, that it has ever been a truſt repoſed in the king, as executive magiſtrate, and the ſupreme head of the church, to promulgate to the people all thoſe civil and religious ordinances which were to be the rule of their civil and religious obedience. There are traces of the ancient mode of promulgating the ordinances of the ſtate yet remaining to us, ſuited to the gloominеſs of the times when few who heard them could have read them; the king's officers tranſmitted authentick copies of them to the ſheriffs, who cauſed them to be publickly read in their county court. When the demand for the authentick copies began to increaſe, and when the introduction of printing facilitated the multiplication of copies, the people were ſupplied with copies by the king's command by his patentee. This ſeemed a very obvious and reaſonable extent of that duty which lay upon the crown to furniſh the people with the authentick text of their ordinances. Our courts of juſtice ſeem to have ſo conſidered it when they eſtabliſhed it as a rule of evidence, that acts of parliament printed by the king's printer ſhould be deemed authentick, and read in evidence as ſuch. As to the promulgation of religious ordinances by the king's command, or by his patentee, it is not to be expected that inſtances ſhould be found of the execution of this truſt by the crown during the papal uſurpation of the ſupreme authority over all eccleſiaſtical matters in this kingdom. It appears, however, by a grant made in the 34th year of King *Henry* the Eighth, to *Richard Grafton* and *Edward Whitchurch*, of the ſole right of printing the Maſs-book and certain other books of divine ſervice, that ſuch books had never at that time been printed in *England*, but had been brought into this kingdom from other countries, probably from *Rowe*; though, as the grant recites, printing was at that time arrived at great perfection here. This grant, which bears date the 28th *January*, the 34th year of *Henry* the Eighth, is to be found in *Rymer*, vol. 14. p. 766. The period between the time of the reeſtabliſhment of the ſupremacy of the crown and the completion of the Reformation under Queen *Elizabeth*, conſidering the fluctuating ſtate of religion, was not likely to afford, and in fact has not afforded, any inſtance of the ſuperintending care of the crown in printing books of divine ſervice, except

except that which I have alluded to, and which I have referred to chiefly to ſhew how the demand of the publick for ſuch books had been ſupplied before that time, namely, from foreign countries, and under the direction of a foreign power; but in the firſt year of Queen *Elizabeth*, the excluſive right of printing books of divine ſervice was inſerted in the ſame patent with the right of printing the acts of parliament, which had ſome time before been granted, and from that time they have been regularly granted together, and enjoyed by the king's patentee. Long uſage, referable to ſuch an origin, ought not to be ſhaken lightly, if there was no authority to ſupport it; but in the caſe of *Baſkett* againſt the Univerſity of *Cambridge*, the right of printing acts of parliament received the ſanction of the court of King's Bench; and in the caſe of *Millar* and *Taylor*, before alluded to, both the rights, as well that reſpecting acts of parliament as that reſpecting books of divine ſervice, were fully acknowledged. The privilege of the patentee has in fact been always executed with the excluſion of all other printers: it is therefore, in conſideration of law, a monopoly; but it is a monopoly ſupported by long uſage, and ſtanding upon very ſpecial grounds of neceſſity and publick utility; for it is of manifeſt publick utility to place in proper hands the right of ſuch publication, as well upon account of the ſpecial care and ſuperintendence which a truſt of ſuch importance neceſſarily requires, as becauſe the excluſive right of doing or authoriſing any acts in which the publick is intereſted implies an obligation to exerciſe that right in ſuch manner as to anſwer the purpoſes for which it was given; and, conſequently, the right now in queſtion impoſes upon the crown an obligation to publiſh and diſperſe as many books of divine ſervice as the intereſt of religion and the demands of the publick require. It appears, then, that the right claimed by the plaintiffs, under the grant to *John Baſkett*, is founded in publick convenience, is ſupported by long uſage, and that it has been acknowledged by the unanimous opinion of all the Judges. Under ſuch circumſtances, we think it is not now to be conſidered as a doubtful right. If it is not doubtful, the plaintiffs are entitled to the account which is prayed: and which the court muſt accordingly decree. It is a matter of form to direct the continuance of the injunction; for in a caſe of this kind there is an end of all the effects of it; the defendant, therefore, muſt be decreed to account according to the prayer of the bill; and as the defendant has by thus printing the books of divine ſervice invaded the rights which the plaintiffs and the king's patentees have been long in the uninterrupted poſſeſſion of, the account muſt be with coſts.

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(*The Statute* 14 *Car.* 2.) By this ſtatute (which expired in 1695) it was enacted, that no private perſon whatſoever ſhould print or cauſe to be printed any book or pamphlet, unleſs the ſame ſhould be firſt entered in the book of the Regiſtrar of the Company of Stationers in London; except acts of parliament, proclamations, and ſuch other books and papers as ſhould be appointed to be printed by virtue of the king's ſign manual, or under the hand of one of the Secretaries of State; and unleſs the ſame ſhould be firſt licenſed by the ſeveral perſons therein directed; that is to ſay, all books concerning the common law were to be printed by the allowance of the Lord Chancellour, the Lords Chief Juſtices and Lord Chief Baron, or one of them; of hiſtory concerning the ſtate of this realm, or other books concerning any affairs of ſtate, by one of the Secretaries of State; of heraldry, by appointment of the Earl Marſhal, or, if there ſhould be no Earl Marſhal, then by two of the Kings of Arms; all other books, whether of divinity, phyſick, philoſophy, or other ſcience or art whatſoever, by the Archbiſhop of Canterbury, or Biſhop of London, or by their appointment reſpectively, or, in the univerſities, by the Chancellour, or Vice-Chancellour there, provided that the ſaid Chancellours or Vice-Chancellours ſhould not meddle either with law of common law, or matters of ſtate or government, nor any book the right of printing which ſolely and properly belonged to any particular perſon. And the printers were to ſet their names,

names, and declare the name of the author if required. But there was a proviſo, that nothing therein ſhould extend to infringe any the juſt rights and privileges of either of the ſaid Univerſities, touching the licenſing or printing of books therein; nor ſhould extend to prejudice the juſt rights and privileges granted by the king, or any of his royal predeceſſors, to any perſon or perſons under the great ſeal or otherwiſe, but that they might exerciſe ſuch rights and privileges according to their reſpective grants.

(*By the* 8 *Ann.*) For the property does not veſt before the book is regiſtered. 2 Atk. 95. See alſo ſtat. 15 G. 3. c. 54. § 6.

And the act further directs, that, if at the end of that term, the author himſelf be ſtill living, the right ſhall then return to him for another term of the ſame duration.

It was determined by the court of King's Bench in the great caſe of *Millar* v. *Taylor*, J. *diſſent.* that an excluſive right in authors exiſted by the common law. But afterwards in the caſe of *Donaldſon* v. *Becket*, before the Houſe of Lords, which was finally determined 12th *February* 1774, it was holden, that no copy-right ſubſiſts in authors after the expiration of the ſeveral terms created by the above ſtatute of Queen *Anne*. In conſequence of this deciſion an act was paſſed in the following year for enabling the two Univerſities in *England*, the four Univerſities in *Scotland*, and the Colleges of *Eton*, *Weſtminſter*, and *Wincheſter* to hold in perpetuity their copy-right in books given or bequeathed to them by authors, or their repreſentatives, upon truſt that the profits ariſing from the printing or reprinting of ſuch books, ſhall be applied as a fund for the advancement of learning, and other beneficial purpoſes of education. 4 Burr. 2303. Stat. 15 G. 3. c. 54.

Although a plaintiff ſhould eſtabliſh his right only as to a *part* of a work, yet the court of Chancery will grant an injunction to reſtrain the publication of ſuch part. If an author has ſold *all his intereſt in the copy-right*, he has no reſulting right at the end of the firſt fourteen years, as againſt his own aſſignee, and will be in-joined from re-publiſhing. Carnan v. Bowles, 2 Br. Ch. Rep 80. *Ibid.*

If there are ſeveral invaſions of a copy-right by different perſons, the proprietor cannot join them all in one bill, but muſt file ſeparate bills againſt each. Dilly v. Doig, 2 Vez jun. 486.

See farther on this point, tit. "Injunction," vol. 3. 174.

(*At the king*) *Qu.* Whether the king, proceeding by and with the advice of parliament, is in that ſituation, in reſpect of which he is under the ſpecial protection of the law, and can be conſidered to be deceived in his grant? 2 H. Bl 500.

The king granted to a ranger of a foreſt all manner *of wood blown or thrown down by the wind, and all dead wood, and the boughs and branches of trees and wood in the foreſt, cut off or thrown down, and houſe-bote and fire-bote*, for himſelf and the foreſters and keepers. It was adjudged, that under theſe words, branches cut from trees felled for his Majeſty's uſe did not paſs. Attorney-General v. Lord Stawell, Anſt 592.

The king may grant the duties of a port to a ſubject in conſideration of his repairing it. Mayor of Hull v. Horner, Cowp. 108. See alſo Mayor of Exeter v. Trimlet, 2 Wilſ. 95.; and Mayor of Yarmouth v. Eaton, 3 Burr. 1407.

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PRIVILEGE.

(A) The Duties and Offices from which certain Perſons by reaſon of their Privilege are exempt.

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(*The king's ſervants*) It is an eſtabliſhed rule of law, that the king cannot grant an exemption from any duties but thoſe he has a title to impoſe; and which are *perſonal* to him, and diſtinct from the general intereſt of the realm. 2 Roll. Abr 198. K pl. 1. 202. T. pl. 2. Therefore where a ſtatute enacted, that the lord lieutenants of the ſeveral counties ſhould "charge any "perſon with horſe and arms for the county where his eſtate ſhould lie," towards the maintenance of the militia, it was holden, that a charter granted to the College of Phyſicians, exempting the members "from bearing or providing arms to ſerve in the militia in London and Weſtmin-"ſter, or the ſuburbs or within ſeven miles thereof," did not exonerate one of the members from the charge, though his eſtate lay within ſeven miles of London. Sir Hans Sloane v. Lord William Paulet, 8 Mod. 72. But it ſhould ſeem, that it is competent to the crown to grant an exemption from being preſſed; becauſe in the crown alone lies the power of iſſuing preſs-warrants. Cowp. 520-1.

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(*It ſeems*) But the equity of this act, it ſhould ſeem, does not extend to other phyſicians not mentioned in it. 2 Hawk. P. C. c. 10 § 44.

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(*Doctor Lee*) The like point was determined in the vicar of Dartford's caſe, 2 Str. 1109. more fully reported in Andr. 353. under the name of Chambers' caſe. The court in delivering their judgment in this laſt caſe ſaid, that upon the authority of Dr. Lee's caſe, and 6 Mod. 140. (*ſupra*), they were clearly of opinion, Mr. Chambers, the vicar, was not compellable to exerciſe the office: the firſt caſe being directly in point, and ſtanding upon both the reaſons given in the books; and the other being contrary to the diſtinction taken between an office at common law, and under act of parliament. And Lee, C. J. added, that the uſage which had been offered of ſeveral clergymen having actually ſerved the office ſince Dr. Lee's caſe, had no influence on the preſent queſtion; for the exemption being claimed as a privilege, any perſon entitled to it may certainly waive it, if he pleaſes.

(*A writ of*) By 1 W. & M. c. 18. § 11 *diſſenting miniſters*, and by 31 G. 3. c. 32. *Roman Catholick prieſts*, are under certain conditions, exempted from ſerving all county, ward, and *pariſh* offices, and therefore a *clergyman of the church of England* may be ſuppoſed to be exempted; for it cannot be imagined, that the legiſlature meant to confer greater privileges upon *ſectaries*, than the *regular clergy* were underſtood to poſſeſs: but there does not appear to be any adjudged caſe preciſely to this point. See note to laſt edition of 6 Mod. *ſupra*.

(*In the caſe*) Heaton's caſe, Barnes, 1143. S. P. But, ſince the 2 G. 3. c. 20 § 42. the militia acts having allowed a commutation of ſervice into a payment of 10*l.* it hath been holden, that an attorney is not entitled to his writ of privilege to exempt him from ſerving in the militia, it being no longer deemed to be *a perſonal* ſervice, upon which ground alone he could be entitled to it. Gerard's caſe 2 Bl. Rep. 1123.—By 26 Ge. 3. c. 170. § 27. "No peer of the realm, nor "any perſon who ſhall ſerve as a commiſſioned officer in any regiment, troop, or company in "his Majeſty's other forces, or in any one of his Majeſty's caſtles or forts, nor any non-commiſ-"ſioned officer or private man, ſerving in any of his Majeſty's other forces, nor any commiſ-"ſioned officer ſerving, or who hath ſerved four years in the militia, nor any perſon being a "member of either of the univerſities, nor any clergyman, nor any teacher of any ſeparate congre-"gation, nor any conſtable or other peace-officer, nor any articled clerk, apprentice, ſeaman, or ſea-"faring man nor any perſon muſtered, trained, and doing duty, or employed in any of his Majeſty's "docks or dockyards for the ſervice thereof, or employed and muſtered in his Majeſty's ſervice in the "Tower of London, Woolwich Warren, the ſeveral gun-wharfs at Portſmouth, or at the ſeve-"ral powder-mills, powder magazines, or other ſtorehouſes belonging to his Majeſty under the di-"rection of the Board of Ordnance, nor any perſon being free of the Company of Watermen of "the river Thames, nor any poor man who has more than one child born in wedlock, ſhall be "liable to ſerve perſonally, or provide a ſubſtitute to ſerve in the militia; and no perſon having

"ſerved

" ſerved perſonally, or by ſubſtitute according to the directions of this, or any former act, ſhall " be obliged to ſerve again, until by rotation it ſhall come to his turn: but no perſon who has " ſerved only as a ſubſtitute ſhall by ſuch ſervice be exempted from ſerving again, if he ſhall be " choſen by ballot.

An attorney, it hath been holden, is exempted by the privilege of the court to which he belongs, from ſerving the office of ſheriff in a corporation; though he be a member of the corporation, and reſident in the corporate town, before and when he is admitted an attorney. Mayor of Norwich v. Berry. 4 Burr. 2113. 1 Bl. Rep. 636. S. C.

A. who was a juſtice of peace, and reſided at *Blackheath* in *Kent*, and in *London*, being appointed conſtable in *London*, moved for a writ of privilege. But the court denied it, ſaying they had nothing to do with it, but the proper method was under the ſtatute of *Car.* 2. to apply to the ſeſſions. Delamotte's caſe, 2 Str. 698.

Barriſters are conſidered as exempt from ſerving the office of ſheriff. *Per* Lord Mansfield, 4Burr. 2114

It is permitted by 1 *W. & M. c.* 18. and 31 *G.* 3. *c.* 20. to diſſenters and *Roman* catholicks to ſerve the office of conſtable by deputy.

The officers of the exciſe and cuſtoms claim, and have been allowed in ſeveral inſtances, their writ of privilege from the court of Exchequer, as officers of the court, to be diſcharged from officers. One of theſe writs of privilege, that are now in uſe, was ſettled by Lord Chief Baron *Comyns* himſelf. Anſtr. 216.

So, the foreign appoſer was allowed his writ of privilege to exempt him from ſerving the office of conſtable. Harriſon's caſe, Bunb. 24.

One *Martin*, who was deputy to the uſher of the cuſtoms, being choſen head-borough for *Weſtham* in the county of *Eſſex*, moved for a writ of privilege to diſcharge him from that office, which was granted. Upon the authority of this precedent it was moved for a writ of privilege for the chief accountant to the commiſſioners for victualling the navy, who was choſen churchwarden of the pariſh of *Saint Botolph*, *Aldgate*, his attendance upon the king's buſineſs and the revenue of the crown being, it was urged, equally concerned as in the other caſe. But the court thought this caſe not like the other caſe, for it did not appear here, that there was a clauſe of exemption in the patent conſtituting the commiſſioners of victualling, as in the other caſe there was for *all* officers, *&c.*; and the true reaſon they went upon in the other caſe was, for that *all* officers in the cuſtoms are bound to an attendance in the court of Exchequer, which, in this caſe, the party applying for this writ of privilege is not. Biſhop v. Lloyd, Bunb. 255.

(B) The particular Privileges in Suits allowed Officers and Attendants in the Courts of Juſtice: And herein,

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(*In the court*) That *officers of the revenue*, as ſuch, are privileged to be ſued in the Exchequer in all caſes, is a doctrine and opinion which has been ſuppoſed to obtain in the Exchequer. However, the general privilege to be ſued in all perſonal actions in that court hath been doubted by very great authority; for it ſeems that the court has always confined the privilege of removing the action, to thoſe caſes in which the action hath been brought for ſomething which hath been done by them in the execution of their office. Lord C. Baron Eyre's argument in Cawthorne v. Campbell, Anſtr. 216 And this doubt of the learned Judge is ſupported by the caſe of Barkley v. Walters, Bunb. 306. where a cuſtom-houſe officer had ſeized two cables, one of which only was

was forfeited; and an action being commenced againſt him in the court of King's Bench, the court of Exchequer refuſed to remove it, becauſe it did not appear, but that action was brought in B. R. for the other cable only.

Page 220 (*So, in an action*) Upon arguing the demurrer, a caſe was quoted, *Baker* againſt *Swindale*, in the court of *C. P. Mich.* 10 *G. Roll.* 360. It was an action brought againſt a prothonotary's clerk by original, to which he pleaded, that he ought to be ſued by bill; whereupon the plaintiff demurred, and the court gave judgment that the defendant ſhould anſwer over. *Per cur.* This caſe is in point; ſerjeants, prothonotaries' clerks, and all others not obliged to attendance in court, are upon the ſame foot. Judgment *quod billa caſſetur.*

Payne v. Fry, 1 Str. 546. The old way of p'eading that a man is a clerk of one of the prothonotaries, was, that he was employed in engroſſing records, *aſſidens in cur'*, and the like.

The defendant pleaded in abatement, that he was one of the clerks of Sir *J. Cooke*, prothonotary in *C. B.*. Upon a rule to ſhew cauſe why it ſhould not be ſet aſide, the affidavit annexed to the plea was produced, wherein the defendant ſwore, that he ſerved his clerkſhip with a Common Pleas attorney, and that he had for many years acted as an attorney or ſolicitor; and followed no other employment. After conſideration the court ſet aſide the plea, being all of opinion, that ſuch clerks had no privilege at all, they not being ſworn as attornies are, nor ever acting as clerks in the prothonotary's office; and that it was not ſufficient for the prothonotary to enter their names in his book. As to ſuch clerks as were actually employed under him, for ſo long as they continued in that employment, they would be privileged, but no longer; as in the caſe of a judge's clerk; and an old rule 8 *Car.* was cited, where they were reſtrained from practiſing as attornies.

Raſt. 473. h. 34 H. 6. 15. And in the court of K. B. of late years an affidavit has been required to that effect. Cooke v. Latimer; Reade v. Chambers. Forteſc. 342, and in the caſe of one Worthington, 1 Ld. Raym. 399. Clift. 572.

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(*A ſerjeant at law*) *Vide ſupr. contr.* But he does not loſe his privilege by reſiding in the country. 2 Bl. Rep. 1065.

(*But it hath*) And the like was done in the caſe of Wigley v. Morgan, 2 Str. 1049. Ca. temp. Hardw. 285. Andr. 384. However, this caſe hath been ſince overruled, and the law is now ſettled agreeably to the doctrine in the text. Pope v. Redfearne, 4 Burr. 2027. Yeardly v. Rowe, 3 Term Rep 573.

(*If an attorney*) So, an attorney ſuing by original, waives his privilege. Hetherington v. Lowth, 2 Str 837.

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(*If the court*) But *quære* of this, for the returning has never been very nicely ſcanned, ſo as to require a man to go the direct road. *Bro Privilege* 4. allows that the protection is not forfeited by the plea of *extra view*, becauſe it may be, the party went to buy a horſe, victuals, or other neceſſaries for his journey. Neither is the law ſo ſtrict in point of time as to require the party to ſet out immediately after the trial is over, as in the caſe of Hatch v. Bliſſet, *infra*, and Gilb. Rep. 308. The defendant, an old woman, had a trial at Wincheſter aſſizes, which was over on Friday at four in the afternoon; ſhe ſtaid there till after dinner on Saturday, and in the evening at ſeven was arreſted going home to Portſmouth, which is twenty miles: and the court held that ſhe ought to be diſcharged, that her protection was expired, and a little deviation or loitering would not alter it. And in a later caſe, where the defendant was attending his cauſe at the ſittings, and though it was put off early in the day, ſtaid in court till five in the afternoon, and then went with his attorney and witneſſes to dine at a tavern, where he was arreſted during dinner; the court held, that ſuch a neceſſary refreſhment as this ought not to be looked upon as a deviation, ſo as to cancel the defendant's privilege *redeundo*. Lightfoot v. Cameron, 2 Bl. Rep. 1113.

And

And it hath lately been laid down by the court of *C. P.* as a general rule, that all persons who have relation to suit which calls for their attendance, whether they are compelled to attend by process or not, are entitled to privilege from arrest *eundo & redeundo*, provided they come *bonâ fide*. And in this description bail and barristers upon the circuit are included. Meekins v. Smith. 1 H. Bl. 636.

The court of *B. R.* hath refused to discharge a person in custody by process of the sheriff's court in a cause afterwards removed into *B. R.* because he was arrested whilst attending commissioners of bankrupt to prove a debt. Kinder v. Williams. 4 Term Rep. 377. But see *Ex parte* Kerney, 1 Atk. 55. *Ex parte* Dick, and *Ex parte* Stow, 2 Bl. Rep. 1142.

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(*Privileges are*) 1 Wilf. 306. 2 Str. 864. 2 Ld. Raym. 1567. Barnard. B. R. 300. But where an attorney is arrested by *latitat* in his own court, it is a motion of course to discharge him on filing common bail. Wheeler's case, 1 Wilf. 208. Imp. K. B. 474 ed. 1791. In the case of Crufsley v. Shawe, 2 Bl. Rep. 1085. the court of C. P. held, that an attorney arrested by *capias* upon a special original out of that court was not entitled to his discharge upon serving the sheriff with a writ of privilege, but must plead his privilege. If indeed the arrest were upon process out of an inferior court, his writ ought to be allowed *instanter*. Rawlins v. Parry, Sir Geo. Cooke's notes, p. 2.

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(*In an action against A.*,) 2 Bl. Rep. 1088.

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(*An attorney*) Whether it is necessary to annex an affidavit to the plea seems to be a matter of some doubt. See 2 Bl. Rep. 1088 It must appear by the plea, that the defendant was an attorney at the time of bringing the action. A mere clerical mistake in the statement of this fact, was holden to be fatal. 2 Str. 864.

(*In assumpsit by A.*) The practice here stated is gone into desuetude, and the method now used of asserting the privilege is by an order from the court of Exchequer to remove the action, whether commenced in the King's Bench, Common Pleas, or any other court, into the office of pleas of the court of Exchequer, and that it shall be there in the same forwardness as in the court out of which the action is removed: but this order does not operate as a *certiorari* to remove the proceedings, but as a personal order on the party to stay his proceedings there, with liberty to commence his action in the office of pleas, and of course calls upon the defendant in that action to appear, to accept a declaration, and to put the plaintiff in the same state of forwardness in the office of pleas as he was in the other court. So that the order is simply an injunction to stay proceedings in the other court, qualified and softened by a liberty given to sue here; and is to be enforced, as all injunctions are, by attachment. Lord C. B. Eyre's argument in Cawthorne v. Campbell, Anstr. 207-8.

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(*A bill cannot*) But now it may be filed in vacation as well as in term time, Dougl. 300; though if it be filed in vacation, otherwise than to avoid the statute of limitations, the plaintiff will not be allowed his costs, if the action should be settled before the ensuing term.

An attorney plaintiff may sue by common process, and indorse his own name on the copy as the attorney, and may afterwards declare by another attorney. Jackson v. Barnard, 7 Term Rep. 35.

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(*It seems*) Barnes, 44. 2 Bl. Rep. 1325. If one attorney sue another attorney by attachment of privilege, and hold him to bail, the defendant may either plead his privilege in abatement, or move the court to stay the proceedings, but in neither case will he be entitled to costs. Barber v. Palmer, 6 Term Rep. 524.

(C) Privilege of Peers and Members of Parliament: And herein,

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(*The peers*) Since this ſtatute, the perſon of a Scotch peer has been holden to be privileged from arreſts, 2 Str. 999. Fort 163. 165. But the above article of the ſtatute of Union, upon which this privilege is claimed by a peer of Scotland, not one of the ſixteen, ſays that the peers of Scotland ſhall have the privileges of the peers of Great Britain, except the right and privilege of ſitting in the Houſe of Lords, *and the privileges depending thereon.* Now, as every privilege claimed by a peer ſolely depends upon, and is in conſequence of his ſitting in parliament, that is, being an actual lord of parliament, it ſeems, that the allowing all the Scotch peers the privilege from arreſts is not within the words of the act of Union, the only act under which the Scotch peers to this day can claim any privilege here at all. 2 Cr. P. 127.

2. How far this Privilege extends to their Servants and Attendants.

On the meeting of the new parliament in November 1774, a doubt was conceived, whether, as this act had thus taken away all privilege from the ſervants of members, ſome alteration ought not to be made in the form of the prayer of the Speaker of the Houſe of Commons to the throne; and the then ſpeaker, Sir Fletcher Norton, at firſt, it ſeems, intended to make an alteration, by claiming all the uſual privileges, "except where the ſame had been varied or taken away by act of parliament." But upon conferring with the Lord Chancellour, Lord Apſley, his Lordſhip ſaid, "that as no alteration "had been made formerly, on the paſſing of the act in King William's time, relating to the privilege of parliament; and as, whatever the Commons claimed, neither the allowance of the "king, nor the claim itſelf, could be ſuppoſed to include privileges not warranted by law; he "was of opinion, that it would be the ſafer way, in order to prevent any difficulties that might "ariſe from an alteration, to adhere to the uſual form; and that he was ready to give the king's "anſwer in the accuſtomed manner." Sir Fletcher Norton acquieſced in this; and made the claim in the ancient form of words, without any alteration, and received the uſual anſwer, and the ſame form has been continued ever ſince.

But now the ſtatute of 10 *G.* 3. *c.* 50. takes away from ſervants all privilege whatever, perſonal, as well as privilege from ſuits.

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(*But privilege*) On the 4th of June 1614, the Lord Chancellour Elleſmere, in a caſe then before the Houſe of Lords, declares, "That no privilege of parliament doth protect any man, in "caſe of breach of the peace" So, on the 7th of February and 8th of June 1757, on a complaint againſt Earl Ferrers, the Lords reſolve, "That no peer or lord of parliament hath privilege of "peerage or of parliament againſt being compelled, by proceſs of the courts in Weſtminſter-hall "to pay obedience to a writ of *habeas corpus* directed to him." In the year 1795, the Earl of Abingdon was committed by the court of King's Bench to the priſon of that court as part of the puniſhment inflicted upon him, being convicted of publiſhing a libel.

In the caſe of Earl Ferrers it was determined by all the judges, that a peer indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the ſame according to the proviſions of the 25 G. 2. c. 37. And ſuppoſing the day appointed by the judgment for execution ſhould laple before ſuch execution done, that a new time may be appointed for the execution, either by the high court of parliament before which ſuch peer ſhall have been attainted, although the office of high ſteward be determined, or by the court of King's Bench, the parliament not then ſitting; and the record of the attainder being properly removed into that court. Foſt Cr. L. 139.

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(*The privilege*) Sir Richard Temple's caſe, Paſch. 13 Car. 2. A trial at bar, wherein Sir Richard Temple was defendant, being appointed for this term, he moved the court by his counſel to put off the trial, upon the ground of his being elected a burgeſs to ſerve in the next parliament which was to meet in eight days, and therefore prayed his privilege. But the court doubted whether they could allow the privilege, becauſe it did not appear to them whether it were actually ſo as he ſuggeſted or not, but by affidavit, which they would not admit to prove this ſuggeſtion. And it was ſaid by the court, that if he were arreſted upon meſne proceſs, or taken in execution, it was proper for the parliament (when they ſhould meet) to diſcharge him, for the court doubted whether they had the power to do ſo. The defendant ſaid, that the clerk of the parliament would not make him out a certificate of his election before the meeting of parliament. Upon which Twiſden, J. aſked, why he could not ſue his writ of privilege out of Chancery upon the return of his

his election? *Quære hiet.* But the court refuſed to grant the motion, becauſe the trial was to come on before the day on which the parliament were to meet.—On the 9th of February 162 , a motion was made, that Mr. Giffard, returned a member of the Houſe, and then in execution, might be ſent for. On this motion being examined into, it appears from a report of the committee of privileges on the 15th. "that one of the burgeſſes for Bury was elected on the 6th of "January; that Mr. Giffard was elected on the 11th of January, but that the indenture was "not dated till the 30th of January, the town clerk conceiving it was to bear date the day of "the next county-court; and that Mr. Giffard was arreſted on the 23d of January, after his "election, but before the return." After much debate and conſideration of this difficulty, on the 17th of February, the clerk of the crown, the ſheriff of Suffolk, and the town-clerk of Bury, were all called up to the table, and there, by order of the Houſe, amended the return from the 30th of January to the 11th; and then it was ordered, that Mr. Giffard ſhould have privilege, and be delivered out of execution; and a warrant was iſſued to the clerk of the crown to bring him up the next day. On the 18th he was accordingly brought in, with the keeper of the gate-houſe, the bar down; the writ of *habeas corpus* was handed up to the clerk, and the writ and return being read by him, the Speaker diſcharged Mr. Giffard, and wiſhed him to take the oath, and then his ſeat in the House. 1 Hatſ. Prec. 164.—On the 1ſt of March 1592, Mr. Serjeant Yelverton, from the committee of privileges and elections, reported the following caſe; "Thomas "Fitzherbert of Staffordſhire, being outlawed upon a *capias utlagatum* after judgment, is elected "burgeſs of this parliament: two hours after his election, before the indenture returned, the "ſheriff arreſted him upon this *capias utlagatum*: the party is in execution: now he ſend-"eth his ſupplication to this Houſe to have a writ from the ſame to be enlarged, to have the "privilege in this caſe to be grantable." On the 5th of April the Houſe came to the following reſolution; "That Thomas Fitzherbert was, by his election, a member thereof; yet that he ought "not to have privilege in three reſpects: 1ſt, Becauſe he was taken in execution before the return "of the indenture of his election: 2d, Becauſe he had been outlawed at the queen's ſuit, and "was now taken in execution for her majeſty's debt: 3d, and laſtly, In regard that he was ſo "taken by the ſheriff, neither *ſedente parliamento*, nor *eundo*, nor *redeundo*." Dewes's Journ. 479. 1 Hatſ. Prec. 107. On the 4th of July 1625, the caſe of Mr. Baſſett was referred to the committee of privileges, who reported, "that he was impriſoned upon meſne proceſs, and afterwards "choſen a burgeſs." There is a debate in the Journal, whether, under theſe circumſtances, he were eligible, or to be allowed privilege? Great diſtinction was made between a perſon arreſted on meſne proceſs, or in execution; and it was at laſt reſolved, upon the queſtion, "That Mr. "Baſſett ſhould have the privilege of the Houſe;" and a warrant was ordered to the marſhall to bring him up the next morning, which was done accordingly. 1 Hatſ. Prec. 163.

(*As to the*) The writ of privilege in the caſe of Trewynnard, in the 36th and 37th H. 8. is to perſons "*venientes ſen venire intendentes.*" Prynn's Fourth Regiſter, 780.

On the 27th of *February*, 1586, the Houſe was informed, that one *William White* had arreſted Mr. *Martin*, a member of the Houſe of Commons; therefore it was ordered, "That the Serjeant ſhould warn *White* "to be here to-morrow, ſitting the court." On the 6th of *March*, *William White* was brought into the Houſe, to anſwer his contempt for arreſting Mr. *Martin*; who anſwered, "that he cauſed him to be arreſted "the 22d day of *January*, which was above fourteen days before the be-"ginning of the parliament." The Houſe upon this appoint a committee to ſearch precedents, who, on the 11th of *March*, make report "of Mr. "*Martin* arreſted upon meſne proceſs by *White*, above twenty days be-"fore the beginning of this parliament, holden by prorogation (miſtaken "for adjournment), and in reſpect that the Houſe was divided in opinion, "Mr. Speaker, with the conſent of the Houſe, moved theſe queſtions to "the Houſe: 1ſt, Whether they would limit a time certain, or a reaſon-"able time, to any member of the Houſe for his privilege? The Houſe "anſwered, A convenient time. 2d, Whether Mr. *Martin* was arreſted "within this reaſonable time? The Houſe anſwered, Yea. 3d, If *White* "ſhould be puniſhed for arreſting *Martin*? The Houſe anſwered, No; "becauſe the arreſt was twenty days before the beginning of the parlia-"ment, and unknown to him, that would be taken for reaſonable time. "But the principal cauſe why *Martin* had his privilege, was, for that "*White* Dewes's Journ. p. 410.

" *White*, the laſt ſeſſion (miſtaken for meeting) of parliament arreſted " Mr. *Martin*, and then knowing him to be a burgeſs for this Houſe, diſ- " charged his arreſt; and then afterwards Mr. *Martin*, again returning " to *London* to ſerve in the Houſe, Mr. *White* did again arreſt him; and " therefore the Houſe took in evil part againſt him his ſecond arreſt, and " thereupon judged, that *Martin* ſhould be diſcharged of his ſecond arreſt " out of the Fleet by the ſaid Mr. *White*."

1 Hatſ. Prec. 100.

It is obſerved upon the above caſe, that this parliament met on the 29th of *October* 1586; on the 22d of *December* they were adjourned by commiſſioners from the queen to the 15th of *February* following; ſo that this arreſt was not either before the beginning of the parliament, or during a prorogation, but on the 22d of *January*, during an adjournment, and conſequently clearly within privilege. For an adjournment, even for a very long period, would not affect privilege, as we may collect from the Journals of the Houſe of Commons of the 1ſt of *June* 1621, and the printed debates of that ſeſſion, when it was ordered, agreeably to the opinion and advice of Sir *Edward Coke*, Mr. *Noy*, Mr. *Hakewill*, and others, " that during that adjournment," (which was for above five months, from the 4th of *June* to the 14th of *November*,) " no ſuits againſt members, or " their ſervants, ſhould be proceeded in, in any court of law; and if they " were, that a letter ſhould iſſue, under the Speaker's hand, for the " party's relief therein, as if the parliament was ſitting; and the party re- " fuſing to obey it to be cenſured at the next acceſs." And a ſimilar reſolution was about the ſame time come to by the Lords. For upon the 2d of *June* 1621, the Lords conſulted the Judges upon this queſtion; and they having anſwered, on the 4th of *June*, that they could not ſatisfy their Lordſhips of any precedents of the continuance of their privileges, during all the time of the long ceſſation, the Lords notwithſtanding reſolve, " That they do know, that the privileges of themſelves, their ſervants and " followers, do continue, notwithſtanding the adjournment of the parlia- " ment; and they order and adjudge the ſame to be obſerved in all points " accordingly."

This reſtriction as to ſuits was afterwards limited by ſtat. 12 & 13 W. 3. c. 3. to an adjournment of 14 days.

On the 22d of *January* 1628, Mr. *Rolle* complained of goods being ſeized by an officer of the cuſtoms for dues; and this complaint was immediately referred to the conſideration of a ſelect committee. The ſubſtance of the caſe was, that theſe goods were ſeized by the cuſtomers, or thoſe who had a leaſe of the cuſtoms, for refuſing to pay the duties of tonnage and poundage, which the Commons had not yet granted to the king; but which the king, as appears from his warrant in the eighth volume of the Parliamentary Hiſtory, p. 311. had directed to be levied by his own authority. The Houſe, on the report from the grand committee upon this violation of their privileges, reſolve, 1. That every member of this Houſe is, during the time of privilege of parliament, to have privilege for his goods and eſtate. 2d, That the 30th of *October* laſt was within the privilege of parliament (*a*); and 3d, That Mr. *Rolle* ought to have privilege for his goods ſeized the 30th of *October* laſt, the 5th of *January* laſt, or at any time ſince.

(*a*) The Houſe had been prorogued from the 20th of June to the 20th of October, and then further prorogued to the 20th of January. When King Charles the ſecond intend to prorogue the the parliament from the 27th of July 1663, to the 16th of March following, a ſpace of eight months, he ſaid in his ſpeech to both houſes of parliament upon that occaſion, " I think it neceſſary to make this " a ſeſſion, that ſo the current of juſtice may run the two next terms, without any obſtruction " by privilege of parliament, and therefore I ſhall prorogue you to the 16th day of March." Lords' Journ. 417.

The

The only ſtatutory declarations of the duration of privilege in any inſtances, are the above ſtatute of 12 & 13 *W.* 3. *c.* 3. and the 4 *G.* 3. *c.* 24. & 24 *G.* 3. *c.* 37.; by which two laſt ſtatutes the right of members to ſend their letters free from poſtage, is aſcertained to continue, during the ſitting of parliament, and within forty days before, and forty days after any ſummons or prorogation of the ſame.

This point, though left undefined by the Britiſh parliament, is in Ireland aſcertained by a ſtatute of the legiſlature of that country, viz. 3 E. 4. c. 1. and limited to forty days before, and forty days after the concluſion of the parliament.

(*It ſeems that*) But ſo early as the 34th of H. 8. Ferrers, a member in execution, was delivered by the ſerjeant without any other warrant than his mace, even though the Lord Chancellour ordered a writ of privilege. Holling. Chron. 1 Hatſ. Prec. 53. Dyer, 61. a. But *qu.* of this caſe, & *vide infra*. Page 233

(*In the caſe*) Col. Pit was firſt brought up by *habeas corpus* into the court of Common Pleas, but as he had been taken by proceſs out of the King's Bench, the Court of Common Pleas refuſed to interfere, and remanded him. Dutton v. Pit, Barnes, 199.

(*So in caſe*) Before this caſe of Ferrers, the Houſe, if in truth the privilege of parliament extended to perſons in execution, had been very tender in their mode of exerting it. It had indeed been the practice to releaſe members in confinement in execution, but this had not been done by any immediate authority of the Houſe itſelf, or even by writ of privilege, but by petition by the Commons to the king, and a ſpecial act of parliament for that purpoſe, an act being ſuppoſed to be neceſſary as well to protect the gaoler from an action for the eſcape, as to ſecure the debt of the creditor, who would otherwiſe have loſt his right to a new execution. See the caſes of Lark, Rot. P. 18 H. 6. No 57. of Clark, Rot. Parl. 39 H. 6. No. 9. and of Hyde, Rot. Parl. 18 E. 4. No. 55. There can be no doubt, however, of the exiſtence of ſuch privilege at preſent, as the ſtat. 1 Ja. 1. c. 13. which is a general law paſſed for the purpoſe of obviating in all caſes the difficulties which were the objects of the above-mentioned ſpecial acts, expreſsly provides, "That nothing therein contained ſhall extend to the diminiſhing of any puniſhment, to be thereafter by cenſure in parliament inflicted upon any perſon which thereafter ſhould make, or procure to be made, any ſuch arreſt as is aforeſaid," that is, any arreſt in execution; and is therefore a parliamentary declaration, that during the privilege of parliament, it is not lawful to arreſt, even in execution, any member of either houſe of parliament. We cannot help remarking with what a high hand the privilege was aſſerted in Ferrers's caſe; for though, as we have before mentioned, it had not been the practice in any preceding time, to releaſe members in execution without a ſpecial act of parliament, yet it appears, that Ferrers was delivered by the ſerjeant, without any other warrant than his mace, even though a writ of privilege was offered by the Lord Chancellour; that the perſons who oppoſed the delivery were impriſoned by the Houſe of Commons, ſome in the Tower, and ſome in Newgate: and the creditor himſelf, who procured the arreſt, was alſo committed for the contempt of the privilege of parliament. And theſe powers, according to Hollingſhead, were admitted by all the judges of England to be legal. Hollingh. Chron. and 1 Hatſ. Prec. 153. Dyer too, in his argument as counſel in Trewynnard's caſe, (Dy. 61. a.) cites the caſe of Ferrers, to ſhew what the law was in this reſpect; but, when in a ſubſequent caſe he was delivering his opinion as judge, he ſaid, "If a man be condemned in debt or treſpaſs, and be elected a member of parliament, and then be taken in execution, he cannot have the privilege of parliament; and ſo it was holden by the ſages of the law in the caſe of Ferrers in the time of H. 8. And though privilege was at that time allowed, *c o ſuit mieux juſt.*" Moor. 57. pl. 153. We may add, that even ſince the ſtat. of 1 Ja. 1. c. 13. no inſtance occurs where any perſon entitled to privilege, if in cuſtody in execution, hath been delivered by any other mode, than by virtue of a writ of privilege, or by a writ of *habeas corpus*, iſſued in obedience to a warrant under the Speaker's hand, ſome ſuch proceſs deemed being neceſſary to give the act its full operation. See Sir Thomas Shirley's caſe, 5 Parl. Hiſt. 113. and 1 Hatſ. Prec. 155. Page 236

Of the Proceedings in Courts by and againſt Perſons entitled to Privilege of Parliament.

By the 2 & 3 *Anne*, *c.* 18. An act for the further explanation and regulation of privilege of parliament, in relation to perſons in publick offices, it is enacted, "That any action or ſuit may be commenced or proſecuted againſt any officer or perſon entruſted or employed in the revenue,

" &c. for

" &c. for any forfeiture, miſdemeanour, or breach of truſt, &c. and " ſhall not be ſtaid or delayed by or under colour or pretence of any pri- " vilege of parliament, although ſuch officer or perſon be a peer of the " realm, or lord of parliament, or one of the knights." &c.

Provided, " That nothing therein ſhall extend to ſubject the perſon of " ſuch officer, being a peer of the realm, or lord of parliament, to be ar- " reſted or impriſoned: but that all proceſs ſhall iſſue againſt ſuch officer " or perſon, being a peer of the realm, or lord of parliament, as ſhould " have iſſued againſt him out of the time of privilege: nor ſhall extend " to the perſon of ſuch officer, being a knight, citizen, or burgeſs of the " *Houſe of Commons*, to be arreſted or impriſoned, during the time of pri- " vilege of parliament; and that againſt ſuch officer or other perſon, be- " ing a knight, citizen, or burgeſs of the *Houſe of Commons*, entitled to " privilege, ſhall be iſſued ſummons and diſtreſſes infinite; which the ſaid " reſpective courts are hereby empowered to iſſue in ſuch caſe, until the " party ſhall appear upon ſuch proceſs, according to the courſe of ſuch re- " ſpective courts."

The act of 12 & 13 *W.* 3. *c.* 3. reſtraining only the privilege of parliament, in actions or ſuits commenced in the courts therein ſpecified, by the 11 *G.* 2. *c.* 24. in amendment of the act of King *William*, it is enacted, " That any perſon and perſons ſhall and may commence and proſecute, in " *Great Britain* or *Ireland*, any action or ſuit in any court of *Record*, or " court of *Equity*, or court of *Admiralty*; and in all cauſes matrimonial " and teſtamentary, in any court having cognizance of cauſes matrimonial " and teſtamentary, againſt any peer or lord of parliament of *Great Britain*, " or againſt any of the knights, citizens, and burgeſſes of the *Houſe of Com-* " *mons* of *Great Britain*, for the time being, or againſt them and any of their " menial and other ſervants, or any other perſon entitled to the privilege " of the parliament of *Great Britain*, at any time from and immediately af- " ter the diſſolution or prorogation of any parliament, until a new parlia- " ment ſhall meet, or the ſame be re-aſſembled; and from and immediate- " ly after any adjournment of both Houſes of Parliament, for above the " ſpace of *fourteen days*, until both Houſes ſhall meet or re-aſſemble; and " the ſaid reſpective courts may proceed," &c.

Provided, " That the ſaid act ſhall not extend to ſubject the perſon of " any knight, &c. to be arreſted during the time of privilege. And § 2. " authoriſes proceeding as above in any of the courts *of great ſeſſions in* Wales " *courts of ſeſſion in the counties palatine of* Cheſter, Lancaſter, *and* Durham " *the courts of King's Bench, Common Pleas*, and *Exchequer*, in *Ireland*, " after any ſuch diſſolution, &c. And the *court of Chancery* in *Ireland*, and " *equity of Exchequer*, are authoriſed to proceed in like manner as the *court* " *of Chancery* and *equity court of Exchequer* in *England* may, againſt any " *peer, knight*, &c. after ſuch diſſolution," &c.

§ 3. ſaves the ſtatute of *limitations* in like manner as the act of King *William*.

And by § 4. No action or ſuit commenced againſt the *king's debtor*. &c. to be ſtaid in any court in *England* or *Ireland* [as by § 4. in the act of King *William*.

And laſtly, by the *ſtat.* 10 *G.* 3. *c.* 50. The preamble of which ſtates that the acts already in being are inſufficient to obviate the inconvenience ariſing from delay of ſuits, by reaſon of the privilege of parliament, it is enacted, " That any perſon or perſons ſhall and may, *at any time*, com- " mence and proſecute any action or ſuit, in any court of *Record*, or

" of *Equity*, or of *Admiralty*; and in all cauſes matrimonial and teſtamen-
" tary, in any court having cognizance of cauſes matrimonial and teſtamen-
" tary, againſt any peer, or lord of parliament of *Great Britain*; or againſt
" any of the knights, citizens, or burgeſſes, and the commiſſioners for
" ſhires and burghs of the *Houſe of Commons* of *Great Britain*, for the
" time being; or againſt their or any of their menial or any other ſervants,
" or any other perſon entitled to the privilege of parliament of *Great Bri-*
" *tain*; and no ſuch action, ſuit, or any other proceſs or proceeding
" thereupon, ſhall, at any time, be impeached, ſtaid, or delayed, by or
" under colour or pretence of any privilege of parliament."

2. Provided, that " Nothing in this act ſhall extend to ſubject the per-
" ſon of any of the knights, citizens, and burgeſſes, or the commiſſioners,
" &c. for the time being, to be arreſted or impriſoned upon any ſuch ſuit
" or proceedings."

3. And whereas the proceſs by *diſtringas* is dilatory and expenſive: For remedy thereof, be it enacted, " That the court out which the writ
" proceeds, may order the iſſues levied, from time to time, to be ſold;
" and the money ariſing thereby to be applied to pay ſuch coſts to the
" plaintiff as the ſaid court ſhall think juſt, under all the circumſtances,
" to order; and the ſurplus to be retained until the defendant ſhall have
" appeared, or other purpoſe of the writ be anſwered."

4. Provided always, when the purpoſe of the writ is anſwered, that then the ſaid iſſues ſhall be returned; or if ſold, what ſhall remain of the money ariſing by ſuch ſale, ſhall be repaid to the party diſtrained upon.

5. And it is further enacted, " That obedience may be enforced to
" any rule of his Majeſty's courts of *King's Bench*, *Common Pleas*, or
" *Exchequer*, againſt any perſon entitled to privilege of parliament, by
" diſtreſs infinite, in caſe any perſon or perſons, entitled to the benefit of
" ſuch rule, ſhall chooſe to proceed in that way: and the laſt clauſe ex-
" tends them to *Scotland*."

The cauſe ſhewn againſt an order *niſi* for a ſequeſtration for want of an anſwer from a member of the Houſe of Commons, was, an anſwer come in; to which it was replied on the part of the plaintiff, that, as exceptions were taken, it was no anſwer, and therefore the order ought to be made abſolute. On the other hand was cited the above caſe of Lord *Clifford*. But by Lord Chancellour—If there is a ſequeſtration *niſi* for want of an anſwer againſt a member of parliament, and he puts in an anſwer before the order is made abſolute, and exceptions are taken to his anſwer, the court *will enlarge the time for ſhewing cauſe* till it ſhall appear whether the anſwer is ſufficient or no. Mr. *Goldſborough*, who ſaid, when Lord *Clifford*'s caſe was before the court, that it was the ſtanding rule of the court there ſhould be a new ſequeſtration *niſi* in this caſe, was a good officer, but yet I ſhould think what I have mentioned is the proper medium. But his Lordſhip at preſent allowed the cauſe, as it was the courſe of the court. Butler v. Raſhfield, 3 Atk. 740.

The plaintiff, in an action againſt a member of parliament, had proceeded agreeably to the act of 10 *G.* 3. *c.* 50. and had obtained rules for ſelling the iſſues levied upon a *diſtringas*, *alias*, and *pluries*; and alſo a rule for an attachment againſt the ſheriff: but no iſſues had been actually levied, and at length defendant appeared; whereupon it was moved, that theſe rules ſhould all be diſcharged. For as no iſſues had been levied, they could not be *ſold*; [*vide* § 3. of the ſtatute 10 *G.* 3. *c.* 50.] and as Martin v. Townſhend 5 Burr. 2725.

the defendant in the action had now appeared, the end and purpoſe of the writs were anſwered. On the other ſide, the plaintiff inſiſted on the coſts of iſſuing the writs, before the rules ſhould be diſcharged. And the court thought that reaſonable; and directed, *that on payment of coſts* the rules ſhould be diſcharged. They were of opinion, that theſe coſts were not to attend the event of the ſuit, but were to be paid to the plaintiff at all events whether he ſhould finally ſucceed in his ſuit or not.

Cowp. 844. In *Trinity* term, 18 *George* 3. in the *King's Bench*, in the caſe of *Goſling and wife againſt Lord Viſcount Weymouth*, the queſtion was, whether a *peer* could be ſued there by *bill of privilege?* And adjudged that he might. The caſe was this:

The plaintiffs commenced an action againſt the Lord *Weymouth*, *by bill of privilege*, to which he pleaded in abatement, that he ought to have been ſued by *original writ*, and *not by bill of privilege*; and thereupon, there was a *demurrer and joinder*. On the argument of which, the court relied on the caſe of *Say* againſt Lord *Byron* in that court, a few years before, and awarded a *reſpondeas ouſter*.

In the caſe of *Say* v. Lord *Byron*, Mr. *L. Robinſon* moved (upon an affidavit, that the plaintiff had ſued out two writs of *diſtringas*, whereupon the ſheriff had levied 40*s*. and 4*d*. and that no bill was filed) for a rule to ſhew cauſe why the ſaid two writs ſhould not be quaſhed, and the money levied thereon be reſtored. He objected that a peer ought not to be ſued by bill, but by original writ; and that the ſtat. of 12 & 13 *W*. 3. does not make any variation in the proceedings againſt peers, but reſpects, in this particular, *commoners* only. Mr. *Stowe* ſhewed cauſe, and the rule was enlarged. Upon ſhewing cauſe at a farther day, the court declared, that there were many precedents of actions againſt peers of parliament for many years before the ſtatute of *W*. 3. as certified by the Maſter, and the clerk of the rules; and ſaid, why could not the court ſupport its ancient juriſdiction, as well as the court of Exchequer, as *debitor domini regis?* The court therefore diſcharged the rule,

It is however remarkable, that when the act of King *William* went to the *Lords* for their concurrence to the proceedings therein, againſt the members of both Houſes, *by bill and ſummons thereon*, the *Lords* expunged that part of the clauſe relating to themſelves being ſued by *original bill and ſummons*, and ſent back the amended bill to the Commons; which afterwards paſſed accordingly, Which clearly proves, that the *Lords*, at that time, did not think themſelves included therein.

Earl of Lonſdale v. Littledale, 2 H. Bl. 267. 299. Nor is it clear even at this day, notwithſtanding the above caſes, that they are included in the act For upon a writ of error by the Earl of *Lonſdale*, to reverſe judgment becauſe he had been ſued by bill, the two following queſtions were propoſed to the judges by the Houſe of Lords. 1ſt. Whether the court of Kings Bench hath any juriſdiction to hold plea in a perſonal action againſt a peer, or lord of parliament, who is neither in the cuſtody of the marſhall. nor is an officer or miniſter of that court without the king's original writ iſſuing out of his Chancery, to warrant ſuch action? 2d, If the court has no ſuch juriſdiction, can it derive ſuch juriſdiction from the acquieſcence of the defendant, by pleading to iſſue in an action commenced without the king's original writ? In anſwer to which the Lord Chief Juſtice *Eyre* ſtated the unanimous opinion of the judges to be, that the firſt queſtion would have admitted of conſiderable doubt, if the objection had been made in an earlier ſtage of the cauſe, but that the caſes of *Say* v. Lord *Byron*, and *Goſling* v. Lord *Weymouth*, were

not to be conſidered as deciſive authorities upon the ſubject. But that after pleading in chief it was too late for the defendant to object to the juriſdiction of the court.

A member of the houſe of Commons may be ſued either in *B. R.* or *C. B.* by bill; but he cannot be declared againſt in *B. R.* as *in the cuſtody of the marſhall.* 2 Str. 734. Say. Rep. 634.

All the ſubſequent proceedings to the declaration againſt a *peer or privileged perſon* are the ſame as in other caſes, except that their bodies cannot be taken *in execution*, unleſs the judgment is obtained upon a *ſtatute-ſtaple*, or *ſtatute-merchant*, *or upon the ſtatute of* Acton Burnell, 11 *Edw.* 1. and then a *capias ad ſatisfaciendum* lies even againſt peers of the realm.

By ſtat. 4 *G.* 3. *c.* 33. the creditor of a member, a merchant, may on affidavit ſue out a writ, and ſerve him, and if he does not make ſatisfaction in two months, he ſhall be bankrupt from the time of ſervice. Merchant committing act of bankruptcy, creditors may ſue out commiſſion, and commiſſioners proceed, notwithſtanding privilege. But the perſon ſhall not be arreſted or impriſoned, except for caſes made felony by the bankrupt acts.

PROHIBITION.

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(A) What Courts may grant a Prohibition.

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(*At the juriſdiction*) The Author of the Commentaries ſays, that the writ of prohibition is iſſuing properly only out of the court of King's Bench, being the King's prerogative writ, but that for the furtherance of juſtice it may now alſo be had in *ſome* caſes out of the court of Chancery, Common Pleas, and Exchequer. 3 Bl. Comm. 112. And Lord Hardwicke is reported to have ſaid, that where the eccleſiaſtical court proceeds to try a cuſtom by a different evidence from which the common law courts would have done, *no other court* has the cognizance of it, but the court of King's Bench. 3 Atk. 628. Rotheram v. Fanſhaw. In the caſe of the Company of Horners in London, it is ſaid that it is the *proper* power and honour of the court of King's Bench to limit the juriſdiction of all the courts. 2 Roll. Rep. 471.

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(*But as to the*) For want of a ſuggeſtion on record the court of B. R diſcharged the rule to ſhew cauſe why a prohibition ſhould not be granted. Hawkins, Aſſignee of Wooldridge, v. Blaquiere and others, Aſſignees of Sampſon, Hil. 20 G. 3. 2 Crompt. Pr. 239.

(B) Whether the granting of a Prohibition be diſcretionary, or *ex debito juſtitiæ.*

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(*If a maſter*) Clay v. Snelgrave. 3 Term Rep. K. B. 315. For without conſent it cannot be done, and the caſe of Wharton v. Pitts, Salk. 568. where ſuch terms were impoſed was over-ruled in Velthaſen v. Ormſley, 3 Term Rep. K. B. 315.

(C) Who have a Right to ſuch a Writ, and may demand it.

Tarrant v. Mawr. 1 Str. 576. If the wife libel in the ſpiritual court to recover her fame, a prohibition ſhall not be granted upon the motion of her huſband.

(E) Of the Suggeſtion and Manner of obtaining a Prohibition.

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(*Where the matter*) 4 Burr. 2037. Cowp. 530.

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(*A motion was*) 1 Str. 187. 4 Burr. 2032. 2039. See Dougl. 318. as to this cuſtom of London.

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(*It hath been*) 2 Roll. Abr. 521. Foy v. Liſter, 2 Salk. 554. 2 Ld. Raym. 1172. S. C. ſemb. *Vide contrà.* and that this computation is confined only to the caſe of a lapſe in *quare impedit*, Co. Lit. 135. b. Cro. Jac. 166, 167. 4 Mod. 186. 3 Burr. 1455. Skin. 314. And that depends on the words in the act of 13 E. 1. ſt. 1. c. 5. "*tempus ſemeſtre.*" But, in all acts where "months" are ſpoken of, without the word "calendar," and nothing is added from which a clear inference can be drawn that the legiſlature intended calendar months, it is underſtood to mean lunar months. Lacon v. Hooper, 6 Term Rep. 226.

Maltom v. Acklom. Barnes, 428 When the declaration is ordered to be amended, the time for proving the ſuggeſtion is to be computed from the amendment

Arg. Creake v. Pitcairn, Tr. 13 G. 2 Caſ. Pr. C. B. 158. It is ſaid, if the party who has obtained a writ of prohibition, be ordered to declare in prohibition, that he is not obliged to make proof of his ſuggeſtion within ſix months purſuant to the 2 & 3 *Ed.* 6. becauſe the proof is, in ſuch caſe, to be made at the trial of the cauſe.

Foy v. Liſter, 2 Ld. Raym. 1172. Where a conſultation is granted, becauſe the ſuggeſtion has not been proved within ſix months, the court will not make the payment of the double coſts and damages given in ſuch caſe to the defendant in prohibition by the 2 & 3 *Edw.* 6. *c.* 13. a part of the rule;—that would be unneceſſary, for if a conſultation be awarded for want of ſuch proof, double coſts and damages follow of courſe.

Creake v. Pitcairne, T. 13 & 14 G. 2. Barnes, 129 *Sed vid.* S. C. Caſ. Pr. C. C. 157. Pract. Reg. 118. A ſuit was inſtituted in an eccleſiaſtical court againſt an *adminiſtrator* for tithes *due from the inteſtate in his lifetime*, to which ſuit the adminiſtrator, alleging a *modus*, obtained a prohibition, but did not prove his ſuggeſtion within the time limited for that purpoſe by the 2 & 3 *Edw.* 6. *c.* 13. and it was doubted, whether or not he was liable to double coſts according to that ſtatute.
According to theſe books, the court reſolved, that the plaintiff in prohibition was not liable to pay any coſts.

1 Rol. Abr. 516. l. 37. If a defendant in prohibition bring an action of debt for the recovery of the double coſts and damages, given by the 2 & 3 *Edw.* 6. where a conſultation is granted for want of the ſuggeſtion's being proved within ſix months, he ſhall alſo have coſts in ſuch action.

Comb. 20. The 5th ſect. of 8 & 9 W. 3. c. The 2 and 3 *Edw.* 6. *c.* 13. § 14. gives coſts where the party applying for a prohibition fails in proving the truth of his ſuggeſtion within ſix months; and this continued to be the only caſe, where either a plaintiff or defendant in prohibition was entitled to recover any coſts until the 8 & 9 *W.* 3. *c.*

W. 3. *c.* 11. By the third ſection of that ſtatute it is enacted, "That in "all ſuits upon prohibitions, the plaintiff obtaining judgment, or any award "of execution after plea pleaded, or demurrer joined therein, ſhall likewiſe "recover his coſts of ſuit: and if the plaintiff ſhall become nonſuit, or ſuffer "a diſcontinuance, or a verdict ſhall paſs againſt him, the defendant ſhall "recover his coſts, and have execution for the ſame by *capias ad ſatisfaci-endum*, *fieri facias*, or *elegit*."

11. provides, that nothing in that act contained ſhall be conſtrued to alter the laws then in being,

relative to the payment of coſts by executors or adminiſtrators.

Where judgment is given for the plaintiff, in a ſuit in prohibition, upon demurrer, or after plea pleaded, he ſhall have coſts taxed from the ſuggeſtion, and ſo as to include the coſts incurred by the motion.

2 Str. 1062. Caſ. temp. Hard. 396. Andr. 62. Barnes, 130

Thus in prohibition, a motion being made that the prothonotary ſhould not allow coſts, except from the time of the delivery of the declaration, the court unanimouſly declared, that the plaintiff ought to have his coſts from the time of the ſuggeſtion, and of the ſuggeſtion itſelf, and all coſts incident and ſubſequent thereto.

Wills v. Turner, H. 2 G. 1. Caſ. Pr. C. P. 11. S. C. B. N. P. 331.

So where, after judgment for the plaintiff in prohibition, the queſtion was, whether the coſts payable by the defendant ſhould be computed from the firſt motion, or only from the declaration? Upon ſearch, it was found to be the courſe of all the courts, to tax only from the time of declaring, except in two inſtances *viz.* *Eads* v. *Jackſon*, *B. R.* 2 *G.*. and *Brown* v. *Turner* and others in *C. B.*, where coſts were allowed from the time of the original motion for the prohibition. And Mr. Baron *Forteſcue* ſaid, that this queſtion had been put to all the judges, whoſe opinions were conformable to theſe two deciſions. Therefore, in the principal caſe, the court of Exchequer ordered coſts to be taxed from the firſt application to the court inclusively; and directed the officers to purſue that mode of taxation, in all ſuch caſes for the future.

Sir Harry Houghton v. Starkey. In Scacc. H. 4 G. 1. 1 Str. 82. S. C. Fort. 348. S. C. cited Caſ. temp. Hardw. 396.

Afterwards, in *Swetnam* v. *Archer*, the ſame queſtion occurred, and received the ſame determination; and, in this caſe, it was agreed that the practice had been uniformly ſuch, ſince the reſolution in *Houghton* v. *Starkey*.

1 Str. *ubi ſup. Sed vide* Ca. temp. Hardw. 396. where this caſe is cited differently, and ſaid to have been never determined.

And this point was again agitated, in a ſubſequent caſe, on account of a doubt entertained on the ſubject by a new Maſter of the King's Bench; when the court reſolved, that the plaintiff in prohibition ſhould have coſts from the very firſt application for the prohibition, becauſe the whole is but one ſuit, and the words of the 8 & 9 *W.* 3. *c.* 11. are, that the plaintiff ſhall recover his coſts of ſuit.

Bury v. Croſs, 1 Str. 83. S. C. 1 Barnard. K. B. 47. S. C. cited Caſ. temp. Hard. 396.

But it hath been holden, that a defendant in prohibition, in caſe of the nonſuit of the plaintiff, is not entitled to the coſts occaſioned by oppoſing the rule for the prohibition, but merely to the coſts of the nonſuit.

Thus, upon a rule to ſhew cauſe why the prothonotary ſhould not review his taxation of coſts, it appeared, that the plaintiff in a ſuit in prohibition had been nonſuited; upon which the queſtion was, whether the defendant ought to have the coſts incurred by oppoſing the rule to ſhew cauſe why the writ

Carliſle v. Meyrick, C. B. H. 17 G. 3. Say. on Coſts, 137.

writ or prohibition ſhould not be granted, as well as the coſts of the nonſuit? It was determined, that he ought to have no more than the coſts of the nonſuit. If the defendant had ſucceeded in his oppoſition to the rule to ſhew cauſe why the prohibition ſhould not be granted, it would even then have been for the conſideration of the court, whether, upon all the circumſtances of the caſe, that rule ſhould be diſcharged with coſts, but as he did not ſucceed in that oppoſition, it muſt be now intended that it was groundleſs, and, conſequently, there is no pretence for his being allowed the coſts thereof.

If, upon argument of a demurrer to a declaration in prohibition, a writ of prohibition be awarded as to ſome of the points contained in the libel in the court below, and a conſultation as to others, the plaintiff in prohibition ſhall have coſts.

Middleton v. Croſt, Caſ. temp. Hardw. 395 S C Andr. 57. 2 Str. 1062.

Thus, where *John Middleton* and his wife were libelled againſt in the ſpiritual court, for being married out of canonical hours, without licence or banns, and in a private houſe; a prohibition was applied for, upon a ſuggeſtion that the power of the eccleſiaſtical court was taken away by the ſtatute of 7 & 8 *W.* 3. *c.* 35. by which penalties were laid on the clergyman marrying and the parties married, without banns or licence, which penalties were to be recovered in the temporal court. In order to bring the matter fully before the court, the plaintiffs were ordered to declare in prohibition; the defendant by his plea denied (in common form) that he had proceeded in the ſpiritual court contrary to the writ of prohibition; and for a conſultation demurred generally. After joinder in demurrer by the plaintiffs, *John Middleton*, the huſband, died; however, notwithſtanding his death, the court, at the inſtance of the parties, and becauſe the eccleſiaſtical court might ſtill proceed againſt the wife, gave judgment, that the prohibition ſhould ſtand as to that part of the libel which was for marrying at an uncanonical hour, (*i. e.*) not between the hours of eight and twelve in the forenoon, and that a conſultation ſhould be awarded *quoad* the reſidue of the cauſe.

In conſequence of this judgment, application was made to the court that the Maſter might be directed to tax *Anne Middleton*, the wife, her coſts, upon the 8 & 9 *W.* 3.; but no ſuggeſtion being then made upon the roll, of the huſband's death, the court refuſed, at that time, to grant any rule.

This ſuggeſtion being afterwards made, the matter was moved again, and a rule to ſhew cauſe was granted.

For the plaintiff, the caſe of Dr. *Bentley* and the Biſhop of *Ely* was cited, where, in a ſuit in prohibition in this court, judgment was given that the prohibition ſhould ſtand as to all the articles, concerning which the Doctor was libelled below; but, upon a writ of error in the Houſe of Lords, that judgment was reverſed, and a new judgment given,—That the prohibition ſhould ſtand as to part of the articles, and a conſultation go as to the reſt, and there it came to be debated, whether the plaintiff in prohibition was entitled to coſts, he having judgment only for part? and this was ſolemnly argued, upon a day appointed for that purpoſe, by all the judges then preſent; and finally the plaintiff had judgment thereupon for his coſts.

Vide 4 Bro. Parl. Caſ. 66.

Upon the firſt argument of the principal caſe, the whole court were clearly of opinion, that where a prohibition goes to part, and a conſultation to other part, the plaintiff in prohibition is entitled to coſts. And Lord *Hardwicke*, then Chief Juſtice of this court, obſerved, that this caſe was

was within the very words of the ſtatute of 8 & 9 *W.* 3. *c.* 11. § 3. which are, *if the plaintiff obtain judgment, or any award of execution after plea pleaded, or demurrer joined*; and the ſtatute only provided for the defendant's recovering his coſts in ſuch ſuits where the plaintiff ſhould become nonſuit, ſuffer a diſcontinuance, or a verdict ſhould paſs againſt him; neither of which was the caſe here. And as to the *quantum* of the coſts, he ſaid, that though it was an equitable conſtruction of the ſtatute, to give coſts from the firſt motion; yet, where a conſultation was awarded as to part, it was in the diſcretion of the court, upon the circumſtances of the caſe, whether they would allow coſts for that time or not. Hil. Term, 10 Geo. 2.

However, it being objected, that the death of the huſband before judgment had abated the ſuit, no rule was then made for coſts, but the court ordered this point to ſtand over for further argument.

Accordingly, this queſtion was argued in a ſubſequent term, when the court were unanimouſly of opinion, that in this caſe the circumſtance of the huſband's death, previous to the judgment, was not an abatement of the ſuit, even at the common law; or, if it was, that it was clearly aided by the 8 & 9 *W.* 3. *c.* 11. § 7. And thereupon they made the rule for the allowance of coſts to the wife abſolute; and added, that ſuch coſts muſt be allowed from the time of the original motion for the prohibition. Andr. 62.

So it hath been determined, that a defendant in a ſuit in prohibition is entitled to coſts, where a verdict is found for him, though it be for part only of the matter in iſſue, and a conſultation be awarded for the reſidue. Malton v. Acklam, Barnes, 138

If, in a ſuit in prohibition, the plaintiff be obliged to declare as adminiſtrator, (as if the prohibition be granted to a ſuit, in the ſpiritual court againſt the plaintiff as adminiſtrator, for tithes due in the inteſtate's lifetime,) and become nonſuit at the trial, he is not liable to the payment of coſts. Creek v. Pitcairne, Caſ. Pr. C. P. 157. Pract. Reg. 118.

A plaintiff in prohibition is entitled to coſts, by the ſtatute of 8 & 9 *W.* 3. *c.* 11. only where he obtains judgment after plea pleaded, or demurrer joined; but, if there be judgment by default in a ſuit in prohibition, and the plaintiff have damages upon a writ of inquiry for the contempt in proceeding after the writ of prohibition delivered, he will be entitled to coſts, by virtue of the ſtatute of *Glouceſter*, *c.* 1.: this was determined in the following caſe.

Upon a motion to ſet aſide a writ of inquiry of damages in prohibition, after judgment by default, upon which the jury had found damages for the plaintiff, it was alleged on the part of the plaintiff that the citing him to appear in the ſpiritual court in a plea of which that court has no cognizance, and whereby the plaintiff may ſuſtain great damage, is a contempt of the laws of the land, and therefore the defendant ought to make the plaintiff ſatisfaction for the damage ſuſtained by the proceedings in the court below; and this the defendant tacitly admits, by ſuffering judgment to go againſt him by default. And if the plaintiff be entitled to damages, he is alſo to coſts, under the ſtatute of *Glouceſter*. Sir E. Bettinſon v. Dr. Hinchman, Caſ. Pr. C. P. 10. S. C. B. N. P. 331. Lill. Ent. 320. Acc. Raym. 387. 2 Jon. 128. 1 Vent. 337. 348. 350. 3 Lev. 360.

The court inclined to be of this opinion, but took further time to conſider of the matter. On a ſubſequent day, the queſtion was ſolemnly argued; after which the court gave the plaintiff leave to proceed on his inquiry, and directed the prothonotary to tax his coſts. But becauſe, in this caſe, the defendant was proſecuted for a contempt at common law, as judge of the ſpiritual court, and he could not poſſibly be in contempt until the

rule

rule was made abſolute to ſtay his proceeding, the coſts were allowed only from the time that the rule for the prohibition was made abſolute.

Hull. on Coſts, 322.

It ſhould ſeem that the caſe reported, by the name of Sir *Edward Bettiſon* v. *Savage*, in *Com.* 335. is the ſame with that above ſtated; though it muſt be confeſſed, the reports differ very widely in ſeveral material points.

According to *Comyns*, the plaintiff having declared in prohibition, the defendant, *quoad* any proceeding ſince the writ of prohibition delivered, pleaded not guilty, and for a conſultation demurred: there was judgment for the plaintiff upon the demurrer, and upon a writ of inquiry of damages in that iſſue, the jury found 2*d.* damages. And the court were of opinion, the plaintiff ſhould have coſts; and, upon error in the King's Bench, this judgment was affirmed. And, afterwards the reporter adds, a writ of error was brought in parliament, which was dropped upon his perſuaſion that it was reaſonable, and agreeable to the authorities in law, that the plaintiff ſhould have coſts.

Facy v. Lange, Cro. Car. 559. S. C. 1 Rol. Abr. 516. 575. Jon. 447. *Vide* 1 Str. 485. 8 Mod. 1.

If one of the iſſues joined upon a declaration in prohibition be, whether the defendant hath proceeded in the ſpiritual court ſubſequent to the granting of a writ of prohibition, and, at the trial, it be found againſt the defendant; or if, in an attachment upon a prohibition, it be found that the party proceeded after the writ of prohibition awarded, the plaintiff, in both caſes, is entitled to recover damages and coſts for the contempt.

If defendant in prohibition compels the plaintiff to declare, and then pleads a nugatory plea, the court will on motion, order him to pay coſts to the plaintiff.

Seed v. Wolfenden, Barnes, 148

Thus, at the defendant's inſtance, it was made part of the rule for a writ of prohibition, that the plaintiff ſhould declare in prohibition. The defendant afterwards demanded a declaration, and threatened a *nonpros* for want thereof. Whereupon the plaintiff's agent prepared a declaration, but when it was ready, he was told by the defendant's agent that he need not deliver it; however, having been at the trouble and expence of preparing it, he delivered the ſame, and demanded a plea. Defendant pleaded nothing to the merits, but only that he did not proceed in the ſpiritual court after the prohibition, gave a rule to reply, and demanded a replication. Upon which the plaintiff obtained a rule for the defendant to ſhew cauſe why he ſhould not pay the plaintiff the coſts of the proceedings in prohibition. The rule was now made abſolute. The court looked upon the plea to be a ſham nugatory plea, not being to the merits of the cauſe; the allegation that the defendant has proceeded contrary to the prohibition, is, and muſt be put into every declaration of this kind; but whether he has ſo proceeded or not, is totally immaterial. The ſtatute 8 & 9 *W.* 3. *c.* 11. gives coſts after plea pleaded, or demurrer, but this is not a plea within that ſtatute.

But, though a plaintiff in prohibition may have prepared, and actually tendered a declaration to defendant, proceedings ſhall be ſtaid without coſts, where the defendant is deſirous of ſubmitting without further litigation.

Gegge v. Jones, 2 Str. 1149.

Thus, upon ſhewing cauſe againſt a prohibition, the court made the rule abſolute, with a direction that the plaintiff ſhould declare in prohibition. He tendered a declaration, but the defendant refuſed it, and applied to ſtay proceedings, as being willing to ſubmit. The plaintiff inſiſted

ed he had a right to go on, in order to get at the coſts of the motion, which he could not otherwiſe have. But the court ſtaid the proceedings *without* coſts; ſaying, the direction to declare was in favour of the defendant, who might waive it.

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(*A prohibition*) Rolle adds, "or on the laſt day but one." Gibſ. 1029. 3 Burn's Eccl. Law, 213.

(F) When to be granted abſolutely, or *quouſque* only; and therein, of directing the Party to declare on his Prohibition.

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(*On* (*b*) *motions*) (*f*) But, if the court be clearly of opinion that there is no ground for a prohibition, it ought to be denied, without putting the defendant to expence, and delaying in the mean time the exerciſe of what appears to them a lawful juriſdiction. For this denial is not concluſive to the plaintiff. If there is no juriſdiction, the ſentence will be a nullity, and upon any attempt to excuſe or enforce it, the whole may be tried in an action (*g*). The plaintiff may alſo apply to any other court in *Weſtminſter-hall* for a prohibition, and take their opinions. *Per* Lord *Manſfield.*

(*f*) Saint John's College v. Todington, 1 Burr. 198-9.

(*g*) Lindo v. Rodney, Dougl. 620.

If however the court incline in favour of the prohibition, the defendant has, it ſeems, a right to put the plaintiff to declare: and having ſuch right he may of courſe waive it, and, after a rule given to declare, ſubmit and ſtay proceedings.

1 Burr. 198 2 Str. 1149. Gegge v. Jones.

Where the party is ordered to declare in prohibition, he ought not to take out the writ, for ſerving the other ſide with a rule is ſufficient; and if in that ſuit he obtain judgment, the judgment is *ſtet prohibitio*, otherwiſe it is *eat conſultatio*; therefore if the party be excommunicated, the mandatory part of the writ to abſoil the party is not to be obeyed till after trial had.

Dean and Biſhop of Wells, Mich. 25 Geo. 2.

The declaration in prohibition is a *qui tam* declaration, for it ſuppoſes a contempt to the king in proceeding after the writ delivered. But the contempt is merely form, not traverſable, and no verdict need be given about it.

12 Co. 61. Statford v. Neale, Str. 482. Seed v. Wolfenden, Barn. 148.

Where an iſſue is joined in a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they ſhall give no more than 1*s.* damages; for it is in nature of an iſſue to inform the conſcience of the court: but, after he has had judgment, *quod ſtet prohibitio*, he may bring his action upon the caſe, and recover the damages he has ſuſtained.

Carter v. Leeds, M. 2 G. 2.

In tithe caſes, and matters of ſuch ſort, where many things are in controverſy, it is frequent to order the prohibition to ſtand as to part, and a conſultation to go as to the other part.

1 L. Raym. 59.

(G) Whether more than one ſuch Writ is to be awarded.

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(*If upon the*) See Com. Dig. tit. Prohibition. (K. 4.) *contr.*

A prohibition

Owen v. — 2 Show. 195. A prohibition was granted in a ſuit for tithes, upon a ſuggeſtion that the lands were barren and newly improved, and a trial had on the declaration in prohibition, and a verdict for the plaintiff that the lands were not barren, on which a conſultation was granted, and he obtained ſentence. From the inferiour court there was an appeal to the Arches, and an allegation entered that the land was barren; and the court there were proceeding to reverſe the ſentence, becauſe barren land, though contrary to the verdict at law; upon which a prohibition was granted *quoad* the allegation of barren land.

(H) At what Time to be granted; And herein, in what Caſes it may be granted after Sentence.

(*It is clearly*) Ca. temp. Hardw. 317. 1 Burr. 314. 2 Burr. 813. 3 Burr. 1922. 2 Str. 1133. 4 Burr. 2037. Cowp. 424. Either never had any at all, or have exceeded that which they had. 3 Term Rep. 37. Prohibition will be granted to a court of appeal where it appears that they have no juriſdiction over the ſubject-matter even after they have remitted the ſuit to the court below, and awarded coſts againſt the appellant, if they are proceeding to enforce the payment of theſe coſts. Darby v. Coſens, 1 Term Rep. 552. On a libel to charge a man to repair a church in reſpect of a light-houſe, a prohibition was granted after ſentence, and an appeal to the Delegates. Sir Iſaac Rebow v. Bickerton, Bunb. 81.

Offley v. Whitehall, Bunb. 17. If a man libels in the ſpiritual court for tithes in kind, and the defendant below ſuggeſts and inſiſts upon a modus, *there*, the ſpiritual court have no juriſdiction to try the modus, their method of trial of preſcription being different from ours: but, if a man libels for a modus, and the defendant admits the modus, the ſpiritual court may proceed in the cauſe. But even in the firſt caſe, if the party permit the ſpiritual court to proceed to ſentence, he comes, *then*, too late for a prohibition, it being *pro defectu triationis* only: but a party can never be too late, where it is *pro defectu juriſdictionis*.

(I) To what Courts a Prohibition may be awarded: And herein, that the Superiour Courts are to determine the Boundaries of all Inferiour Juriſdictions.

Page 250
(*Hence prohibitions*) So they are grantable to naval and military courts martial. 2 H. Bl. 100.

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(*So a prohibition*) A prohibition will go, where viſitatorial authority is uſurped. Reg. 40. b.

(K) Prohibitions to Inferior Temporal Courts in what Inſtances to be granted.

Page 254
(*But in the*) See acc. Cro. J. 296. 1 Term Rep. 552. 3 Term Rep. 3. 315.

Home v. Earl of Camden, 1 H. Bl. 487. 4 Term The miſinterpretation of a ſtatute by an inferior court, the conſideration of which ariſeth incidentally in the courſe of a proceeding, which is confeſſed to be within its juriſdiction, ſhould ſeem to be rather a matter of appeal than a ground for a prohibition. But clearly in ſuch a caſe a prohibition

prohibition will not lie, unleſs it be made appear to the ſuperior court, that the party applying for the prohibition, has, in the courſe of the proceedings in the inferiour court, alleged the grounds for a contrary interpretation of the ſtatute on which he applies for a prohibition, and that the inferior court has proceeded notwithſtanding ſuch allegation. Rep. 382. 2 H. Bl. 533.

As no right is veſted by any of the prize acts in the captors of an enemy's ſhip and cargo in war, before the ultimate adjudication of the courts of prize; it follows, that the iſſuing of a monition to the prize agents by the court of commiſſioners of appeals in prize cauſes, to bring in the proceeds of a ſhip and cargo, which have been ſold, after a ſentence of condemnation as lawful prize, but from which ſentence there is an appeal, (on a ſubject diſtinct from the queſtion, whether prize or not, which is not diſputed,) cannot be a ground for a prohibition to that court, for the monition neither interferes with nor defeats any veſted rights. *Id.*

(L) Prohibitions to the Spiritual Court in what Inſtances: And herein.

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(*So, if a vicar*) The bounds of pariſhes, though coming in queſtion in a ſpiritual matter, ſhall be tried in the temporal courts. This is a maxim in which all the books of common law are unanimous; though our provincial conſtitutions expreſsly mention *Limites parochiarum* among the matters *quæ merè ad forum eccleſiaſticum pertinere noſcuntur*, and *quæ non poſſunt ad forum ſeculare aliquatenus pertinere*, complaining of this as one incroachment, among others, which the temporal courts were making upon the ſpiritual at that time. Gibſ. Cod. 239.

(*But, if the*) 1 Sid. 89. S. C. 1 Keb. 369. S. C. 2 R. Abr. 312. pl. 7. S. P. But ſee Gibſ. Cod. 239.

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(*There are*) The ſame law of an apparitor, Pearſon v. Campion, Doug. 629.

Where a perſon is ſued in the eccleſiaſtical court for a ſeat in the church, if he would obtain a prohibition, and ouſt the ordinary of juriſdiction, he muſt ſhew ſuch a legal title as cannot be tried in the eccleſiaſtical court, which can only be by *preſcription*, and *preſcription* can in ſuch caſe be no otherwiſe proved than by ſhewing repairs; therefore, in a declaration in prohibition, the plaintiff regularly ought to ſet out a cuſtom of repairing; but, if he do not, and if the defendant do not demur, but go to trial, it will be aided by the verdict, for the plaintiff ought not to have a verdict, unleſs he proves a cuſtom to repair. Stedman v Hay, Com Rep. 368.

If a churchwarden has made up his accounts, and had them allowed at veſtry; if there is a libel againſt the churchwarden in the ſpiritual court, relating to his accounts, a prohibition ſhall go. Nutkins v. Robinſon, Bunb. 247. Snowden v. Herring, *Id.* 289.

2. Where they determine on a Matter of Freehold.

A prohibition was granted to a ſuit in the ſpiritual court for breaking a church-wall, and cutting down the boughs of a tree in a church-yard; for the reſtor having a freehold in him has a right to bring his action, whereby the party would be ſubjected to a double proſecution. Beſides, the ordinary cannot puniſh a treſpaſs committed on the body of the church, unleſs it hinder divine ſervice. Binſted v. Collins, Bunb. 229.

(*So*

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(*So. although*) So, a prohibition ſhall not go to ſtay a ſuit for a mortuary, unleſs the cuſtom hath been denied in the ſpiritual court. Johnſon v. Oldham, 1 Ld. Raym. 609. 12 Mod. 416. S. C. Churchwardens libel againſt the rector, that there hath been time out of mind, and is, a chapel of eaſe within the pariſh; and that the rector of the pariſh, time out of mind, hath repaired and ought to repair the chancel of the ſaid chapel; and that the chancel being out of repair, the defendant, being rector, hath not repaired it. The rector denied the cuſtom in the ſpiritual court, and a decree was made for the rector, that there was no ſuch cuſtom, and coſts were taxed there for the rector. The churchwardens moved there for a prohibition; and it was argued for the prohibition, that it ought to be granted, becauſe it appears that the libel is upon a cuſtom, which the defendant hath denied; and it may be, the queſtion was in the ſpiritual court, cuſtom or not, which is not triable there, but at the common law; and then this appearing upon the libel, that the court hath not juriſdiction, a prohibition may be granted after ſentence. But all the court held the contrary. For by Holt, C. J.—The reaſon for which the ſpiritual court ought not to try cuſtoms is, becauſe they have different notions of cuſtoms, as to the time which creates them, from thoſe which the common law hath; for in ſome caſes the uſage of ten years, in ſome twenty, in ſome thirty years, make a cuſtom in the ſpiritual court; whereas by the common law it muſt be for time immemorial. And therefore ſince there is ſo much difference between the laws, the common law will not permit that court to adjudge upon cuſtoms, by which in many caſes the inheritance of perſons may be bound. But, in this caſe, that reaſon fails; for the ſpiritual court is ſo far from adjudging, that there is any ſuch cuſtom which the common law allows, that they have adjudged that there hath not been any cuſtom allowed by their law, which allows a leſs time than the common law to make a cuſtom. And the plaintiffs having grounded their libel upon a cuſtom, which was well grounded if the cuſtom had not been denied, (for libels there may be upon cuſtoms,) but the cuſtom being denied and found no cuſtom, it is not reaſon to prohibit the court in executing their ſentence againſt the plaintiffs. For the deſign of the motion for a prohibition, is only to excuſe the plaintiffs from coſts. And there is no reaſon but that they ought to pay them; ſince it appears, that they have vexed the defendant without cauſe.—Churchwardens of Market Boſworth v. the Rector of Market Boſworth, 1 Ld. Raym. 435.—The vicar of *N.* was libelled againſt in the ſpiritual court, for that by cuſtom out of mind, the vicars of *N.* had, by themſelves or others, ſaid and performed divine ſervice in the chapel of *C.* for which there was ſuch a recompence, and that he neglected. The defendant came for a prohibition, and without traverſing this cuſtom, ſuggeſted, that all cuſtoms were triable at common law. And it was urged, that it was enough for a prohibition, that a cuſtom appeared to charge the vicar with a duty, for which he was not liable of common right. But by Holt, C. J.—A parſon may be bound to an eccleſiaſtical duty by cuſtom, and when he is bound by cuſtom, the ſpiritual court may puniſh him if he neglects that duty: the cuſtom might have a reaſonable commencement by compoſition in the ſpiritual court, and begin by an eccleſiaſtical act; and a bare preſcription only is not a ſufficient ground for a prohibition, unleſs it concerns a layman; whereas here, it is an eccleſiaſtical right, an eccleſiaſtical perſon, and an eccleſiaſtical duty, and the preſcription not denied. Jones v. Stone, 1 Ld. Raym. 578. 2 Salk. 550. S. C. And if the ſubject of the ſuit be within the juriſdiction of the ſpiritual court, the mere ſuggeſtion of a cuſtom in the pleadings there, if they do not go on to try it, will be no ground for a prohibition. Dutens v. Robſon, 1 H. Bl. 100.

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RELEASE.

(A) Releaſes that are expreſs and by Deed: And herein,

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(*So, in another*) See the caſes of Sibthorp v. Moxom, and Toplis v. Baker, v. 4. p. 387-8.

Maitland v. Adair, 3 Vez. jun. 231.

In the will of *John Adair* was the following clauſe: "I deviſe to my "brother, the Rev. Mr. *Adair*, 2000*l.* I alſo return him a bond for "400*l.* with intereſt due thereon, which he owes me." It appeared by the

the Maſter's report, that the above bond was a joint bond in the *Scotch* form by the teſtator's brother and his ſon. The queſtion was, Whether this diſpoſition of the bond by the will amounted to a releaſe, or was only a legacy, and therefore lapſed by the death of the teſtator's brother in his lifetime, and the bond was ſtill remaining in force againſt the co-obligor and executor of his father? Lord Chancellour—There is not the leaſt doubt as to the bond. It is diſtinctly a legacy to the brother. The inquiry directed, whether it remained in the hands of Mr. *Adair*, ſhews what the court thought at the hearing. There is no foundation therefore for *Thomas Adair*, the ſon, to have the bond delivered up.

(B) Releaſe by Operation of Law, how created, and the Effect thereof.

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(*If the obligor*) And the bare appointment of a creditor to be executor, if he refuſe to act, will not extinguiſh his legal remedy for the recovery of his debt. Rawlinſon v. Shaw, 3 Term Rep. 557.

A teſtator bequeathed to his brother 500*l.* and the like ſum to his nephew, and appointed them his executors. The brother was indebted to the teſtator 7000*l.*, and the nephew was indebted to him 1000*l.* at the time of his deceaſe. A bill being filed by the next of kin, praying an account of the perſonal eſtate of the teſtator, and particularly of the ſums in which the executors were indebted to him, and payment of the ſame to the plaintiffs; it was contended on behalf of the defendants, that the appointment of the brother and nephew executors was an extinguiſhment of the debt: that this was clearly ſo at law; and that there is no caſe, in equity, where it has been holden otherwiſe, except where there has been a direct gift of the reſidue: as in the caſe of *Brown* v. *Selwin*, *ca. temp. Talb.* 240.; and even there, Lord *Talbot* ſpoke of it as an undecided point: but that there was no caſe where it had not been holden an extinguiſhment againſt the next of kin. But Lord *Thurlowe* ſaid, he thought it had been a ſettled point in a court of equity, that the appintment of the debtor executor, was no more than parting with the action; and declared it a truſt for the next of kin. Carey v. Goodinge, 3 Br. Ch. Rep. 110.

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(*Alſo where*) It is now ſettled, that ſuch a bond may be enforced *at law* againſt the heirs of the huſband. Milbourne v. Ewart, 5 Term Rep. 381. and Hayes *ex dim.* Foord, there cited, v Foord.

(C) Releaſes of Lands and Hereditaments how they enure: And herein,

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(*And according*) But 48 E. 3. 9. ſeems to the contrary, becauſe when the tenant pleads the diſſeiſin to compel the lord to avow upon him, it is ſtrange, that the lord, by his own act of acceptance, ſhould maintain his avowry, and deſtroy the feudal contract. Gilb. Ten. 64, 65.

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(*So if there*) But tenants in common cannot releaſe to each other, the freehold being ſeveral.

(E) Of

(E) Of Releaſes by Executors and Adminiſtrators.

Page 280
(*In the caſe*) The law, however, is as ſtated in the text; the opinion of Lord Hardwicke in Hudſon v. Hudſon was applicable only to the particular circumſtances of that caſe. Jacomb v. Harwood, 2 Vez. 265.

(F) How far the Husband's Releaſe ſhall bind the Wife.

See vol. I. p. 286, 7, 8, 9.

(H) How far a Poſſibility or Contingent Intereſt may be releaſed.

Page 284
(*A city orphan*) See acc. Cox. v. Bellitha, 2 P. Wms. 273. Lockyer v. Savage, 2 Str. 947. Medcalfe v. Ives, 1 Atk. 63. *Secus*, if a mere *voluntary* releaſe, Morris v. Burroughs, 1 Atk. 401.

(K) Releaſe, in what Caſes reſtrained to the ſpecial Purpoſe for which it was given.

Page 289
(*But herein the ſure rule*) 2 Vez. 310.

The Profeſſion have already been appriſed by Mr. FEARNE, *that the former collection in this Abridgment under the title* "REMAINDER," *ſeems to be an extract from a Manuſcript Treatiſe, apparently of the Lord Chief Baron* GILBERT, *upon that ſubject. In the following pages of this volume they will find the whole of that Treatiſe, which I am enabled to lay before them, by the unſolicited kindneſs of Mr.* HARGRAVE, *who, as ſoon as he was informed I was engaged in the editing of this work, was pleaſed to communicate the Manuſcript to me, with a permiſſion to print it at length. Such a favour, ſo conferred, I acknowledge with gratitude and with pride: whilſt it adds to the value of the Work, it does honour to the Editor. The parts of the Treatiſe which never before appeared in print, I have diſtinguiſhed by including them between inverted commas: the other part I have marked with a ſingle inverted comma. The additional collections of the Compiler of the Abridgment are left without any diſtinguiſhing mark: and the paſſages for which I am reſponſible are, as uſual, inſerted between crotchets.*

HENRY GWILLIM.

Remainder and Reverſion.

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"ALL that it ſeems neceſſary to obſerve by way of introduction to "the enſuing head, is, that after ſuch time as the feudal property "came to be extended and enlarged to a perpetual and durable eſtate, "and that donations were frequently made to the feudary and his heirs; "this gave him the abſolute ownerſhip and property in the feud, and, "conſequently, as abſolute a power of diſpoſing thereof to ſuch perſons, "and upon ſuch terms, as he thought fit; ſo that if he aliened the eſtate "to any perſon for life, or years, or any like intereſt, as the whole bene-"fit he intended the perſon ſhould be capable of, yet he left a reverſion in "himſelf, which being alienable, he might at the ſame time limit it to go "over to any other perſon after the firſt intereſt determined. And this "he might likewiſe limit and circumſcribe as he thought fit, and make a "further limitation over to any third perſon, and ſo on till he gave it out "in as large a manner as he himſelf enjoyed it. All the limitations after "the firſt were called 'Remainders,' either from their being a part of "what remained and was left in the donor; or, from the nature and "manner of their exiſtence, as not being to come to the perſon intended, "till after the preceding eſtates ſpent. But, becauſe upon ſuch dona-"tions made, the donors either reſerved particular ſervices to themſelves, "or in default of ſuch reſervation the law created and raiſed to them "certain duties and ſervices to be done by the tenant, as a recompence "and conſideration for his enjoying the feud: therefore the tenant could "in

Cowell; and Terms of Law, tit. "Remainder." Co. Lit. 49. a. 143. a. 26. 51. Moor, 344. Vaugh. 269.

" in no caſe alien or diſpoſe of the feud without a particular licence of his
" lord for that purpoſe, ſince this would have been a breach of that truſt
" the law had inveſted him with, and might have endangered the peace
" and ſecurity of the lord by ſubjecting him to the perſon of his greateſt
Co. Litt. " enemy. And as the tenant in ſuch caſe had no power to alien without
43. a. b. " his lord's licence, ſo neither could he alien in ſuch a manner as to
2 Inſt. 65. " leave his lord for any time, though never ſo ſmall and inconſiderable,
66. 501. " without a tenant to do his ſervices, which the lord could in no ſort be
" ſuppoſed to diſpenſe with by his licence. For beſides the danger that
" might poſſibly happen in that interval, the ſervices being created at the
" ſame time with the feud, and coming to the lord in lieu thereof, were
" to be as perpetual and unalienable as the enjoyment of that was to be.
" And ſince the ſervices to be performed were ſuch as none who were
" uncertain of enjoying the feud during their lives, would either under-
" take or think themſelves under a ſufficient encouragement to perform
" as they ought, becauſe, if they held the feud but for years, and ſhould
" happen to ſurvive thoſe years, they would then become deſtitute of a
" proviſion and ſupport for their lives, notwithſtanding all their former
" labours and ſervices to the lord; and, conſequently, from ſuch tenants
" the lord could not expect a faithful and zealous diſcharge of their du-
" ties; therefore the ſervices were always to be performed by ſuch as
" held the feud for life, at leaſt; and, conſequently, the tenant could
9 Co. 135. " not by his alienation leave the lord without ſuch a one. For this rea-
Co. Lit. " ſon it was, that if a leaſe was made for years, remainder to the right
269. a. b. " heirs of *J. S.* there would be no tenant of the freehold to do the ſer-
" vices. So, if a leaſe were made for life, or a gift in tail, to begin at a
" future day or time, ſuch leaſe or gift were made void; for until the
" commencement, the leſſee or donee would have nothing, and conſe-
" quently, be under no obligation to do the ſervices: and the leſſor or
" donor in the mean time having parted with their intereſt *pro tanto*
" would be regardleſs of the ſervices. To prevent, therefore, this in-
" convenience and danger to the lord, the law adjudged ſuch leaſe, gift,
" or remainder to be void; and, conſequently, the firſt tenant continued
" tenant ſtill to the lord, and as ſuch was obliged to a performance of
" the ſervices. Theſe reaſons, though they now ſeem antiquated, may
" perhaps be of equal force with the reaſon now commonly urged from
" the danger of ſuffering the freehold to be at any time in abeyance, ex-
" pectance, or ſuſpence, becauſe the rights of ſtrangers would ſuffer
" thereby for want of a perſon in the mean time to charge with a præcipe
" for recovery thereof. But yet it was not abſolutely neceſſary, that the
" eſtate of freehold or inheritance ſhould be the preſent and only ſubſiſt-
" ing intereſt: for if a leaſe were made for years, remainder for life, or
" in tail, and livery thereupon, this remainder was good; for here was
" no time wherein the lord was without a tenant of the freehold, and
" his being obliged to all the feudal ſervices might perhaps be one reaſon
" why ſo little regard was had to the intereſt of the leſſee for years, he
6 Co. 57, 8. " being no ways able to controul or impeach the acts or diſpoſition of the
" freeholder.

" Another thing obſervable is, that as the tenant could in no ſort alien
" without his lord's licence, nor could that licence be ſo interpreted as
" to deprive the lord of a tenant qualified to do his ſervices, ſo, when
" he had, by a ſufficient proviſion, taken care of his lord, he might
" then carry over the diſpoſition to any other perſon as far as he pleaſed.

" For

" For it would have been unreaſonable to compel him to aſſign over the " whole fee to any other perſon, when no exigencies of the tenure re- " quired it, and would alſo have taken away his power of providing for " others, whom he might lie under equal obligations to take care of. " Hence came the notion of remainders; and the reaſon why they were " to be limited and paſs out of the grantor at the ſame time with the par- " ticular eſtate, ſeems to ariſe from the nature of the licence formerly " given for alienation. For as the tenant could not alien at all without 1 Weſt. " his lord's licence, ſo neither could he alien for any longer time, or to pl. 567. " any other perſon, than ſuch licence warranted. Therefore, if he had " a mind to diſpoſe of the feud to ſeveral perſons in ſucceſſion, he was to " procure a licence for that purpoſe, and by proper limitations to let in " all perſons within the benefit of it at the ſame time, leſt by death or " otherwiſe he might be afterwards prevented from purſuing it. And " theſe remainders are now limited of ſuch ſorts of inheritance as will " not come within the rules of this reaſoning. And though licences " for alienation are ceaſed, yet it has been thought fit to obſerve the " rules deducible therefrom in the limiting and ſettling of ſuch remain- " ders. But, before we enter into a particular diviſion of this head, it " will be neceſſary to obſerve further, that anciently the tenant being poſ- " ſeſſed of the entire property in the feud, might, upon his alienation in " fee, have erected a ſeignory to himſelf, to ariſe out of the tenancy. " And this practice was encouraged, becauſe it multiplied feudal tenants, " and brought greater force into the field. But, though theſe ſeignories " were ſo far in the nature of reverſions, that upon determination of the " tenancy in fee by eſcheat or forfeiture, the tenancy came back again to " the firſt tenant, and he became ſeiſed thereof in fee as he was before; " and though the ſeignories themſelves were then alienable, as the re- " verſion now is, and carried with them the rents and ſervices, as a grant " of the reverſion now does; yet, whether they might have then limited " a remainder over upon a tenancy in fee, as they may now do, where " the reverſion would otherwiſe veſt in themſelves, is uncertain, ſince " there was no reaſon of convenience to multiply ſuch remainders, though " they found it convenient to multiply ſuch ſeignories. But, however it " happened before the ſtatute of *quia emptores*, yet, after that ſtatute, no " one could have diſpoſed of the fee without a remainder upon it. For " the fee in all caſes by that ſtatute was to be holden of the firſt feudal " lord; and, conſequently, the tenant, who made the alienation, had " nothing further to expect in the tenancy either as a ſeignory, reverſion, " or eſcheat; but theſe now belonged to the firſt feudal lord, and there- " fore the tenant could not diſpoſe of what belonged to another: for " the reaſon of making that ſtatute was, that the tenant might not erect " ſeignories to himſelf to prevent the eſcheat to his lord: hence it plain- " ly followed, that every remainder muſt depend upon a particular and " leſs intereſt than the fee, and therefore was confined to three caſes " viz. to eſtates for years, which is the leaſt certain intereſt the law " knows, to eſtates for life, and to eſtates-tail. The eſtates for years " and for life were the ancient ones at common law, and were the terms " for which people uſually diſpoſed of the feudal intereſt: the eſtate-tail " came in upon the conſtruction of the ſtatute *de donis*, which made " the inheritance to be certainly deſcendible. And when the ſtatute " *quia emptores* followed it ſo near, they then conſtrued the fee conditi- " onal in the donee to be an eſtate-tail, and the ancient ſeignory in the

Co. Litt. 22, 23. a. 2 Inſt. 335. " donor to be a reverſion. If they had not made ſuch conſtruction, the " ſtatute of *quia emptores* had ſhut out the donor, which had been to car- " ry the matter farther than either ſtatute intended; and therefore to pre- " ſerve the force of both ſtatutes, that which was before called a ſeignory, " was now called a reverſion, that the donor might have his own intereſt " preſerved, and yet not be ſaid to erect an intermediate ſeignory be- " tween him and his lord. which the ſtatute of *quia emptores* had forbidden. " And all this plainly ſhews, that a ſeignory and reverſion are in their " own nature much the ſame.

(B) What Words are ſufficient to create a Remainder.

1. Of the Propriety of the Words made uſe of to paſs the Remainder.

2. Of the Deſcription or Deſignation of the Perſon who is to take the Remainder.

(M) Of veſted Remainders, and of the particular Eſtate to ſupport them in their creation; how long it muſt continue; and when by Determination, Grant, or Refuſal thereof, the Remainder is diſcontinued, barred, or deſtroyed, and when not.

(A) Of what Things a Remainder may be made.

" ALL that it ſeems neceſſary to obſerve for explaining and clearing this " point will be reſolved by putting a caſe or two, wherein it has been " holden doubtful if the remainder were good.

" A man ſeiſed of lands in fee grants thereout a rent-charge to one for " life or years, remainder over to another in fee or in tail, *&c.* It was " doubted, whether this remainder were good, becauſe this rent had no " exiſtence at all before the grant; and the grantor cannot be ſaid to have " any part of the rent left in him, as he would of land, becauſe he firſt " gave being to the rent, and bounded the time of its exiſtence, which " being run out, nothing thereof remains to grant over to another; and a " remainder is to be granted out of that which would otherwiſe be a re- " verſion in the grantor, which here this rent cannot be, being newly cre- " ted. But in this caſe, by the better opinion of the books, and a judg- " ment lately in point *a*), ſuch remainder of a rent newly created has been " holden good. For, as the grantor might at firſt have granted it in fee " or for ever, having ſuch perpetual and durable intereſt in the fund out " of which it was to ariſe, ſo he may ſhare and divide the grant, and give " part thereof to one, and part to another in ſucceſſion; and the rather, " becauſe the particular eſtate and remainders are but as one eſtate, as to " the grantor, being limited to paſs out of him all at the ſame time. And " as to him, it makes no difference, whether one or more take benefit " jointly, or in ſucceſſion one after another. But (*b*), if he grant ſuch " rent for life or years, without going further, he cannot after grant the re- " verſion thereof to another, becauſe he has no reverſion in him for the " reaſons before given. The reaſon of this caſe will go likewiſe to com- " mons, eſtovers, *&c.* newly created."

Plowd. 35. a. 1 Brook, 252. pl. 8. 254. pl. 54. 58. 2 Ro. Abr. 415. pl. 2 26. 70. 76. 78. (*a*) 1 Lev. 144. 1 Sid. 285. 2 Keb. 29. (*b*) Mo. pl. 100.

But

" But before we leave this head, it may be proper to inquire into the " reaſons and practice of limiting remainders in perſonal goods or chattels; " for theſe in their own nature ſeem incapable of ſuch a limitation, becauſe, " being things tranſitory and by many accidents liable to be loſt, deſtroy- " ed, or otherwiſe impaired: beſides, the exigencies of trade and com- " merce requiring a frequent circulation thereof, it would put a ſtop to all " trading, and occaſion perpetual ſuits and quarrels, if ſuch limitations " were generally tolerated and allowed. But yet in laſt wills and teſta- " ments, ſuch limitations over of perſonal goods or chattels have ſome- " times prevailed; eſpecially, where the firſt deviſee had only the uſe or " occupation thereof deviſed to him; for then it was holden, that the pro- " perty continued in the executors of the teſtator, and that the firſt devi- " ſee had no power to alter or take it from them. But in either caſe, if " the firſt deviſee did actually give, grant, or ſell ſuch perſonal goods or " chattels, the judges would very rarely allow of actions to be brought by " thoſe in remainder for the recovery thereof. Hence it came to paſs, " that it was a long while before the judges of the common law could be " prevailed with to have any regard for a deviſe over even of a chattel real " or a term for years, after an eſtate for life limited therein, becauſe the " eſtate for life being in the eye of the law of greater regard and conſide- " ration than an eſtate for years, they thought, he who had it deviſed to " him for life, had therein included all that the deviſor had a power to " diſpoſe of. And though they have now gained that point upon the an- " cient common law, by eſtabliſhing ſuch remainders, and have thereby " brought that branch out of the Chancery, (which court frequently help- " ed the remainder-man by allowing bills to compel the firſt deviſee to give " ſecurity, &c.) yet it was at firſt introduced into the common law under " a new name, and took all the ſanction it has ſince received from thence; " an account whereof, and how far it has been carried, may be ſeen at " large in the Duke of *Norfolk*'s caſe. But, as to perſonal goods and " chattels, the common law has provided no ſufficient remedy for the de- " viſee in remainder of them, either during the life of the firſt deviſee, or " after his death; therefore the court of Chancery ſeem to have taken that " branch to themſelves, in lieu of the other which they loſt, and to allow " of the ſame remedy for ſuch deviſee in remainder of perſonal goods and " chattels, as they before did to the deviſee in remainder of chattels real " or terms for years.

37 H 6. 30. a. Dy. 7. pl. 8. 359. pl. 52. Cro. Car. 347. Plowd. 521 b. 542. b. Br. tit. Deviſe, pl. 13, 5 Co. 16, 17 1 Ro. Abr. 610. pl 4. Godolph. Abr. 356. Swinb. 137. 1 Bulſtr. 192 8 Co. 95. 2 Benl. pl. 57. 3 Ch. Ca. 1.

" Therefore, where a man deviſed 600*l.* a-piece to two daughters, " and the reſidue of his perſonal eſtate to his ſon, and if either of his chil- " dren died during their minority, the ſurvivors to be heirs to the deceaſ- " ed by equal portions; the ſon died, and the one ſiſter brought a bill " againſt the executors and the other ſiſter to have her own 600*l.* and the " half of the brother's perſonal eſtate; ſhe had a decree accordingly; but " was forced to give ſecurity to pay back her own 600*l* in caſe ſhe died " during her minority; though it was ſaid, if ſhe died during minority " leaving iſſue, it would be a hard caſe.

1 Ch. Ca. 159.

" A deviſe was made of the uſe of goods, plate, and houſehold ſtuff " to one for eleven years, and after to another, and held a good " deviſe, and a decree to deliver them accordingly after the eleven " years.

2 Ch. Rep. 137. Jolly v. Wilſ.

" So, upon a deviſe of the uſe of certain books, jewels, and rarities, " to one for life, and after of the things themſelves to another; he in the " remainder brought a bill in the lifetime of the firſt deviſee to have ſecuri- " ty for their forthcoming after the death of the firſt deviſees; and the court

1 Ch Ca. 130. Vauchell v. Lemon.

" being assisted by two judges, held the remainder good; but ordered them
" to move for the security another time."

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A farmer) [Where the things limited over are of a perishable nature, the modern way, I believe, is to direct them to be sold, and to allow the tenant for life the interest of the produce of the sale.]

2 Ch. Rep. 151. Warner v. Bootley. Swinb. 137. God. Abr. 360 Manning's case.

" But, where a man devised debts and personal estate to one, whom
" he intended executrix, for life, and after her death to another; the
" executrix died, and he in remainder brought a bill against her executor
" for the said personal estate; the bill was dismissed, and the remainder
" holden void, the first devisee being executrix, in whom the personal es-
" tate vested and attached by a right prior to the devise, and so belonged
" to her executor."

8 Co. 94. *contrà*. There, the devise is, to the executrix for life, remainder over, and the executory devise adjudged good.

1 Ch. Rep. 129. 260. 2 Ch. Rep. 66. 153. 2 Ch. Ca, 94. 2 Vent. 349.

" Where money, goods, or other personal chattels, are devised to one
" and the heirs of his body, or to one, and if he die, without heirs of his
" body, the remainder over, this remainder is totally void, and the courts
" will not allow of a bill by the remainder-man to compel security to have
" the money, *&c.* after the death of the first devisee; but it shall go to
" his executors or administrators. For the first devise gives the absolute
" property of personal estate, as a like devise of real estate before the sta-
" tute *de donis* gave a fee, upon which no limitation could be made further;
" and as the heirs are the representatives to take a real estate, so are the
" executors to take a personal estate; and this is not within the statute *de*
" *donis*, but remains at common law."

(*If A. devise*) [See Gregory v Pelham, 5 Br. P. C. 435. Duke of Brigewater v. Egerton 2 Vez. 122. 1 Br Ch. Rep. 281 notes. Duke of Marlborough v. Spencer. 5 Br. P. C. 591. Foley v. Burnell, 1 Br. Ch Rep. 274. Dom. Proc. 27 April 1785. Vaughan v. Burslem. 3 Br Ch. Rep. 101.]

2 Ch. Rep.

" But, where a devise was of money and goods to one for life,
" and if the devisee died without issue, then to go over to another, this
" was held a good devise over; for the first limitation being expres-
" ly for life, the words after could not enlarge it by implication, as
" they would a real estate, and then it falls within the common rule of
" other cases.

Pawlett v. Doggett, MSS. Gilb.

" One by will devised 1300*l.* to his daughter *A.* to be paid at her age
" of 21 years, and if she died without issue before 21, then to go over to
" *B.*, provided if she married before 21 without consent of certain persons,
" then to go over to *C.* She did marry before 21 without such consent,
" and upon a bill brought by *B.* it was decreed, that *A.* should give secu-
" rity, *&c* for the money, if she died before 21 without issue; and the
" Master of the Rolls who heard the cause said, the law was now settled
" accordingly. But there, the decree was so ordered as to serve both
" contingencies, *viz.* that upon her marriage before 21 without consent,
" the money should go to *C.*, yet so that if she died before 21 without is-
" sue, it should go to *B.* according to the devise."

(B) What Words are sufficient to create a Remainder.

1. Of the Propriety of the Words made use of to pass the Remainder.

Page 296 (*So an estate*) " And in the common limitations of settlements at this
" day, the word *remainder* is seldom used."

2. Of

2. Of the Deſcription or Deſignation of the Perſon who is to take the Remainder.

" As to the deſcription or deſignation of the perſon who is to take the " remainder, ſo far as it falls within the names of purchaſe allowed of by " law, I ſhall not here enter into it, that being equally applicable to poſſeſ- " ſions as well as remainders. All that ſeems here proper to come under " conſideration is, how far a limitation in remainder to a man's own right " heirs, or the heirs male or female of his own body, or to the right heirs " of another perſon, ſhall be good as a remainder, and how far not. As " to the limitation to a man's own right heirs, or the heirs male or female " of his own body, this is void, becauſe, ſay the books, no one can make " his own right heir a purchaſer either of a fee-ſimple or a fee-tail, with- " out departing with the whole eſtate. But this being a reaſon that car- " ries little ſatisfaction or inſtruction with it, we muſt therefore ſeek high- " er and endeavour to fetch the reaſon of it from the old conſtitution where- " on all our law ſeems to be founded, that is, from the nature of the feu- " dal tenure, and the relation that was at firſt eſtabliſhed betwixt the lord " and his tenant. And then clearly the reaſon ſeems to be this: when " donations came to be made to the feudary and his heirs, or heirs male " or heirs female of his body, under certain duties and ſervices, theſe " words, " heirs, *&c.*" being words of limitation, and appropriated to " meaſure out the length or continuance of the eſtate intended to be given, " and of the preſent tenant only, the lord could have notice how far he " would be capable of performing the ſervices, but not of the heirs, or " heirs male or female, *&c* who were not then *in eſſe*, and yet were to " be liable to the ſame ſervices, when they came into the tenancy: there- " fore the lord was to have the tuition and education of ſuch heirs, *&c.* " in caſe they happened by reaſon of their minority to be incapable of per- " forming the ſervices, that ſo he might by his care and diſcipline ſecure " to himſelf tenants always capable thereof, either in their own perſons, if " they happened to be males, or by proper marriages with his tenants, if " they proved to be females. And this was the more reaſonable, becauſe " he gave the tenancy to the heirs, or heirs male, or heirs female, *&c.* " as well as to the tenant himſelf; and all who came under that deſcrip- " tion were equally in his view, and within the words of his gift. But " now, if the tenant might have broken through this proviſion of his lord, " and have given the tenancy to his heirs, *&c.* by his own immediate gift, " then all theſe ends of the tenure had been fruſtrated and defeated; for " they coming to the tenancy, not by the donation of the lord, but by the " diſpoſition of the tenant, though they would have been ſtill liable to the " naked ſervices, yet the lord had loſt the advantages of wardſhip, marria- " ges, *&c.* which were annexed only to thoſe who came in upon the terms " of his own donation by deſcent; and ſince they, as heirs, were equally " included in the firſt donation, and upon the death of their anceſtor were " to come in, in virtue thereof, therefore the law conſtrues ſuch gift or " diſpoſition of the tenant, whether in poſſeſſion or remainder, to be total- " ly void; either for that then it came too late, the tenancy being veſted " in them immediately upon their anceſtor's death, and therefore it was " fruitleſs to give them what they had already; or to prevent the miſchiefs " that might accrue to the lord by ſettling in ſuch tenants, as for the pre- " ſent might not be capable of doing the ſervices, and for want of a pro- " per education under the lord, would never after be qualified for them

Co. Litt. 22.

And

" And this ſeems to be the true reaſon of that ſo often *decantatum* in our " books, that a man cannot make his own right heir, or heir male, or fe- " male, a purchaſer, without departing with the whole fee. And there- " fore when the tenants found that this would not do to defeat the lord of " the wardſhip and marriage of their heirs, they then found out the way " of making feoffments and other diſpoſitions to their eldeſt ſon apparent " by name in their lifetime, and then, though they died leaving him a mi- 2 Inſt. 109, " nor, and not capable of the ſervices, yet the lord loſt the advantages 100, &c. " of wardſhip, marriage, &c. But to meet with this deviſe, and others Co. Lit. 76. " of the like kind, the ſtatute of *Marlb. c.* 6. and other ſubſequent 78. " ſtatutes were made, which have ſecured the lords againſt all the 6 Co. 78. Plowd. 82. " evaſions of their tenants to defeat them of the advantages of their ſeig- a. " nory."

Dy. 156. " So, where *A.* by indenture gave lands to *B.* for life, remainder to Graſwold's " the heirs male of the body of *A.*, remainder to his own right heirs; *A.* caſe. " died, leaving two ſons; the eldeſt had iſſue a daughter, and died; it Hob. 30. " was adjudged for the daughter againſt the uncle; either, becauſe the eſ- 2 Roll. Abr 415. pl. 1. " tate to the heirs male was void, the fee being caſt upon him by the death Co. Litt. " of the anceſtor, in virtue of the firſt donation; or, becauſe, admitting 22. b. " it to be good, then it was veſted in the eldeſt ſon by purchaſe, being the Bendl. 40. 2 Leon. 25. " firſt taker, and conſequently ceaſed upon his dying without iſſue male, 2 Mod. " and then the daughter is heir of the fee-ſimple." 209.

1 Ventr. 378. 1 Roll. Rep. 239. *contrà per* Co. *arguendo.*

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(*But if a man*) [In a ſubſequent caſe, where the uſe was limited to the grantor himſelf for 99 years, remainder to the uſe of the truſtees for 25 years, remainder *to* (the uſe of) *the heirs male of his own body*, remainder to his own right heirs; the court held the limitation to the *heirs male* of the body to be void, becauſe there was no preceding freehold limited to ſupport it, and that it ſhould not be implied *contrary to the intent* of the conveyance, that there the eſtate took effect by tranſmutation of poſſeſſion out of the ſeiſin of the truſtees, and not like Fenwick (ſhould be Pybus) and Mitford's caſe, where the owner *covenanted to ſtand ſeiſed* to the uſe of the heirs of his body. And Powell, J. held, that even in that caſe, if there had been an *expreſs eſtate limited to the covenantor*, it had been different. Adams v. Savage, 2 Salk. 679. 2 Ld. Raym. 854 6 Mod. 134. S. C. So, where *A.* by marriage ſettlement conveyed certain lands to the uſe of himſelf for 99 years, if he ſo long lived and after to the uſe of truſtees for 200 years, remainder to the uſe *of the heirs male of his own body*, remainder to his own right heirs; upon a caſe referred to the judges of C. B. from the court of Chancery, they held the limitation to the heirs male of the body of *A.* void, no freehold being limited to any perſon precedent to that eſtate; and that no eſtate of freehold could *reſult to* A for his life *by implication*; becauſe another eſtate, *viz* for 99 years if, &c. was expreſsly limited to him, which would be inconſiſtent with a freehold by implication. Rawley v. Holland, Vin. Abr. tit. " Uſes," F. pl 11.]

Page 299 (*If a man makes*) " And therefore a leaſe for 1000 years made by the " feoffor was holden good againſt the heir, becauſe it took effect " out of the reverſion, which the uſe brought back to the feoffor him- " ſelf."

" And there a caſe is cited, where ſuch fine calling it a remainder was " not received: for if it were, this would be an eaſy evaſion to defeat " the lord of wardſhip, marriage, &c. of the heir, though his anceſtor " always continued ſeiſed of the ancient fee till his death, and the ſame " by priority of right attached in his heir immediately upon his death, as " included within the words of the firſt donation.

2 Br. 6. pl. 93. " If a man had made a feoffment in fee before the ſtatute of uſes, to " the uſe of himſelf for life, remainder to *A.* in tail, remainder to the " right heirs of the feoffor, and died, and then *A.* died without iſſue, the " heirs of the feoffor being within age, he ſhould be in ward for the uſe " coming

" coming to the feoffor in lieu of the land, for ſo much as was not diſ-
" poſed of ſhall be of the ſame nature with the land itſelf, and then ſuch
" a remainder of lands in poſſeſſion had been void, becauſe it veſted in
" the heir by deſcent in virtue of the firſt donation, which was the el-
" der title. And ſo it ſhall be, where it is limited by way of uſe. But, Dy. 172.
" where a man makes a feoffment in fee upon condition to re-enfeoff him, pl. 12. 237.
" and the feoffee gives it to the feoffor for life, remainder to another in pl 30.
" tail, remainder to the right heirs of the feoffor; there, in ſuch caſe, Cro. Jac.
" his heir ſhall not be in ward by the common law, becauſe, though he is 41. 2 Co.
" in by deſcent, and not by purchaſe, as ſhall appear hereafter, yet, he 92, 9 Co.
" is not in of the old reverſion; for both the fee and the uſe of it were 126. 132.
" out of the feoffor, being made to a ſpecial intent, and therefore he takes
" it by deſcent as a remainder, for this ſhuts out the lord from the ward-
" ſhip, &c. becauſe the intervening remainder upon the death of the
" feoffor is not held immediately of the lord, and ſo his anceſtor died not
" ſeiſed of the fee within the tenure of the lord; as in the other caſe of
" the reverſion he did; for that was held immediately of the lord, though
" he could not have the fruit of it till the determination of the intermedi-
" ate eſtate, But in the other caſe, if the remainder-man in tail had died
" without iſſue, living the feoffor, then clearly upon his death, his heir
" would be in ward, becauſe his anceſtor died ſeiſed within the homage
" and fee of his lord. But this point of the wardſhip belongs to another
" head, and therefore no further occaſion to explain it here.

" If one makes a feoffment in fee to the uſe of himſelf for life, or in Co. Litt.
" tail, remainder to the uſe of the feoffee, yet the feoffee hath no reverſi- 22. b
" on, but it is in nature of a remainder, although the eſtate of the feoffor Dy. 362.
" is executed by the ſtatute, and the feoffee is in by the common law, 1 Co. 137.
" which concurring with the ſtatute law ſhall be preferred, ſince that can
" give him no more than what he has already by the common law. And
" the reaſon why this is a remainder ſeems to be, becauſe the eſtate firſt
" moving from the feoffor, the uſe immediately reſulted back to him in
" fee, and then, when he limits that uſe to himſelf for life or in tail only,
" with remainder to the uſe of the feoffee, though this cannot give him
" what he has already, yet it may well ſerve to declare in what manner
" he ſhall have it; and the uſe being limited in remainder, ſo ſhall be the
" eſtate, which takes it ſupported under ſuch limitations.

" One makes a leaſe for years, rendering rent, and after by will de- 2 Leon. 33
" viſes a further term to the leſſee rendering the ſame rent, and deviſes Machell v.
" over the inheritance to a ſtranger. The queſtion was, if this ſhould Dunton.
" paſs to the ſtranger as a remainder, or a reverſion; becauſe the term
" and inheritance being both deviſed by will, which could not take effect
" till the deviſor's death, he could have no remainder of that new term,
" and conſequently could not deviſe ſuch reverſion to another. But yet
" by the better opinion, this ſhould be a reverſion, becauſe the rent would
" not be incident to it as a remainder; and in wills, the intent of the party
" is principally to be regarded. *Sed qu.* becauſe the rent may well go to
" the executors of the teſtator.

" A copyholder ſurrenders to the uſe of *A.* for life, and after to the uſe 1 Leon
" of the right heirs of the copyholder; and at another time he ſurrenders 102. Allen
" the ſaid reverſion to the uſe of *B.* in fee, and dies; and then *A.* dies; v. Palmer.
" and the heir of the copyholder enters. And by *Coke*, he may; for the Snpplem. to
" land remains in the lord till his death, and then his heirs ſhall be in by Co. Copyh.
" purchaſe, and not by deſcent; and if ſo, he had nothing in him to 3.

" make

(*a*) The diſtinction taken by

Coke is questioned by our author in his Law of Tenures (pag. 172.) and

" make a ſurrender of. And he ſaid, the difference was between this " caſe and where the ſurrender is, to the uſe of himſelf for life, remainder " to another in tail, *&c*, remainder to his own right heirs, there, his " heirs ſhall have it by deſcent. *Sed quære* of this caſe (*a*), for it ap- " pears by the books,"

alſo by Mr. Fearne, (Contingent Remaind. 86, 4th ed.)

It has indeed been recognized in the caſe of Roe v. Quartley, 1 Term Rep. 634.; but, as it is now ſettled, that the ſurrenderor of a copyhold taking the ultimate limitation is in of his *old* eſtate,

" And that in theſe caſes the heir may enter before or without admit- " tance; and it is likened to a feoffment in fee to the uſe of his laſt will, " notwithſtanding which he may diſpoſe thereof in his lifetime: And it " is alſo agreed, that a ſurrender to the uſe of the right heirs of *J. S.* who " is then living is void, or to an infant *en ventre ſa mere*, or to the uſe of " one after his death, becauſe the freehold cannot expect. And yet in " theſe caſes, if the eſtate might continue in the lord in the mean time, " they might be good; and *Coke* agrees in the principal caſe, that if the " anceſtor had taken an eſtate for life, his heirs ſhould have it by deſcent, " and not by purchaſe; therefore it ſeems to be the ſame where the law " gives him an eſtate for life, as in this caſe it does, till the future uſe " comes *in eſſe*, and then the heir cannot have it by purchaſe; and conſe- " quently the anceſtor's ſurrenders to the uſe of a ſtranger good. *Quære* " *ergo.*"

(ſee Roe v. Griffith, 4 Burr. 1952. Smith v. Trigg, 1 Str 487. Thruſtout v. Cunningham, 2 Bl. Rep. 1046.); it ſhould ſeem, that the above caſe of Allen v. Palmer is (notwithſtanding its recognition in that of Roe v. Quartley) not now law. See Watkins's Gilb. Trin. 436. Co. Copyh. 97. Suppl 3. 13. 15. 75. Cro. Ja. 3, 6.]

[2 Burr. 1106.]

" And the reaſon of theſe caſes ſeems to be, either the prejudice that " might enſue to the lord, or to the donor, by the loſs of wardſhip, mar- " riage, *&c.* if ſuch heirs ſhould be purchaſers, becauſe they then claim- " ing nothing from their anceſtor by hereditary ſucceſſion, would not be " liable to the terms and conditions affixed to the hereditary ſucceſſion " only, and then every one would make his heirs purchaſers; or from " the prejudice that might happen to the heirs themſelves, by the loſs of " ſuch remainder, if the anceſtor ſhould do any thing to forfeit or deter- " mine his eſtate for life after the determination of the intermediate eſ- " tate; for they not being capable of taking ſuch remainder when the " preceding eſtates ended, they could never after lay claim to it, and ſo " an unwary anceſtor might defeat his heir of the purchaſe; or laſtly, " from the conformity and parity of reaſon theſe bear to a limitation to *A.* " and his heirs, or the heirs male or female of his body: for, as this " gives an eſtate for life by implication and more; ſo the other gives him " the ſame in expreſs words and more *et expreſſio eorum quæ tacite inſunt nihil* " *operatur.* And though there be the interpoſition of another eſtate be- " tween them, that only breaks the order of the limitation, not the ope- " ration of the words, which being the ſame in both caſes, ought to " have in both caſes the ſame operation and conſtruction. But, if a " leaſe be made to *A.*, or a feoffment to the uſe of *A.* for years, re- " mainder to or to the uſe of *B.* for life or in tail, remainder to or to " the uſe of the right heirs, or heirs male or female of the body of *A.*, " theſe remainders are perfectly contingent and uncertain whether they " ſhall ever take place or not; for if the remainder determine living *A.* " then they are become void, becauſe *non eſt hæres viventis*, and they can- " not take during the life of *A.* and then theſe would want a tenant " of

" of the freehold, and a tenant to do the ſervices to the lord in the mean " time, which the law will not ſuffer. So, and for the ſame reaſon, if a " leaſe be made, or a feoffment in fee to the uſe of *A.* for years, remain- " der to the uſe of *J. S* who is then living, or to the wife whom *J. S.* " ſhall marry, theſe are likewiſe void. It is no objection in the caſe of the " wife, that ſhe cannot do the ſervices in her own perſon, for her huſ- " band would be obliged to do them for her, and, as a recompence, " would be tenant by the curteſy after her death."

" If a feoffment be made to the uſe of *A.* and *B.* during their joint " lives, and after the death of either of them, to the uſe of *C.* for life, " and after to the uſe of the heirs or heirs of the body of *B.*, this remain- " der is not veſted in *B.* preſently, but is in abeyance or contingency to " veſt or not to veſt as the caſe ſhall happen. For, if *A.* and *C.* die in the " lifetime of *B.*, the remainder is void, *quia non eſt hæres viventis*; and " both their eſtates are determined, and yet the remainder cannot take " effect. But, if *B* dies before *A.*, then his heirs, or heirs of his bo- " dy, ſhall have it by deſcent, as a remainder veſted in *B.*, for that upon " his death before *A.* the whole eſtate for life is gone, as if it had been " limited to *B.* only for life; and if it had been ſo limited, his heir or " heirs of his body ſhould not have taken by purchaſe for the reaſons " before mentioned

1 Roll. Abr 416. [See this doctrine controverted by Mr. Fearne in his C. R. 32, 33. 4th edit.]

" Having conſidered the relation of anceſtor and heir, let us now con- " ſider the relation of teſtator and his executors, or inteſtate and his ad- " miniſtrators, upon remainders limited to them for years: as for exam- " ple, if a leaſe be made to *A.* for life, or for 99 years, if he ſo long live, " and after his death, or after the determination of that eſtate, remainder " to his executors for 20, *&c* years, this term veſts in the teſtator him- " ſelf, and he may give, grant, forfeit, or diſpoſe thereof, as if it had " been expreſsly limited to himſelf; and if he dies inteſtate without diſpo- " ſing thereof, it ſhall go to his adminiſtrators; for the teſtator and ex- " ecutors, or inteſtate and adminiſtrators are correlatives as to chattels, " as the anceſtor and heir are for inheritances; and as heirs are properly " made uſe of for lengthening out the inheritance to the ſame perſon, ſo " are executors for lengthening out chattels to the ſame perſon; and as " heirs cannot take in the anceſtor's life, ſo executors cannot take in the " teſtator's life, becauſe neither the one nor the other can be known till " their death; and therefore as a remainder to the heirs veſts in the an- " ceſtor himſelf, where he hath an eſtate for life therein; ſo does a re- " mainder to the executors veſt in the teſtator himſelf where he had be- " fore any int reſt limited to him. But, as heirs may be in ſome caſes a " word of purchaſe, ſo may executors be ſo. Therefore if one make a " leaſe to *A. for* 99 *years, if he ſo long live, and if he die within the term, or during the term, then to his executors or aſſigns for* 40 *years*, in this " caſe, his executors or aſſigns take by purchaſe upon the contingency of " his dying within or during the term; for, if he ſurvives it, they ſhall " not take at all. And though in this caſe the term be expreſsly made " determinable upon his death, and therefore he cannot properly be ſaid " to die within the term, or during the term, ſince that dies with him, " and his death is the determination of it; yet, it being at firſt granted " for 99 years, if he ſo long live, his not living ſo long may well be " made the condition of the veſting of a remainder to another; and it " being uncertain, whether he will live ſo long or not, ſo is the veſting of " the remainder uncertain; and by conſequence, it cannot veſt in the

1 Roll Abr 911. (3) 2 Roll. Abr. 418. Co. Litt. 44 b. 319. b. 1 Co. 134. Br. Abr. 37 p. 17. Cro. Eliz. 658. 666. 840. Moor, 1. 911. Yelv. 9. 85. Spark, v. Spark, 2 Roll. Abr 47. pl. 6. Moor, pl. 244. 459 4 Leon. 239 Noy, 32. Owen, 125.

" teſtator

" teſtator himſelf, ſince he muſt be dead before it can be known, whe-
" ther it will veſt at all; and then the executors or adminiſtrators, if
" they ſhall be conſtrued within the word aſſigns, being the firſt takers,
" ſhall have it by purchaſe. Another reaſon for their taking by purchaſe
" in this caſe may be, that the owner intended not to part with the land
" any longer, if the firſt leſſee outlived the 99 years; but, if he died
" ſooner, then he was willing to grant it out for a longer time, and there-
" fore likewiſe the remainder was contingent.

2 Leon. 7. Dy. 309. b. " If one make a leaſe for life to *A.*, remainder to his own executors
" for years, this remainder is good, and the executors muſt take it by
" purchaſe; for a man cannot limit ſuch an eſtate to himſelf, and there-
" fore the term ſhall be in abeyance till his death. And this was con-
" ſtrued to be a contingent remainder in the executors, becauſe it cannot
" be to the party himſelf, for two reaſons: 1ſt, Becauſe he cannot be
" grantor and grantee to himſelf; and therefore where there are not pro-
" per parties, the one to convey, the other to take a right, the grant were
" itſelf a nullity, and would be of no ſignificance, if it were not conſtrued
" a contingent limitation to the executors. 2dly, Becauſe having the
" old reverſion, this term, if raiſed to the party himſelf, would be mer-
" ged, and therefore that the party's intentions may take place, it was
" conſtrued a contingent limitation to the executors.

Cro. Eliz. 666. Moor, pl. 244. Dy. 309. in marg. 314. 1 Leon. 346. 2 Leon. 5. 3 Leon. 20. " And here the difference is between where a ſtranger limits an eſtate
" for life, the remainder to the executors of the tenant for life, for there
" the term for years in remainder is veſted in the tenant for life, becauſe
" the word executors is no more than a prolongation of his intereſt; and
" where a man limits an eſtate to himſelf for life, the remainder for years
" to his own executors, there, ſince it cannot, for the reaſons before men-
" tioned, admit of that conſtruction, therefore it is a contingent term in
" the executors, who take it by purchaſe. But, where ſuch limitation is
" expreſsly mentioned to be for the performance of the will, they do not
" take *jure proprio*, but as aſſets to fulfil the intention of the teſta-
" tor.

Moor, pl. 459. 1024. " One levied a fine to the uſe of himſelf for life, remainder to the uſe
" of his wife for life, remainder to the uſe of his executors for 20 years,
" or to them, without any remainder to his wife; and after he levies a
" fine, or makes a feoffment to other uſes; and then by his will makes
" three executors, and dies. The term to the executors ſhall never ariſe:
" for whether this term were in abeyance, as the books ſay it was, ſo
" that he himſelf could not grant, forfeit, or releaſe it; or, whether it
" veſted in the teſtator himſelf, yet by ſuch fine or feoffment, it is con-
" founded and gone; becauſe if it be an intereſt veſted, it paſſeth by the
" feoffment; if it be not veſted, the feoffment deſtroys the particular
" eſtate, and then the contingent remainder ſinks of courſe.

Yelv. 85. " If a leaſe be made to *A.* for life, and after his death to the executors
" or aſſigns of *B.*, this is no intereſt in *B.*, but only a naked power in
" him to name executors or aſſigns who ſhall take the term.

1 Leon. 196. " But, if one make a feoffment in fee to the uſe of himſelf for life,
" and after his death to the uſe of his adminiſtrators for 20 years, re-
" mainder over; this limitation is abſolutely void, and the other re-
" mainders ſhall veſt preſently, by reaſon of the interval between the
" death of the feoffor, and the taking out letters of adminiſtration, be-
" fore which time there is no perſon to take it; and there can be no oc-
" cupancy of it in the mean time, for the law will not create new eſtates
" to ſupply the intention of the parties."

(D) C

(D) Of the ſeveral Kinds of Remainders, as diſtinguiſhed into Remainders veſted, or in Contingency and Abeyance.

" So, if the land be of the nature of gavelkind, yet the eldeſt ſon only as heir ſhall take it, and not all the ſons; for the cuſtom extends only to deſcent of inheritances, and not to purchaſes, and is to be taken ſtrictly." Hob 31. 1 Co 105. Dav. 31. 1 Br. Abr. 254. pl. 42.

" But here it may be objected, that then theſe remainders ought to eſcheat to the lord, as well as where his tenant dies without heirs; for they actually paſſed out of the feoffor: and though they cannot veſt in the perſon intended, yet it is not reaſonable they ſhould return to the feoffor againſt his own grant, and when he has by his own act parted with and given them away; but the lord ought rather to have them by eſcheat. In anſwer to this objection, it is to be obſerved, that the reaſon of the eſcheat is the death of the tenant without heirs: ſo are the words of the writ—*Præcipe* A. *quod reddat* B. *decem acras terræ cum pertinentiis*, &c *quas* C. *tenuit et quæ ad ipſum* B. *reverti debent, tanquam eſchæta ſua eo quod prædictus* C. *obiit ſine hærede.* But *J. S.* neither died without heir, nor, if he had, was he ever tenant to the lord: for nothing veſted either in him or his heirs, and therefore the lord can have no eſcheat as from them; and as to the feoffor, he or his heirs are ſtill *in eſſe*: and ſince the grantor could not take the remainder, and no other perſon has right to claim it, it muſt return back again, and ſettle in the feoffor, as if no diſpoſition thereof had been made."

" Lands deviſable by cuſtom, were deviſed to *A.* for life, remainder to *B.* in tail, remainder to the next heir male of the deviſor, and to the heirs male of his body; the deviſor dies; *A.* enters; *B.* dies without iſſue; and after *A.* dies; and then one *C.* as heir of the deviſor, viz. daughter of *D.*, ſon of the deviſor, enters and aliens in fee, and after hath iſſue *E.*, who, as heir male of the body of the deviſor enters upon the alienee, who brings treſpaſs. *Optima opinio*, that as the firſt who entered as heir to the fee-ſimple was a female, and there was no heir male of the deviſor to take when the remainder fell, he who is born after ſhall not have it." 1 Br. Abr. 234 b. pl. 5 Hob. 33.

" If a leaſe be made to *A.* for life, remainder to the right heirs of *J. S.* and *J. N.*, and after *J. S.* dies, and then tenant for life dies in the life of *J. N.*, the remainder for a moiety veſts in the right heirs of *J. S.*, and upon the death of *J. N.* his heirs ſhall take nothing, becauſe not in *eſſe* to take when the remainder fell; and the right heirs of *J. S.* cannot take the whole, becauſe that was limited to them and others jointly. 1 Br. Abr. 253. pl. 21.

" If brother and ſiſter are, and lands are let for term of life, remainder to the right heirs of the brother, and after the brother dies, and then tenant for life dies, and the ſiſter enters; ſhe ſhall retain the land againſt a ſon or daughter of the brother born after, becauſe this veſted in her by purchaſe." *Ibid.*

" *A.* having iſſue two ſons and two daughters, deviſes his lands to his younger ſon in tail, and for want of ſuch iſſue to the heirs of the body of his eldeſt ſon, and if he die without iſſue, then to his two daughters in fee, and dies: the younger ſon dies without iſſue, living the eldeſt who has iſſue; and if this iſſue ſhould Challoner v. Bower, 2 Leon. 79.

" take

" take the remainder, his father being alive, was the queſtion? It was
" urged, that though in caſe of a grant he could not, yet being here in caſe
" of a will, the intent of the deviſor ſhould prevail to carry it to him But
" the court was ſtrongly againſt it, and held no difference as to this be-
" tween a grant and a deviſe, and would ſuffer no witneſſes to be heard to
" prove the teſtator's intent, but gave judgment for the daughters.

Hob. 74. Barn's caſe, 1 Ventr. 374. " If one covenant, upon proper conſiderations, to ſtand ſeiſed to the
" uſe of *A.* for life, remainder to the right heirs of *B.*, in this caſe the
" remainder is not drawn out of the covenantor, and put in abeyance till
" the death of *B.*, but there is a reverſion left in the covenantor, out of
" which the remainder, when it happens, ſhall be drawn. And this
" differs from the remainders before mentioned, which ariſe out of the
" eſtate executed either at common law, or upon a feoffment to uſes, as
Br. Abr. " will appear hereafter."
253. pl. 42.
254. pl. 61. " If a leaſe for life, or a gift in tail be made to *A.*, remainder to the
2 Br. Abr. " right heirs, or heirs male, or heirs female of the body of *J. S.*, who is
54. b pl. 1. " then or after attainted of treaſon or felony, and is executed or dies, and
95. pl 40. " then after *A.* die; yet this remainder is become void, and can never
1 Co. 103 " take effect; becauſe none can be heir to a perſon attainted, nor can he
Hob. 31, 32 " have heirs male or heirs female of his body to take by purchaſe. But,
" upon a gift to a man and the heirs male or female of his body, if he
" were attainted before the ſtatute of 26 *H.* 8. and at this day, if he be at-
1 Lev. 75. " tainted of felony, ſuch heirs ſhall take by deſcent *per formam doni*, upon
St. Tr. 53. " conſtruction of the ſtatute *de donis*, *W.* 2. But, if a remainder be given
1 Keb. 249. " by act of parliament to the right heirs of *J. S.*, who is attainted of trea-
615. 745. " ſon or felony, this remainder is good, becauſe the act takes off the diſ-
Wheatley v. Thomas " ability, and reſtores the capacity as to ſuch remainder; eſpecially, if the
" attainder be taken notice of in the act; for then it is in nature of a reſti-
" tution, and *parliamentum omnia poteſt*; and though a perſon attainted can
" have no heir, yet by ſuch deſcription it is ſufficiently known who is
" meant by it, and then the act ſupervenes with its abſolute power to enable
3 Keb. 351. " him to take.
Collman v. Barton. " Three brothers are—the ſecond ſettles his eſtate to ſeveral perſons in
Cro. Car. " tail ſucceſſively, remainder to his own right heirs: the eldeſt brother is
435. " attainted of treaſon and executed, leaving ſeveral children: the ſecond
Hob. 334. " brother dies without iſſue: all the eſtates-tail determine; and the young-
Co. Lit. 8. a. " eſt brother being dead, his iſſue claimed the reverſion as heirs to the ſe-
" cond brother, and the defendant claimed by eſcheat, and had a verdict
" in ejectment. For though the blood of the elder brother be corrupted
" ſo that his iſſue cannot take; yet, they, being heirs at law, ſtand in the
" way of the youngeſt brother, ſo that he or his iſſue cannot take, and
" therefore the land muſt eſcheat. But this more properly belongs to an-
1 Co. 130. " ther head, and therefore I ſhall here conſider it no further.
2 Co. 20. a " If one makes a leaſe for years either at common law or by way of uſe,
Sir T. " remainder to the right heirs of *J. S.*, who is then living, or to the wife
Raym. 83. " whom *J. S.* ſhall marry; theſe remainders are void; becauſe, till the
Poph. 482. " death or marriage of *J. S.*, there is no perſon to take the freehold, and
Co. Lit. 217. a. " that cannot be in abeyance, as has been proved already. But it is ſaid
Dav. 34. " if ſuch limitation were by way of uſe before 27 *H.* 8. it would have been
4 Leon. 21. " good; becauſe the eſtate in law continued in the feoffee, and they were
4 Mod. 256. " tenants to the lord, and all precipes were to be brought againſt them
1 Co. 135. " And though one book ſeem *contrà*, yet the reaſon there given
Godb. 319. *contrà*. " only, that the remainder ought to be limited to one *in eſſe*, which
" ſeems to carry very little weight in it, when no reaſon of neceſſity
"

" or convenience requires it; and therefore the other opinion ſeems to " be law."

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(*A. by indenture*) [*Vide* Fearne's C. R. 430. 4th edit.]

" But, if a man deviſes lands to *A.* for five years from *Michaelmas* " next enſuing, and after to *B.* and his heirs, and dies before *Michael-* " *mas*, yet is the remainder good, becauſe till *Michaelmas* the freehold " deſcends to the heir, and he is tenant to all the purpoſes, either of " doing the ſervices, or anſwering to ſtrangers' precipes. For here " is no livery to operate preſently, and therefore no inconvenience to al- " low of ſuch future limitations, as it would be, if it were by deed exe- " cuted with livery. And in *Noy* it was held, that a deviſe for years, " remainder to the right heirs of *J. S.* was good, if *J. S.* died within the " term, becauſe the freehold in the mean time deſcended to the heirs, and " was not in abeyance."

Cro. Eliz. 878. Poph. 4. Sir T. Raym. 83. Pow. 156. Co. Lit. 217. a. Noy, 43. 4 Mod. 259 283. Swinh. 124 Godolph. 360.

(*A. in conſideration*) " For there is no contingency in the caſe, but when " one dies, the other is tenant in tail executed. So, for the ſame reaſon, if " a leaſe be made to *A.* for life, remainder to *B.* for life, remainder to *A.* " and *B.*, and their heirs, or to the right heirs of *A.* and *B.*, this remain- " der continues diſtinct, and is not executed in poſſeſſion. And theſe re- " mainders are ſo diſtinct from the poſſeſſion, that they may be granted as " remainders, without affecting the particular eſtate.

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" But, where an eſtate is limited to *A.* and *B.*, and to the heirs of *A.*, " or (which is all one) to *A.* and *B.* for their lives, and after their deaths, " to the right heirs of *A.*, or to huſband and wife, and the heirs of the " body of the huſband; or to two men, and the heirs of their bodies, or " to the heirs of the body of one of them; theſe eſtates are, to ſome purpo- " ſes, executed, and to others not, to continue as remainders. For, as to " prevent the ſurvivor from taking the whole, they are not executed; be- " cauſe the firſt words gave them a joint eſtate for their lives, which ſhall " go to the ſurvivor; and this the limitation after ſhall not controul. Yet " they are ſo far executed in poſſeſſion, that he who has the inheritance can- " not grant it away as a remainder diſtinct from the poſſeſſion. And in " the caſe of the huſband and wife, between whom there are no moieties, " the inheritance is ſo executed in the huſband, that if he makes a feoffment, " this will be a diſcontinuance to his iſſue; but, if he ſuffers a common " recovery with ſingle voucher, this will bind neither the iſſue, nor re- " mainder; becauſe his wife was ſeiſed of the whole jointly with him, and " not partly, and there are no moieties between them; and therefore it " cannot be good for any part: but the feoffment deals with the poſſeſſion, " and gives it away by ſolemn livery; and therefore to preſerve the war- " ranty, this amounts to a diſcontinuance, and the iſſue ſhall be put to his " formedon in deſcender, and thoſe in remainder to their formedon in re- " mainder: and if the huſband levies a fine, this will bind the iſſue by the " ſtatute of 4 *H.* 7. and 32 *H.* 8. But, whether this will be a diſconti- " nuance of the remainder or reverſion ſeems doubtful. But, if the eſtate " were to the huſband and wife, and heirs of the body of the wife, " there, a fine levied by the huſband would be no bar or diſcontinuance to " the iſſue or thoſe in remainder, becauſe he had but an eſtate for life. " But this belongs to another inquiry.

Co. Lit. 182-3-4. 2 Co. 61. Cro. Eliz. 470. 481. Poph. 52. Dy. 9. pl. 22. Cro. Car. 320. 3 Co. 5. Moor, 210. Yelv. 131. 1 Lev. 37. 1 Sid. 83.

" Copyhold land was ſurrendered to the uſe of the wife for life, re- " mainder to the uſe of the right heirs of the huſband and wife: it was

3 Leon. 4. 2 Roll. Abr. 417. pl. 6.

" the

" the opinion of the juſtices, that the fee was executed for a moiety in the
" wife, and the huſband thereof ſeiſed in her right; ſo that upon her death
" ſuch moiety ſhould go to her heirs, though the huſband was then living.
" So, if a leaſe were made to *A.* for life, remainder to the right heirs of
" *A.* and *B.*, this was executed for a moiety in *A.*, and then for the other
" moiety, in both caſes it muſt be contingent, and if the wife or *A.* die
" firſt, will be void; for *non eſt hæres viventis*, and it cannot veſt in the
" heirs of the huſband or of *B.* during their lives; and though there are
" no moieties between the huſband and wife, yet, in this caſe, the inhe-
" ritance may well execute in the wife for a moiety, becauſe the wife takes
" the whole, and the huſband nothing at all, and ſo the point of taking
" by moieties is out of the caſe. Alſo, the heirs of the wife, who are to
" take a moiety of the inheritance, need not be heirs of the huſband too,
" as they muſt, where ſuch remainder is limited to the heirs of the body
" of the huſband and wife; for in that caſe it cannot be executed for a
" moiety, becauſe it may happen, that the heirs of her body cannot take
" after her death; as, if the huſband ſurvives, they cannot, becauſe they
" are to be heirs of the body of the huſband as well as of the wife; but in
" this caſe, immediately upon the death of the wife, the inheritance for a
" moiety may veſt in her heirs. But, if an eſtate be made to the wife for
" life, remainder to the huſband and wife and their heirs; or to *A.* for
" life, remainder to *A.* and *B.* and their heirs, theſe remainders are not
" executed in the wife or in *A.* for a moiety, but continue diſtinct as re-
" mainders: for otherwiſe where the remainder is a joint-tenancy in fee,
" and the ſurvivor ſhall take the whole, if this ſhould be executed in poſſeſ-
" ſion for a moiety, this would be againſt the intent of the deed, and ex-
" clude the benefit of the ſurvivorſhip.

2 Roll. Abr. 416. pl. 1. 2. 6 Co. 17.

" If lands are given to a woman and the heirs of the body of her huſband
" who is then dead; it is ſaid, that the wife and the iſſue of the huſband
" are joint-tenants for life, with remainder to the iſſue in tail. For, ſince
" they are named to take in poſſeſſion as the wife, and if they ſhould take
" only an eſtate for life, the donor would have again the land, though
" there were ſtill heirs of the body of the huſband in being, which by the
" words and intent of the gift he ought not to have, ſince he has given it to
" the heirs of the body of the huſband, and whoever anſwers that deſcrip-
" tion is compriſed within the words of the gift, therefore, they ſhall
" have a remainder in tail."

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(*But where*) " But whether he ſhould take for life only, or in tail, ſeems
" doubtful upon the whole caſe."

(*A. by his will*) [*Begotten* and *to be begotten* generally bear the ſame conſtruction. *Vide* Lit. 20. b. 4th edit.] 2 Vern. 545. 711. Pr. Ch. 91. 2 P. Wms. 457. *Id.* 35. Fearne's C. R.

Goodright v. White, 2 Bl. Rep. 1010

A teſtator after charging the lands with annuities to his wife, and
her deceaſe to four of his five daughters, and another annuity to his
daughter *M.* for ſeventy years, if ſhe and the teſtator's ſon *R.* ſhould ſo
jointly live, to commence at the expiration of the term of two years
after given in the premiſes to the ſaid *M.*, and the death of teſtator's
and after deviſing the premiſes to his ſaid daughter *M.* for two years
his deceaſe, with remainder to his ſon *R.* (if then living) for ninety
if he ſo long lived; he deviſed the premiſes ſo ſubject, to *R.*'s *heirs*
and to the *heirs of his daughter* M. jointly and equally, and *their heirs*
"

aſſigns for ever. And for want of heirs male lawfully begotten of the ſaid *R.* at the time of his deceaſe, he deviſed the premiſes to the *heirs and aſſigns of the ſaid M. lawfully begotten of her body*, to hold to the heirs and aſſigns of the ſaid *M.* for ever. The ſon *R.*, at the time of the will, had *one* ſon and two daughters; and the daughter *M.* had then one ſon On the teſtator's death *M.* entered, and held the whole of the lands for the two years; when the ſon *R.* entered and held them till his death, upon which, *M.* entering, the ſon of *R.* brought his ejectment. Upon the caſe being argued in the court of *C. B.*, *De Grey*, C. J. ſaid, the queſtion was, Whether there was a ſufficient *deſignation* of the perſon to make the *ſon* of *M.* take as her *heir*, living the mother? That two hundred years ago it might have been thought not ſufficient, becauſe the deſcription was not legally and *technically* true. But that, within a century paſt, a more liberal conſtruction of the words of a teſtator had prevailed; and they had been generally taken in their *popular* ſenſe, which was moſt likely to have been his meaning. That in the principal caſe, the intent of the teſtator was clear, that the ſame favour ſhould be extended to the heirs of *M.* as to the heir male of *R.*; he took notice that *M.* was *living* by leaving her a term, and a ſubſequent annuity; and meant a *preſent* intereſt ſhould veſt in her heir, that is, her *heir apparent* during *her life*; he therefore did not think the leſſor of the plaintiff was entitled to more than one moiety of the premiſes.—The reſt of the juſtices agreed in the ſame opinion, and the plaintiff had judgment as to one moiety only.

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(*t when one*) [This caſe was again brought before the court in Gwynne v. Hooke, 18th Dec. 1740, when Lord Hardwicke directed a caſe for the opinion of the court of K. B. (Reg. Lib. A. 1740, fo. 310.) who certified in confirmation of Lord Macclesfield's order, (Vin. Abr. tit. Deviſe. W. b pl. 13. n. and that certificate was afterwards confirmed, and the bill diſmiſſed with coſts. Reg Lib. A. 1741, fol. 646. But in Wills v. Palmer, 5 Burr 2615 on a caſe ſent to the court of K. B by the court of Chancery, the queſtion aroſe on both a will and a deed, whether *A.* took by purchaſe under the deſcription of *heirs male of the body* of *B.* being in the firſt caſe the *grantor*; the court certified, that *A.* took an eſtate-tail by *deſcent*; but they added in the certificate, that if *a third perſon* had been the grantor, they ſhould have thought that *A.* would have taken by *purchaſe* as heir male of the body of *B.* And they alſo certified. that he did ſo take under the will. Cox's note, 2 P. Wms. 3.]

" If *A.* makes a feoffment in fee to the uſe of himſelf for life, remainder to the firſt ſon of his body begotten, and the heirs male of the body of ſuch firſt ſon, and to the ſecond, *&c.* in like manner; and for want of ſuch iſſue, remainder to himſelf and the heirs of his body, with remainder to *B.* in fee; in this caſe, till iſſue, *A.* is tenant in tail general executed, with remainder to *B.* in fee. But, if he had iſſue a ſon, then all his eſtate tail opens and lets in the remainder to ſuch ſon, and then he is become again tenant for life, remainder to ſuch firſt ſon in tail male, *&c*, remainder to himſelf in tail general, remainder to *B.* in fee. And this ariſes upon the conſtruction of the ſtatute of uſes; for before that ſtatute the uſe being nothing elſe but the perception of the profits, and no eſtate in the land itſelf, was not ſubject to the ſame rules of law by which the land itſelf was governed, nor had the *ceſtuy que uſe* any other remedy than by *ſubpœna* in Chancery, to compel the tenant of the land to let him into the perception of the profits, or convey the poſſeſſion to him. And though that ſtatute by carrying the poſſeſſion to the uſe, did in effect take away and deſtroy the uſe, for ſo much as was executed in poſſeſſion, yet it ſtill left in the parties the ſame power of limiting and appointing the uſes, as they had before. And when the perſon, who Chudleigh's caſe, 16. 133. 11 Co. 82. Co. Lit. 28. a. 2 Saund. 382. 386, 387. Cro. Eliz. 345. *contr.*

" was

" was to take the uſe, came *in eſſe*, the ſtatute ſupplied the place of the
" Chancery, and carried the poſſeſſion to the uſe, if nothing were done in
" the mean time to hinder the riſing of the uſe; and though the eſtates
" were before united, yet by an act of parliament they may well be ſevered
" again to let in the intermediate uſe, ſince the ſtatute executes the poſſeſ-
" ſion only according to the uſes when they happen, as well as thoſe that
" are capable of being executed preſently. And therefore in that caſe,
" though the wife of the tenant in tail hath by the intermarriage title of
" dower, yet it is defeated again by the birth of a ſon, which turns the eſ-
" tate-tail to an eſtate for life by the terms of the ſettlement under which
" only the title of dower accrued, and therefore muſt be ſubject to be de-
" feated by the terms of the ſame ſettlement."

Cro. Car. 102. Yelv. 85. Poph. 5. 10 Co. 51. Cro. Eliz. 580. 1 Leon. 245 Co. Lit. 278. b.

" If one makes a feoffment in fee to the uſe of himſelf and his wife, and
" to the heirs of the ſurvivor of them, or to the heirs of ſuch as dies firſt;
" this is in the nature of a contingent remainder to the ſurvivor, or who
" dies firſt, and after the contingency happened, the heirs ſhall be in by
" deſcent; but by a feoffment before it takes place, the remainders will
" be deſtroyed. But theſe contingent remainders cannot be granted over,
" becauſe they are in no perſon to grant; therefore, where a leaſe was
" made to the huſband and wife for 21 years, remainder to the ſurvivor of
" them for 40 years, and the huſband granted away this remainder; it
" was holden a void grant, though he ſurvived, becauſe till the contingency
" happened, he had nothing in him to grant, releaſe, or ſurrender. So
" if a leaſe be made for life, remainder to the right heir of *J. S.* who is
" then living, if the eldeſt ſon of *J. S.* grants this remainder, and then
" *J. S.* dies, yet upon the determination of the particular eſtate, the
" grantor may enter, becauſe his grant was void, having nothing in him
" to grant. And in the caſe of the huſband and wife, if lands are given
" to them, and to the heirs of the body of the ſurvivor of them, and they
" both join in a leaſe for 21 years, obſerving all the circumſtances requi-
" ſite by 32 *H.* 8. yet this leaſe ſhall not bind the iſſue for the above rea-
" ſon.

10 Co. 51.

Clerk v. Sydenham, Yelv. 85. Plowd. 88 *Vide ſupra.*

" A leaſe was made to *A.*, *B.*, and *C.* for their lives, remainder to the
" aſſigns of the ſurvivor of them for 99 years. *B.* was the ſurvivor.
" was holden, that the 99 years was an intereſt veſted in him, which he
" might well diſpoſe of, as he thought fit, and not a bare power only
" nominating one to take it. For *aſſigns* is a word proper for the limita-
" tion of a further intereſt to the ſame party, in caſe of a chattel, as he
" is for the inheritance, and yet both veſt in the party himſelf; for aſſigns
" are either in fact, or in law, as executors, *&c.*; and it appears before
" that a remainder to his executors in ſuch manner veſts in the party him-
" ſelf; and ſo it does in caſe of ſuch a limitation to his aſſigns, who by
" want of an actual aſſignee, will be his executors."

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(One levies) " And *vide infra*, that a remainder to commence after
" ſuch attempt, is repugnant and againſt law."

Holcroft's caſe, Muor, 486 Sir T. S. C. cited. Raym. 429.

" *A.* by indenture covenants to levy a fine to the uſe of himſelf for life,
" and after his deceaſe to the uſe of *B.* his ſon, ſo long and until he
" tempt to alien, and then to the uſe of *C.*, and the heirs male of his
" during the life of *B.*, and immediately after his deceaſe, to the uſe
" the firſt and other ſons of *B.* in tail male ſucceſſively, remainder
" in tail. It was objected, that no uſe veſted in *C.* till *B.* attempted
" alien, for the uſe to *C.* and all the limitations after depend on *B.*

" t

" tempt to alien. But it seemed to the court, that it should be intended " in the limitation of the use that after *B.*'s death without issue male, *C.* " should have the land, be there any attempt to alien or not, by reason of " the words, *and immediately after his decease to the first son*, &c.; for the " use which was to arise upon the attempt to alien, is only restrained to " the use for the life of *B.*

" If one devise land to *A.* and the heirs of his body, provided that if *A.* " happen to die without heirs of his body, that then it shall remain to *B.*, " this is a good remainder vested presently, and no contingency at all, but " the ordinary limitation of a remainder upon an estate-tail. So, in a " lease for life, upon condition that if the lessee die, then it shall remain, &c. " this is a good remainder executed presently." Hob. 30, 31 1 Br. Abr. 155. pl. 83. Plowd. 25. a.

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(*One devises lands to his wife*) [In Lady Anne Fry's case, 1 Ventr. 203. Hale expressed a similar opinion, where, he said, it is all one as if the estate had been devised to her for life, *and if she marries, then to remain* which had been but an estate *quam diu sola vixerit.*—In a case where a testator devised lands to his wife *during her widowhood*, and *if she should marry again*, that then his daughter should enter, provided that if his wife married and survived his daughter, the estate should return to her; Lord Hardwicke took a distinction between the devise of an estate during widowhood, with remainder over, and a devise during widowhood with remainder over on her marrying again within *a limited time*. Jordan v Holkham. Ambl. 209. Where there was a devise to a wife provided she remained a widow; but in case she married a second husband, then to testator's nephew when he should attain the age of twenty-three years; it was held, that the widow had an estate till the nephew attained the age of twenty-three years, though she married before. Lee v. Freeman, 1 Term Rep. 389]

" *A.* in consideration of a marriage intended between *B.* his nephew " and *C.* the daughter of *D.*, and of 200 marks paid by *D.*, makes a " feoffment to the use of *B.* and *C.* for their lives, and after carnal co- " pulation to the use of the issues of their bodies, remainder to *B.* and " the heirs of his body begotten, &c. The marriage never takes effect, " but *B.* marries another woman, and hath issue by her; and *A.* marri- " ed also, and had issue; and after the death of *A* and *B.* the question " between their children was, 1st, If the use should arise to *B.* and *C.* " for their lives by reason of the money paid, though no marriage was " had? 2d, If the remainders which were limited after the marriage are " not now prevented from rising, by reason no marriage was had? As to " the first, the justices thought, the use would well arise, though no " marriage was had, because it was limited out of the estate of the feof- " fees, which was an estate executed, and needed no consideration to " raise the use. But, if it had been by way of covenant to stand seized, " they held, no use would arise; because the marriage was the principal " consideration, and that failing, the consideration to raise the use fails " likewise, and the money would not be sufficient. As to the second " point, they thought the consideration of name and blood sufficient to " raise a use to *B.* who was *A.*'s nephew, and that it might be independent " on the other limitations, which were not to arise but upon the marriage " had. But no judgment was given." Moor, 101. pl. 247. Dy. 334 b. Calthrop's case.

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" (*Lands were*) And they seemed to rely upon the case in *Perkins*, " where lands were leased to *A.* and *B.* for the life of *C.*, remainder to " the right heirs of *A.*; then *C.* died, living *A.* and *B.*, and after *A.* " takes wife and died, living *B.* It is there said, that the wife of *A.* " shall be endowed, because *C.* died, living *A.* the husband, so that the " freehold and inheritance were united in the husband during cover- " ture. Which case, if it be law, may give some colour to the princi- Perk. § 337

" pal caſe. But it ſeems to me not to be law; for the rule is, that
" where by poſſibility the particular eſtate may determine, before the re-
" mainder can take effect, there, ſuch remainder is contingent; and by
" the death of *C.* the particular eſtate is abſolutely determined, for the
" remainder cannot then take effect, becauſe *A.* cannot have heirs dur-
" ing his life. And this is no infringement of the other rule, that
" wherever the anceſtor takes an eſtate for life, and after in the ſame
" conveyance a limitation is made to his right heirs, or the heirs of his body
" mediately or immediately, that in ſuch caſe the remainder veſts in the
" anceſtor himſelf, and by conſequence the heirs ſhall be in by deſcent,
" and not by purchaſe; for here, *A.* took no eſtate for his own life; and
" though it was an eſtate of freehold, yet it was ſo limited, that without any
" act or default of his it might determine during his life; and ſince the life of
" *C.* was made the meaſure of the continuance of the eſtate of *A.* and *B.*, it
" is more reaſonable to give it *A.* after *C.*'s death, than it is to give it *B.*
" likewiſe: but both their eſtates are to be bounded and circumſcribed by
" the life of *C.*, and when he dies, living *A.*, who can then have no
" heir to take the remainder, it ſeems in reaſon, the remainder is deſtroy-
" ed. So, in the principal caſe, when the eſtate is limited to the huſ-
" band and wife during *their joint lives*, this is no abſolute eſtate for their
5 Co. 9. " lives ſo as to go to the ſurvivor, but the death of either of them deter-
" mines that eſtate, and the remainder being limited to the heirs of the
" body of the wife who ſurvived, and can have no heir during her life,
" ſeems to be defeated thereby. And note, they ſeemed to agree, that
1 Sid. 247 " if an eſtate were made to the huſband and wife *during coverture*, re-
" mainder to the heirs, or heirs of the body of the huſband, that this was
" a contingent remainder. And there ſeems no difference in reaſon be-
" tween ſuch a limitation, and where it is *durante viduitate*, or to two for
" their joint lives, or to two during the life of a third perſon, with ſuch
" remainder over; becauſe in all thoſe caſes the particular eſtate deter-
" mines, before the remainder can take effect. And the caſe in 2 *Ro.*
" *Abr. ſupra*, ſeems expreſsly to contradict the principal caſe, and the
" reaſon of it. So the caſe *ſupra*. But in the principal caſe, if the wife
" had died firſt, there had been no doubt but the heirs of her body had
" taken by deſcent, ſhe having had the whole during her life. And this
" ſeems to differ much from a limitation to baron and feme, and the heirs
" of the body of the feme; for there, whichever of them dies firſt, yet
" the ſurvivor ſhall hold during life. *Ideo quære* of theſe matters. As
Quære. " to the ſecond point of the caſe, if the ſecond limitation to the wife
" ſhould take effect, becauſe it was upon the dying without ſuch iſſue,
" whereas there was iſſue ſo begotten living at the death of the huſband;
[See Fearne's C. R. 432, 433, &c. whether the doctrine of the principal caſe is vindicated, and Rolle's diſtinctions are controverted.] " the court ſaid, there was no colour for it, for ſuch heir and ſuch iſſue
" is all one, for unleſs in the heir, it is not ſuch iſſue. Note, this objec-
" on ſeems to make the ſecond remainder to the wife conditional upon the
" huſband's not leaving iſſue at the time of his death, which here he did.
" But the limitation is not confined to his leaving iſſue at the time of his
" death, but is general, *and for default of ſuch* iſſue or heir, and ſeems
" not to differ from the common limitation of remainders after eſtate
" tail, and therefore may well veſt as a remainder in the wife immedi-
" ately upon the huſband's death.

" One makes a feoffment in fee to the uſe of himſelf for life, and af- 10 Co. 85.
" ter to the uſe of ſuch perſon and perſons to whom he ſhall demiſe any
" part of the premiſes for life or years, and after for the performance of
" his laſt will, and to the uſe of ſuch perſon and perſons to whom he ſhall
" by his laſt will deviſe any eſtate or eſtates, and after to the uſe of *B.*
" in tail, with other remainders over. Theſe remainders are contingent,
" and not executed in *B.* and the others till the death of the feoffor, be-
" cauſe the feoffor hath ſuch power that by his will he may give away the
" whole fee-ſimple, and therefore till his death it being uncertain whe-
" ther they will ever veſt or not, they muſt needs be contingent, and
" then the uſe of the fee in the mean time veſts again in the feoffor. But
" *quere* in this caſe, if he afterwards makes a feoffment in fee, or com-
" mits a forfeiture, if thoſe in remainder may not enter preſently: for
" ſuch feoffment is not in purſuance of his power, and if it be not warrant-
" ed by that, it cannot be good at all. For if it ſhould, he might then
" derogate from his own grant, and avoid it in what manner he pleaſed.
" And if it be ſo, that thoſe in remainder may enter in ſuch caſe, then
" their remainder muſt be veſted in them before, and cannot be contin-
" gent; for the feoffment which gives away the whole eſtate to another,
" can never operate ſo as to veſt it in them at the ſame time too. Be-
" ſides, the account given of theſe remainders is inconſiſtent with their
" being in contingency; for all contingent remainders paſs out of the
" feoffor at the ſame time with the particular eſtate, and are carried into
" abeyance till the contingency happens; but here it is ſaid, the uſe of
" the fee is veſted in the feoffor till his death, which cannot be; there-
" fore, it ſeems more reaſonable to conſtrue theſe remainders to be veſted
" preſently, though ſubject to be diveſted and taken out of them by the fe-
" offor, if he purſues his power in deviſing away the whole. But, if he
" makes ſuch feoffment, it ſhould ſeem, he can never after execute his
" power, for that was incluſively given away and extinguiſhed in the fe-
" offment, whether thoſe in remainder may enter for the forfeiture or
" not; and if they cannot, then their eſtates are abſolutely in the power
" of the feoffor, and his reſerving to himſelf a power to defeat them in
" ſuch a particular manner was altogether idle, which ſeems not reaſon-
" able."

(G) Of Remainders in Abeyance or Contingency; what Eſtate is ſufficient to ſupport them; when they are to take effect; and by what Means they may be deſtroyed or prevented from coming *in eſſe*; and therein, of Remainders by way of executory Deviſe or future Intereſt.

" A Contingent remainder muſt veſt during the particular eſtate, be-
" cauſe if remote contingencies ſhould be allowed to hang over
" titles, no man would know when he was ſafe in his purchaſes. The
" law therefore has appointed how long ſuch contingencies are to expect,
" which is, only during the continuance of the particular eſtate, and then
" the remainder muſt come in being; ſince remainder *ex vi termini* ſigni-
" fies a remaining part of a particular eſtate preceding. Whether ſuch par-
" ticular eſtate determine by effluxion of time, or by merger of the particu-

" pal caſe. But it ſeems to me not to be law; for the rule is, that
" where by poſſibility the particular eſtate may determine, before the re-
" mainder can take effect, there, ſuch remainder is contingent; and by
" the death of *C.* the particular eſtate is abſolutely determined, for the
" remainder cannot then take effect, becauſe *A.* cannot have heirs dur-
" ing his life. And this is no infringement of the other rule, that
" wherever the anceſtor takes an eſtate for life, and after in the ſame
" conveyance a limitation is made to his right heirs, or the heirs of his body
" mediately or immediately, that in ſuch caſe the remainder veſts in the
" anceſtor himſelf, and by conſequence the heirs ſhall be in by deſcent,
" and not by purchaſe; for here, *A.* took no eſtate for his own life; and
" though it was an eſtate of freehold, yet it was ſo limited, that without any
" act or default of his it might determine during his life; and ſince the life of
" *C.* was made the meaſure of the continuance of the eſtate of *A.* and *B.*, it
" is more reaſonable to give it *A.* after *C.*'s death, than it is to give it *B.*
" likewiſe: but both their eſtates are to be bounded and circumſcribed by
" the life of *C.*, and when he dies, living *A.*, who can then have no
" heir to take the remainder, it ſeems in reaſon, the remainder is deſtroy-
" ed. So, in the principal caſe, when the eſtate is limited to the hus-
" band and wife during *their joint lives*, this is no abſolute eſtate for their
5 Co. 9. " lives ſo as to go to the ſurvivor, but the death of either of them deter-
" mines that eſtate, and the remainder being limited to the heirs of the
" body of the wife who ſurvived, and can have no heir during her life,
" ſeems to be defeated thereby. And note, they ſeemed to agree, that
1 Sid. 247 " if an eſtate were made to the huſband and wife *during coverture*, re-
" mainder to the heirs, or heirs of the body of the huſband, that this was
" a contingent remainder. And there ſeems no difference in reaſon be-
" tween ſuch a limitation, and where it is *durante viduitate*, or to two for
" their joint lives, or to two during the life of a third perſon, with ſuch
" remainder over; becauſe in all thoſe caſes the particular eſtate deter-
" mines, before the remainder can take effect. And the caſe in 2 *Abr.*
" *Abr. ſupra*, ſeems expreſsly to contradict the principal caſe, and the
" reaſon of it. So the caſe *ſupra*. But in the principal caſe, if the wife
" had died firſt, there had been no doubt but the heirs of her body had
" taken by deſcent, ſhe having had the whole during her life. And this
" ſeems to differ much from a limitation to baron and feme, and the heirs
" of the body of the feme; for there, whichever of them dies firſt,
" the ſurvivor ſhall hold during life. *Ideo quære* of theſe matters.
Quære. " to the ſecond point of the caſe, if the ſecond limitation to the wife
" ſhould take effect, becauſe it was upon the dying without ſuch iſſue,
" whereas there was iſſue ſo begotten living at the death of the huſband;
[See Fearne's C. R. 432, 433, &c. whether the doctrine of the principal caſe is vindicated, and Rolle's diſtinctions are controverted.] " the court ſaid, there was no colour for it, for ſuch heir and ſuch iſſue
" is all one, for unleſs in the heir, it is not ſuch iſſue. Note, this objec-
" tion ſeems to make the ſecond remainder to the wife conditional upon
" huſband's not leaving iſſue at the time of his death, which here he did.
" But the limitation is not confined to his leaving iſſue at the time of his
" death, but is general, *and for default of ſuch* iſſue or heir, and ſeems
" not to differ from the common limitation of remainders after eſtate
" tail, and therefore may well veſt as a remainder in the wife immedi-
" ately upon the huſband's death.

" One makes a feoffment in fee to the uſe of himſelf for life, and af- 1c Co. 85.
" ter to the uſe of ſuch perſon and perſons to whom he ſhall demiſe any
" part of the premiſes for life or years, and after for the performance of
" his laſt will, and to the uſe of ſuch perſon and perſons to whom he ſhall
" by his laſt will deviſe any eſtate or eſtates, and after to the uſe of *B.*
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" whole fee-ſimple, and therefore till his death it being uncertain whe-
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" then the uſe of the fee in the mean time veſts again in the feoffor. But
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" mits a forfeiture, if thoſe in remainder may not enter preſently: for
" ſuch feoffment is not in purſuance of his power, and if it be not warrant-
" ed by that, it cannot be good at all. For if it ſhould, he might then
" derogate from his own grant, and avoid it in what manner he pleaſed.
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" ſides, the account given of theſe remainders is inconſiſtent with their
" being in contingency; for all contingent remainders paſs out of the
" feoffor at the ſame time with the particular eſtate, and are carried into
" abeyance till the contingency happens; but here it is ſaid, the uſe of
" the fee is veſted in the feoffor till his death, which cannot be; there-
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" preſently, though ſubject to be diveſted and taken out of them by the fe-
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" of the feoffor, and his reſerving to himſelf a power to defeat them in
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(G) Of Remainders in Abeyance or Contingency; what Eſtate is ſufficient to ſupport them; when they are to take effect; and by what Means they may be deſtroyed or prevented from coming *in eſſe*; and therein, of Remainders by way of executory Deviſe or future Intereſt.

" A Contingent remainder muſt veſt during the particular eſtate, be-
" cauſe if remote contingencies ſhould be allowed to hang over
" titles, no man would know when he was ſafe in his purchaſes. The
" law therefore has appointed how long ſuch contingencies are to expect,
" which is, only during the continuance of the particular eſtate, and then
" the remainder muſt come in being; ſince remainder *ex vi termini* ſigni-
" fies a remaining part of a particular eſtate preceding. Whether ſuch par-
" ticular eſtate determine by effluxion of time, or by merger of the particu-

" lar eſtate in a greater, it is all one: for if the contingent remainder do
" not veſt before ſuch merger, it can have no being afterwards; ſince the
" particular eſtate is the ſole limitation on which the remainder is to take
" place.

" Contingent remainders ariſe either at common law, or by way of
" uſe, and are alſo to be deſtroyed two ways: 1ſt, By the merger of the
" particular eſtate which ſupports them; for the particular eſtate being,
" as hath been ſaid, the ſole time of limitation in which theſe contingen-
" cies are to take place, the merger of that eſtate is the deſtruction of
" the remainders; and this, whether ſuch remainders be limited at com-
" mon law or by way of uſe. But then every particular eſtate upon which
" ſuch remainders depend muſt be taken away; for the remainder is the
" remaining part of ſuch particular eſtate, when there are more than
" one in the limitation; and each particular eſtate is the time appointed
" by law when ſuch contingent remainders are to take place; and there-
" fore the deſtroying of one of theſe particular eſtates is no deſtruction of
" the remainder. Hence it is, that if an eſtate be limited to *A.* for life, re-
2 Roll. Abr 796. Wegg v. Villers, 1 Ventr. 188. " mainder to *B.* for life, with contingent remainders over; if *A.* makes a fe-
" offment, this does not deſtroy the contingent remainder, becauſe *B.* hath a
" right to enter and recontinue his eſtate, which therefore in judgment of law
" ſubſiſts in him; and therefore that eſtate is not gone within the compaſs
" of which the contingent remainder is to veſt. So it is, if *B.* had only a
" right of action; as, if a deſcent had been caſt upon the heir of the feoffee
" of *A.* and put *B.* to his real action; becauſe he who hath the right to the
" eſtate, hath, by the better opinion, in judgment of law, the eſtate in
" him.

" 2dly, Such contingent remainder ariſing by way of uſe, may be alſo
" deſtroyed by taking away the ſeiſin out of which the uſe ariſeth. For
" the ſtatute of the 27 *H.* 8. hath executed the ſeiſin of the feoffee to the
" uſes limited, ſo that if there be no ſeiſin at the time when the uſe is
" to take place, ſuch uſe muſt be deſtroyed; becauſe no ſeiſin or poſſeſſion
" can be executed to it; and therefore if the perſon in whom the legal ſei-
" ſin is, made a feoffment for value without notice, ſuch feoffee comes
" into a good title at law, and there is no reaſon in equity to take it from
" him, and by conſequence, in ſuch caſes, the ſeiſin out of which the uſe
" ariſeth is deſtroyed. And therefore if a man covenants to ſtand ſeiſed
" to the uſe of himſelf and his heirs, till an intended marriage of his ſon
" takes effect, and after the marriage to the uſe of his ſon for his life, re-
" mainder to his wife for her life, with contingent remainders to the iſſue
" of the marriage, the father makes a feoffment in fee for value, without
" notice of the uſes before ſuch marriage; ſuch uſes are deſtroyed; and
" though the marriage takes effect, they can never ariſe, becauſe the ſeiſin
" out of which the uſes were to ariſe is deſtroyed. Otherwiſe it is, if the
" feoffment had been without value, or with notice; becauſe ſuch feoffees
" had only acquired a ſeiſin which equity would make liable to the uſes as
" a mere ſubſtitute of the feoffor. The ſame law of a leaſe for years re-
" ſerving rent for the time of the continuance of ſuch leaſe; becauſe ſuch
" leaſe is valuable. Otherwiſe, of a leaſe for years reſerving no rent; be-
" cauſe for no valuable conſideration.

2 Roll. Abr. 796. Wegg v. " If a man makes a feoffment to *J. S.*, to the uſe of himſelf for life
" remainder to his daughter on her marriage for her life, remainder t
" he

" her firſt ſon, remainder to his own right heir; if he makes a feoffment " in fee, or grants the reverſion without value, that will not diſplace the " contingent remainders; becauſe the feoffee comes in as a volunteer, and " therefore ſhall not diſturb a valuable ſettlement. But, if ſuch feoffor and " *J. S.* join in a feoffment for value without notice, it will deſtroy the re- " mainders, for the former reaſon. But, if he himſelf makes a feoffment " for value without *J. S.*, ſuch contingent remainders, by the better opi- " nion, will ariſe of the firſt livery to *J. S.* if they happen within the life " of the daughter, which is called the *ſcintilla juris* in *J. S.* to be executed " to the contingent uſes. The reaſon of which is, that ſince there is a " particular eſtate ſtill continuing in the daughter, within the compaſs " of which the contingent remainders may ſtill veſt; and ſince before the " ſtatute there was a ſeiſin continuing in the feoffee, and the intention of " the ſtatute was to preſerve and not to deſtroy the eſtate, therefore, in " ſupport of the ſtatute, the law rather will ſuppoſe a ſeiſin in feoffees to " be executed to the contingent uſes, if they happen within time, than " ſuffer ſuch contingent uſes to be deſtroyed by limitations ſubſequent to " them.

Villers. [*Vide* Fearne's C. R. 433, 434, 435, 436, 437, &c.]

" Let us in the next place ſee by what means theſe contingent remain- " ders may be deſtroyed or prevented from ever ariſing."

" A *ceſtuy que uſe* in fee 1 *H.* 8. deviſes, that his feoffees ſhall be ſeiſed " to the uſe of *B.* his ſon for life, remainder to the next heir of the body " of *B.* and *C.* his wife for life, remainder to the next heir of the ſaid heir " begotten, and for default of ſuch iſſue to the uſe of the heirs of the body " of *B.* and *C.* his wife for the life and lives of every ſuch heir or heirs, " and for default of ſuch heirs, to the uſe of the heirs of the body of *B.* " remainder to the right heirs of *B.* and if any one of the ſaid heirs ſhall " let, ſet, alien, or mortgage his right, title, or intereſt, or ſuffer any re- " covery to be had againſt him by his conſent, *&c.* that then the uſe limit- " ed to ſuch heir ſhall be void during his life, and the feoffees ſhall thence- " forth be ſeiſed to the uſe of the heir apparent of ſuch offender, as if he " were dead. *A.* dies; *B.* hath iſſue by *C.* a ſon named *D.* and dies, in " 31 *H.* 8. *C.* dies; *D.* enters, and hath iſſue two ſons, *E.* and *F.* " then *D.* 4 *El.* by indenture and fine conveys to the defendant with war- " ranty, and afterwards, 6 *Eliz.*, *E.* levies a fine to him with warranty " likewiſe. Afterwards *E* hath two ſons, who are now living. The " heir of the ſurvivor of the feoffees within five years after the full age of " *F.* and ſeven years after the fine levied, enters to revive the uſe limited " to *F.* who enters, and lets to the plaintiff. And by *Geoffries* J. B. had " an eſtate-tail, becauſe the eſtates are limited to go in a courſe of deſcent " from heir to heir of his body. But by *Gawdy* and *Southcote* J every iſ- " ſue of *B.* and *C.* hath eſtate for life ſucceſſively with a remainder in tail " expectant, as heirs of the body of *B.* and ſuch remainder in tail ſhall not " be executed in poſſeſſion by reaſon of the meſne remainders for life limit- " ed to the heirs of the body of *B* and *C.* for their lives, which, though " though they are but contingent, ſhall hinder the cloſing of the eſtate for " life with the remainder in tail in poſſeſſion. But by *Wray* C. J. and, as " it ſeems, the better opinion, *B.* and *C.* have but eſtates for life by expreſs " limitation; but the remainder to the heirs of the body of *B.* which is an " eſtate-tail, cloſes with their eſtates for life, and gives them an eſtate-tail in " poſſeſſion, ſubject to open and let in the contingent remainders to the " heirs of the body of *B.* and *C.* for their lives reſpectively; then *D.* by " his fine ſevers his two eſtates, forfeits his eſtate for life, and lets in *E.*

1 Leon 256 Manning v. Andrews. *Vide* 1 Co. 138. Pl. 371. that ſuch limitations of perpetual freehold are againſt law and void; becauſe thereby lords would their loſe their ward- ſhips, eſ- cheats, &c. *Idem quære.*

" his

" his heir-apparent for his life, and *E.* by his fine lets in *F* his then heir
" apparent by purchaſe, which the ſons of *E.* born after ſhall not diveſt.
" But by *Geoffries* J *E.* being in by forfeiture of *D.* his father, his eſtate
" ſhall not be again ſubject to the forfeiture by his alienation; or, if it be,
" yet *F.* can have no more than *E.* had at the time of the forfeiture, which
" was but during the life of *D.* his father, and not the inheritance in tail,
" for that continued in *D.* ſubject to no forfeiture. As to the regreſs of
" the feoffees, *Geoffries* J. held, that *F.* taking in his turn as heir of the
" body of *B.* and *C.* which was contingent, they ought to enter to revive
" the uſe to him, but that their entry by fine and nonclaim was barred.
" *Southcote* J. thought they could not enter at all, becauſe the ſtatute takes
" out all the right from them, but that *F.* might enter, and was not bound
" to the five years, having no right at the time of the fine levied, his right
" coming by the fine of *E.* as the *cauſa cauſans*. But *Wray* was clear, that
" no eſtate was left in the feoffees to warrant their entry; but that the
" contingent uſes, when they happen, ſhould veſt without ſuch entry:
" then, when *D.* levied a fine, he gave an eſtate of inheritance to the de-
" fendant, having the entail and fee annexed to his eſtate for life, and *E.*
" by his entry could gain only an eſtate for life as next heir apparent accor-
" ding to the will, and by his fine he could give only that eſtate for life,
" and ſo by the fine of *D.* the right of the entail and fee were clearly
" barred and gone; and by the fine of *E.* his eſtate for life was gone;
" and ſo *F.* to whom no eſtate was ſpecially limited, but who was to
" take only as heir apparent to *E.* had no cauſe to enter. *Quære* of this
" caſe."

1 Co. 130. b
134. b.
135. b.
129. a.
2 Sid. 67.

" So it is, if a leaſe be made to *A.* for life, remainder to the right heirs
" of *J. S.* if *A.* makes a feoffment living *J. S.* the remainder is gone.
" But in theſe caſes, if *A.* had been diſſeiſed, yet the remainder might
" have taken place; for, as the right of the particular eſtate was ſubſiſting,
" ſo the right of the remainders which depended upon it was in the ſame
" condition and *A.* by his re-entry ſhall reſtore not only his own eſtate,
" but the contingent remainders likewiſe. But in that caſe, if *J. S.* dies,
" and then *A.* dies before any re-entry, then the feoffees muſt enter to re-
" vive the uſe to his right heirs; becauſe, until ſuch entry, the diſſeiſin
" continues, and the uſe to draw after it the poſſeſſion, until that poſſeſ-
" ſion be reſtored, it cannot be carried to the uſe, and none have right to
" the poſſeſſion but the feoffees."

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(*A. Tenant for life, remainder to his firſt ſon*) [allowed to be good law by Lord Hardwicke in Hooker v. Hooker, Ca. Temp. Hard. 13. Elie v. Oſborne, 2 P. Wms. 610. Manſel v. Manſel, Ca. temp. Talb. 252]

Wegg v. Villers.
1 Roll Abr 796
1 Ventr 188. S. C. cited.

" *A.* covenants to ſtand ſeiſed to the uſe of himſelf for life, remainder
" to his wife for life, remainder to *B* his daughter for life, remainder to
" the firſt ſon to be begotten of the body of *B.* and after to divers other
" ſons of *B.* in like manner, remainder to his own right heirs; and after,
" for diſturbing the riſing of the contingent eſtate, grants his reverſion in fee
" without conſideration, and with expreſs notice of the firſt uſes; and af-
" terwards makes a feoffment in fee, and dies: his wife enters: *B.* dies,
" and then the wife dies. It was adjudged, 1ſt, That this grant of the
" reverſion, which was in himſelf, and out of which the contingent re-
" mainder was to ariſe, (being by way of covenant to ſtand ſeiſed,) could
" not prevent the contingent remainder from riſing, becauſe the grantee
" had

" had expreſs notice of the ſettlement, and therefore took it ſubject to the " uſes limited thereby. 2d, That this feoffment did not deſtroy the con- " tingent eſtate; for this was a forfeiture of his eſtate for life, and of the " eſtate for life of the wife in remainder during the coverture, ſo that the " daughter might have entered for the forfeiture during the coverture, " which right of entry was ſufficient to ſupport the contingent remainder. " But it is there ſaid, it would have been more doubtful, if the daughter " had not had an eſtate for life, but that the contingent remainder had " depended immediately upon the eſtate for life of the wife. becauſe the " feoffment of the huſband paſſed his eſtate and the eſtate of the wife too, " during the coverture, and then neither of their eſtates were *in eſſe* to ſup- 3 Mod. 310 " port the contingent remainders, and that in ſuch caſe the contingent re- " mainder ſhould be deſtroyed. This was upon a conveyance made by " Sir *Edward Coke*.

" Note, It was held by *Glyn*, C. J. in the above caſe, that if the feoff- 2 Sid. 159 " ment of the Lord *Coke* had preceded the grant of the reverſion, this [Mr. Fearne after explaining very fully this doctrine as to the neceſſity of an actual entry to reſtore or reduce contingent uſes after they have been diveſted, adds,— But we ought to be very cautious how we at this day admit ſuch a doctrine in practice; a doctrine which would lead us to conclude, that in common caſes of ſtrict ſettle-

" had for ever deſtroyed the contingent remainders, and that no entry by " thoſe in remainder could have revived them. And therefore there " ſeems a difference between ſuch contingent remainders as are to ariſe " out of the eſtate of the perſon who makes the feoffment, and ſuch as " ariſe out of the eſtate of a third perſon. Where they are to ariſe out " of the eſtate of the perſon who makes the feoffment, they are thereby for " ever deſtroyed, becauſe there can be no *ſcintilla juris* left in him againſt " his own feoffment to ſerve them, when they come *in eſſe*. But, where " the *ſcintilla juris* is in a third perſon, there, if the firſt eſtates are re- " duced in poſſeſſion before the happening of the contiugencp, the *ſcintilla* " *juris* is likewiſe reſtored to ſuch third perſon ſufficient to ſerve them, " when they come in *eſſe*; and therefore in the above caſe, he having " granted his reverſion out of which the contingent uſes were to ariſe, " though he himſelf after made a feoffment by diſſeiſin, yet, upon the en- " try of the wife after his death, the *ſcintilla juris* in the grantees of the " grantees of the reverſion revived to ſerve the future uſe. But, if after " ſuch feoffment, they had releaſed all their rights, &c, or, if they them- " ſelves being lawfully in poſſeſſion, had made ſuch feoffment, the contin- " gent remainders could never afterwards have ariſen. But, where ſuch " feoffees to uſes enter and diſſeiſe the tenant in poſſeſſion, and make a " feoffment in fee, there, by the entry of thoſe in remainder in whom an " eſtate certain was ſettled, the diſſeiſin is purged, and by conſequence " their *ſcintilla juris* reſtored to ſerve the contingent uſes.

ment upon marriage, where the conveyance is by way of uſe, if the father the firſt tenant for life, were by feoffment, &c. to diveſt the eſtates, leaving them a right of entry, the contingent remainders to the ſons, &c. could not take effect; unleſs the mother, ſuppoſing her to take a remainder for life and to ſurvive the father, or elſe the truſtees to whom the remainder for preſerving contingent uſes was limited, or elſe the general grantees or releaſees to whom the lands were conveyed to the uſes expreſſed, ſhould actually make an entry into the land; an opinion which, with all due deference to what was delivered by the court of K. B. in their arguments upon the caſe of Wegg v. Villers, I cannot perſuade myſelf would hold at this day; for, Firſt, as to what was reſolved in the caſe of Wegg v. Villers, we are to obſerve; that as there was, beſides the *right of entry* in *the daughter*, an *actual entry* made by the *mother* in that caſe; the point, whether the mere right of entry in the daughter would have been ſufficient, without any entry by her or by the mother, or by the grantee, was not the queſtion which came before the court; nor of conſequence, did the judgment of the court in that caſe depend upon or decide the doctrine in regard to that point. And as to the other caſes put and agreed to by the court in their debate of the principal caſe, the opinions upon them were really extrajudicial; and, indeed, ſo far as they

they reſpected the ſuppoſed neceſſity of an *entry* to reſtore or reduce contingent uſes; they appear to have been founded on an artificial ſtrain of reaſoning, much too ſubtle and metaphyſical to bear any great ſtreſs. If we are to infer (as is ſaid in the arguments in Chudleigh's caſe) a *ſcintilla juris* in the feoffees, that may enable them to enter and reſtore their *poſſibility of a ſeiſin*, (or, if the contingency has happened, their *actual ſeiſin*,) to ſerve the contingent uſes; what is it that confines us to ſuch narrow and inſufficient limits in regard to the meaſure of this *ſcintilla juris*? Why not extend the inference one degree further, and ſuppoſe ſuch a *ſcintilla juris*, as may be competent to ſerve the contingent uſes, without the unneceſſary circuity of an *actual entry*? The latter inference is certainly more adequate, and better adapted to the end propoſed; and what is there diſcoverable in the ſtatute of uſes, which excludes this and admits the former? Nay, how does it appear that any thing, contained in that ſtatute, puts us to the neceſſity of recurring to any *ſcintilla juris* at all in the feoffees, or any entry to be made either by them or by the *ceſtui que uſe* under any preceding veſted uſe, in order to reſtore and reduce a contingent uſe to the *capacity* of taking effect, whilſt a right of entry ſubſiſts in any preceding *ceſtui que uſe*? On the contrary, does not the ſtatute expreſsly enact, that where any perſon, &c. is ſeiſed to the uſe of others, ſuch other perſons, *i. e.* the *ceſtui que uſe*, ſhall be deemed and adjudged in lawful ſeiſin, eſtate, and poſſeſſion, &c. *to all intents, conſtructions, and purpoſes in the law*, of and in ſuch like eſtates as they had in the uſe, &c. (*a*)? And muſt not theſe words, *to all intents, inſtructions, and purpoſes in law*, be referred to the *legal* properties, qualities, and capacities of eſtates of the like degree or meaſure at common law? If ſo, the *ceſtui que uſe* become enabled to, and take by virtue of this ſtatute, eſtates poſſeſſing and bearing in themſelves all the qualities, properties, and capacities of eſtates at common law, of the like degree or meaſure; now one of the *legal* qualities or capacities, of an eſtate at common law, of the degree or meaſure of freehold, is, that after it is diveſted and turned to a *right of entry*, ſuch right of entry will ſupport a contingent remainder; and one of the qualities or capacities of a *contingent remainder* at common law is, a capacity of being ſupported by ſuch right of entry: why then do not, a preceding *veſted uſe*, of the degree or meaſure of freehold, and a ſubſequent *contingent uſe*, reſpectively, acquire theſe *legal* qualities, properties, or capacities, amongſt other qualities or properties of eſtates of like nature and degree at common law? If they do, it is obvious there can be no neceſſity for any *actual entry* by any body, to reſtore a contingent uſe, where there ſubſiſts a *right of entry* in a *ceſtui que uſe* of a preceding veſted freehold to ſupport it; but ſuch right of entry alone will preſerve its capacity of veſting and taking effect. If we deny this, we at the ſame time deny that the *ceſtui que uſe* have lawful ſeiſin, eſtate, and poſſeſſion, &c to *all intents, conſtructions, and purpoſes in the law*, of ſuch eſtate as they have in *the uſe*. I think, that a little attention to the apparent operation of the ſtatute of uſes, in relation to this point, will be ſufficient to prevent our too haſtily admitting a doctrine, which, without the aid of metaphyſical ſubtleties, ſeems hardly reconcileable to the *expreſs force* of that ſtatute. Fearne's C. R. 442. 4th edit.]

Heyns v. Villers 2 Sid. 64. 98. 123. 257.

" This caſe was upon the ſame conveyance with that of *Wegg* v. *Villars*:
" but the caſe, as there put, is, that after ſuch covenant to ſtand ſeiſed,
" Sir *Edward Coke* made a leaſe for years, and then granted the reverſion
" without any conſideration, and the leſſee attorned, and after Sir *Edward*
" entered, and made a feoffment in fee before the birth of any ſon, and
" then died, and his wife entered: and then, it was agreed, that by the
" leaſe for years and the grant of the reverſion, the whole eſtate of Sir
" *Edward*, out of which the contingent uſes were to ariſe, is transferred,
" and that the leaſe for years ſhould be good againſt the contingent remain-
" ders, but not againſt the remainders that were actually veſted, as ſhall
" appear hereafter: but, as to the reverſion, that being granted without
" conſideration, was liable to ſerve the contingent uſes when they came
" *in eſſe*, in the ſame manner as if it had not been granted over at all:
" then, by ſuch leaſe and grant of the reverſion, the whole eſtate being
" out of Sir *Edward*, his feoffment after was a diſſeiſin, and diveſted all
" the eſtates *in eſſe*, and returned them and the contingent remainders to
" a right, which right was reſtored again to poſſeſſion by the entry of the
" wife after his death.—But there, it was clear, that when the wife en-
" tered, ſhe revived the eſtate to herſelf for life, and the contingent re-
" mainders alſo. And it is ſaid in *Ventris*, 189. that it had been a queſ-

(*a*) *Vide* 2 Co. 54. a. Moor, 212. 1 Leon. 258. 1 Mod. 155.

" tion

"tion, whether a right of action would ſupport a contingent remainder; "but that a right of entry would, was never doubted. And there it was "agreed, that if *A.* makes a feoffment in fee to the uſe of himſelf for "life, remainder to *B.* for life, remainder to the firſt ſon of *B.* in tail, "&c., remainder to his own right heirs; that in this caſe a feoffment by "*A.* will not deſtroy the contingent remainders, becauſe the right of en- "try in *B.* for the forfeiture preſerves them, and if he does ſo enter, all "the eſtates in remainder are veſted, ſo that his ſon after his death may 1 Co. 130.
"enter without any re-entry by the feoffees. But, if after ſuch feoffment "*B.* dies before entry leaving a ſon, he cannot enter though his contingent "eſtate be not deſtroyed; but in ſuch caſe the feoffees muſt enter by the "*ſcintilla juris* left in them for ſuch purpoſe to revive the contingent uſes "for the reaſon before given.

"If one makes a feoffment to divers others with ſeveral contingent re- 1 Roll. Abr "mainders, and no eſtate is left in the feoffees, and after they enter and 797. pl. 15. 16.
"diſſeiſe the tenant in poſſeſſion, and make a feoffment in fee, yet, if the "tenant in poſſeſſion, or any of thoſe in remainder in whom an eſtate cer- "tain was ſettled before the feoffment, re-enter, by this all the contingent "remainders are reduced *in ſtatu quo*, &c., and may be executed by the "ſtatute of uſes; for the feoffees are but conduits to convey the eſtate, "and have no power to deſtroy any contingent eſtate. But, upon "ſuch ſettlement, if the eſtates *in eſſe* are diveſted by diſſeiſin, feoffment, "&c. before the contingencies happen, and afterwards they happen, and "then the eſtates *in eſſe* determine before any re-entry; if the feoffees re- "leaſe all their right in the land, or make a feoffment, or any other way "bar their right of entry; in this caſe, the contingent uſes can never be "revived to be executed by the ſtatute, becauſe the feoffees have barred "their *ſcintilla juris*, and none in *eſſe* can enter.

"If one on marriage of his ſon, &c. covenant to ſtand ſeiſed to the 2 Lev. 52. 54.
"uſe of the ſon for life or for 99 years, if he ſo long live, remainder to 3 Keb. 430.
"two ſtrangers during the life of the ſon, upon truſt to ſupport contingent "remainders, with remainder to the firſt and other ſons in tail; this re- "mainder to the two ſtrangers is void, becauſe there is no conſideration; "and then, by conſequence, there is no eſtate to ſupport the contingent "remainder to the ſons."

"*A.* tenant for life, remainder to his firſt and other ſons in tail ſucceſ- 2 Saund. "ſively, remainder to *B.* in fee: *A.* and *B.* before the birth of any ſon, 386. 3 Keb. 12.
"levy a fine of their eſtate to a third perſon. This makes no diſcontinu- "ance or diveſting of any eſtates, becauſe each gives only his own eſtate. "Yet by *Hale* and other good opinions, the contingent remainder is de- "ſtroyed, becauſe, though the eſtates paſs divided from them, yet they "are united in the grantee, and ſo no particular eſtate in being to ſupport "the contingent remainder."

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(Note) *Vide* 1 Term Rep 634.

"One having three ſons *A.*, *B.*, and *C.*, deviſes lands to them ſeve- Cro. Jac. "rally without limitation of any eſtate, and that *if any of them die, the* 260. "*other ſurviving ſhall be his heir*. *A.* the eldeſt dies leaving iſſue; and 1 Bulſtr. 61 "if this part ſhould go to his ſon, or to *B.* and *C.*, was the queſtion. Wood v. "It was adjudged by three juſtices againſt *Fleming* C. J. for the ſon of *A.* Ingerſole, "becauſe nothing but a freehold paſſed by the deviſe, and the reverſion Swinb. 118. "in fee deſcending upon *A.* his eldeſt ſon, had merged his eſtate for life, "and that after his death this could not be revived to veſt the remainder "in *B.* and *C.* But *Fleming* C. J. was of opinion, that this might well

"veſt

" veſt in *B.* and *C.* by way of remainder, and then the words implied " that every one ſhould have it after the other, and therefore, though the " freehold of *A.* was merged by the deſcent of the fee, yet to ſupport the " intent of the will, this ought to veſt in the ſurviving ſons for their lives.

2 Lev. 202. Sir T. Jon. 79. 3 Keb. 789. 924. Forteſcue v. Abbott, Pollexf. 481.

" One having three ſons *A*, *B.*, and *C.*, deviſes lands to them ſeve- " rally without limitation of any eſtate, and if any of them die, his part to " remain to the others, equally to be divided between them. *A.* dies hav- " ing firſt granted the land for 1000 years to the defendant. It was ad- " judged, that though by the deſcent of the fee upon *A.* the eldeſt ſon, " his eſtate for life was merged, and ſo the contingent remainders to the " other ſons were deſtroyed (for in theſe caſes the remainder muſt be in " contingency, and cannot veſt preſently, becauſe it is uncertain which of " the ſons will ſurvive) yet that it ſhould be good to them by way of exe- " cutory deviſe, according to the opinion of *Fleming* in the caſe next before, " (for ſo muſt his opinion be underſtood, though it is there ſaid, by way " of *remainder*,) and that this was the moſt reaſonable conſtruction to ſup- " port the intent of the will. And they ſaid, the caſe of *Wood* v. *Inger-* " *ſole* was beſt put in *Bulſtrode*; for upon inſpection of the record the " words appear to be *if any of my ſons die, the* ONE *to be the other's* " *heirs*, which words import no certainty, which of the ſurvivors, or " whether both ſhall have the part of the ſon who dies firſt, and therefore " that part of the deviſe was void, and by conſequence would not carry " over the eſtate from the ſon of *A.* or defeat the leaſe made by *A.* And " *Jones* ſays, it was reſolved in this caſe by the court, that to ſupport the " intent of the will it ſhould be conſtrued, that he deviſed for life to *A.* " remainder to *B*, and *C*, equally to be divided between them; and ſo in " the other deviſes; and that by this conſtruction an actual croſs remain- " der for each one's part ſhould be executed in the other. *Sed quære* " of this conſtruction.

1 Lev. 11. Sir T. Raym. 28. 1 Sid. 47. 1 Keb. 29. 119. MSS. Plunkett v. Holmes.

" One deviſed lands to *A.* his eldeſt ſon for life, and if he ſhould die " without iſſue living at the time of his death, then to *B.* his ſecond ſon " and his heirs; but if *A.* had iſſue living at the time of his death, then " the lands ſhould remain to *A.* and his heirs; and died. *A.* entered, and " ſuffered a common recovery, and died without iſſue, having by his will de- " viſed the lands to the defendant. *B.* entered, and let to the plaintiff; and " the queſtion was, if *A.* had by the will an eſtate for life only, with a con- " tingent remainder to *B.*? or, if the fee was veſted in *A.* with an execu- " ry deviſe to *B.*? and, admitting it to be an executory deviſe to *B.*, " the common recovery barred it? It was argued for the plaintiff, that " had the fee; for though an eſtate for life only is deviſed to him, yet " deſcent of the reverſion, the whole fee was executed in him, which " merges his eſtate for life, and then the eſtate to *B.* can be no other than " an executory deviſe. For when all the fee is given to or veſted in one " perſon, with limitation of a fee to another perſon upon a contingency, " this cannot be a remainder; for a fee cannot be limited upon a fee, as " appears before, but of neceſſity this muſt take effect as an executory de- " viſe. But when only part of the eſtate, as for life or in tail, is given to " one, and the reſidue to another upon a contingency, as to the " heirs of *J. S.*, who is then living, or to ſuch perſon as ſhall be living " in ſuch houſe at ſuch a time, this remainder is contingent. But when " the whole fee is in *A.*, either by the deviſe, by a tranſpoſition of " words, or by deſcent of the fee, and then the deviſe to *B.* can be " other than an executory deviſe, which being to happen within the " paſs of one life, hath been allowed good. *Cro. Ja.* 590. *Pet* v. *Bro-*

As to the ſecond point, they relied upon the ſame caſe, that this cannot be barred by the common recovery. *Sed per totam curiam* it was adjudged, that *A.* had but an eſtate for life by the will, and the remainder to his heir was not executed; for both the remainders to *A.* and to *B.* are upon a contingency, not a contingency upon a contingency, which the law will not allow, (for then by the ſame reaſon it might allow a hundred contingencies one after another, and ſo quite elude the ſtatute of *quia emptores*,) but upon one and the ſame contingency, which looks ſeveral ways, *viz.* if *A.* hath iſſue living at the time of his deceaſe, then to him and his heirs; but if not, then to *B.* and his heirs. And the caſe was thus conſidered, as if *A.* had been a ſtranger, and not heir at law. But then conſidering him as heir at law, and that the reverſion deſcended to him, yet, *per curiam*, not ſo abſolutely as to merge and confound the eſtate for life given by the will againſt the expreſs words and intent thereof; but there ſhall be an hiatus or opening to let in the remainders when they happen; and though *A.* happens to be heir at law, yet this being matter *dehors* the will, no uſe ſhall be made of it in expounding the will; and *Archer*'s caſe is expreſs in the point, where, though *Robert* the deviſee for life was heir, yet the remainder to his next heir male was a good contingent remainder, and the eſtate for life, not merged in the fee, ſhould deſcend on him. And it cannot be ſuppoſed, that this conſideration eſcaped a quick-ſighted reporter, but was omitted as a thing of no value. As to the ſecond point, if the remainder to *B.* be contingent, there is no doubt but it is barred or deſtroyed by the recovery, and it ſo would be, by a bare ſurrender of the eſtate for life. And they all agreed, that if, by any conſtruction, it could be made a contingent remainder, it ſhould be ſo taken, rather than an executory deviſe, which could not be barred by a common recovery, and ſo would tend to a perpetuity. And note, they all ſeemed to agree, that the fee was not in abeyance, but deſcended to *A.*, ſubject to ſuch hiatus, and that *quoad B.* the deviſee in remainder, *A.* had but an eſtate for life. *Quære* if the conſtruction in this caſe does not thwart the ſecond of the two preceding caſes, where the court, allowing the remainders to be in contingency, held them deſtroyed by the deſcent of the fee upon the eldeſt ſon, which merged his eſtate for life, and therefore they were." Cro. Car. 158. 360. 1 Co. 66.

[*A.* deviſed lands to his ſiſter, who was heir at law, and her aſſigns during her life, and if ſhe ſhould marry, and have iſſue male of her body living the time of her death, then to ſuch iſſue male and his heirs male for ever; but if ſhe ſhould leave no iſſue male at her death, then to *G.* and his heirs for ever. The queſtion reſpected the title of the teſtator's ſiſter's huſband to be tenant by the curteſy of the lands ſo deviſed to her; and the court held, that the inheritance was never executed in poſſeſſion of the ſiſter, during her life, (notwithſtanding the inheritance deſcended on her,) and therefore her huſband could not be tenant by the curteſy; it follows, that the deſcent of the fee did not merge her eſtate for life, or deſtroy the contingency.] Boothby v. Vernon. 9 Mod. 147

Lands were conveyed to the uſe of *A.* and his wife for life, remainder to the uſe of *B.* the ſon of *A.* for life, remainder to the firſt and other ſons of *B.* in tail, remainder to *A.* in fee. *A.* and his wife died in the life of *B.* who afterwards died without iſſue, leaving a wife. The queſtion was, Whether the wife of *B.* was entitled to dower in the land? It was decreed ſhe was: and Lord Chancellour, with one of the Hooker v. Hooker, Ca. temp. Hardw. 13. Fearne's C. R. 302.

" the judges, was of opinion, that the eſtate for life in *B.* was merged by
" the deſcent of the inheritance upon him, and the contingent remainder
" deſtroyed.]

Page 316 ('*A and B joint tenants*') Note, *Ventris* reports the ſame caſe to be
" adjudged, that they were deſtroyed, but gives no reaſon for the judg-
" ment; and the other two reporters were two of the judges that gave the
" judgment, and therefore are more to be relied upon."

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(*A copyholder in fee*) [*Vide* Watk. Gilb. Ten. 266. and notes; and Fearne's C. R. 458.]

2 Roll. Abr 794. (6). Pawſey v. Lowdall. [So, in the above caſe of Lane v. Pannell, it is obſervable, that the ſurrender of the baron to *B* in fee, did not deſtroy the contingent remainder: for the legal freehold being in the lords, the ſurrender of the baron paſſed more than he lawfully might. Fearne's C. R. 470 4th edit. So, where copyhold lands were deviſed to *A.* for life, remainder to his firſt and other ſons in tail, &c. remainder to *B* in fee and *A.*, before he had any ſons born, bought the reverſion of *B*, and had it ſurrendered to his (*A.*'s) own uſe, thinking by that means to merge his eſtate for life, and ſo deſtroy the contingent remainder to his firſt ſon; it was agreed, that this ſurrender of the reverſion would not bar the ſon, becauſe the freehold and inheritance were in the lord; for there is not the like convenience as in freehold eſtates at common law, in reſpect of contingent remainders, where there is nobody againſt whom to bring the *præcipe*. Mildmay v. Hungerford, 2 Vern. 243.]

" A copyholder in fee ſurrenders to the uſe of his will, and after by his
" will deviſes the eſtate to *B.* for life, remainder to the heir of his body
" begotten, for ever, and dies. *B.* is admitted, and after ſurrenders to
" the lord of the manor to do with it as he pleaſes, and dies leaving
" ſon. Now admitting the remainder to the heir of the body of *B*
" to be a good remainder, and that ſuch heir ſhould take it by pur-
" chaſe, this ſurrender of *B.* hath not deſtroyed it; for this operates
" only as a grant to the lord of his eſtate for life, and is no forfeiture to
" give an entry to a remainder-man; and by conſequence continues in the
" lord to ſupport the contingent remainder, in the ſame manner as it did
" in *B.*, there being only a change of the perſon, but no alteration made
" in the eſtate; for it is ſtill determinable upon the death of *B.* as it was
" before, and not ſooner.

3 Keb. 759. MSS. Hales v. Riſley.

" *A.* tenant for life, remainder to *B.* for life, remainder to the firſt
" ſecond, and other ſons of *B.* in tail male ſucceſſively; *A* and *B.* join
" in an indenture tripartite between *A.* of the firſt part, and *B.* of the
" cond part, and *C.* and *D.* of the third part, whereby *A.* covenants with
" *C.* and *D.* to levy a fine to other uſes: *B.* ſeals the deed; and it was
" gued by the ſealing it ſhould be ſaid that *B.* joined in the fine, and
" the fine all the eſtates are diveſted and put to a right, and the contin-
" eſtates diſturbed; and *B.* is eſtopped from entering to revive them;
" though he hath a ſon after, yet he cannot enter till the contingent uſe
" revived by entry; which, as this caſe is, no perſon has power to
" But *per cur*, clearly—*B.*'s ſealing the deed, only ſhews his conſent
" *A.* may levy the fine; for he does not covenant, or transfer over his
" tate in remainder: and admitting that *B.* ſhould be eſtopped, yet
" ſons, who claim not under him, are not eſtopped to ſay, that there
" a ſufficient eſtate continuing to ſupport the contingent remainders;
" then, if they are preſerved, every one, who hath right, may enter in
" turn. And after it was adjudged accordingly; and ſaid, there was
" thing in the caſe worth an argument.

Mo 8. 15. Sir Thomas Palmer's caſe. Pop. 22.

" *A.* covenants upon proper conſiderations to ſtand ſeiſed to the uſe
" himſelf for life, remainder to *B.* his ſon for life, remainder to the
" and other ſons of *B.* in tail ſucceſſively; remainder to the right
" of *A*; after *A.* is attainted of treaſon, and executed before the birth

any ſon of *B.* It was adjudged, that by ſuch attainder the king had the fee-ſimple, diſcharged of all the remainders to the ſons not then born, and that they were utterly barred. The reaſon ſeems to be, becauſe they were to ariſe by way of uſe out of the eſtates of the covenantor, which by ſuch attainder are come to the king; and he cannot be ſeiſed to the uſe of any perſon (*a*). But it ſeems if they were to ariſe out of an eſtate executed in feoffees, then the attainder of *A.*, which could only forfeit his own eſtate for life, and remainder in fee, would not prevent them from riſing. But the greater doubt in ſuch caſe would be, if the feoffees themſelves were attainted of treaſon before the birth of any ſon; for all the books agree, they have no eſtate left in them, but a *ſcintilla juris* to ſerve the contingent uſes when they happen. and how far that *ſcintilla juris* is forfeitable, or their entry requiſite to ſerve the contingent uſes, when no actual diſturbance is made of the poſſeſſion ſeems doubtful. For in other caſes, unleſs the poſſeſſion be diſturbed by diſſeiſin, feoffment, *&c.* no entry of the feoffees is requiſite to raiſe the contingent uſes when they happen, as appears before. *Ideo quære* of this.

[(*a*) But, here, the queſtion ariſes, how are to reconcile this reſolution with the principle that *any preceding veſted freehold* eſtate will ſupport a contingent remainder; for here, whatever effect the forfeiture of *A.*'s eſtate for life and remainder in fee,

ight otherwiſe have had, yet as *B.* had a *veſted* freehold, why was not that capable of ſupporting the contingent remainder to his ſons? If indeed there had been an office found antecedent to the birth of a ſon of *B.*, that *A.* was ſeiſed in fee, it might have accounted for the reſolution in the above caſe, by taking away the *right of entry* of *B.*, according to the diſtinction I ſhall notice in the next cited caſe. But abſtracted from a circumſtance of that nature, which does not appear in the report of Sir Thomas Palmer's caſe, that of Corbet v. Tichborn, 2 Saik. 570. of much later date, ſeems to claim our better attention. It was a caſe where *J. S.* being tenant for life, remainder to his wife for life, remainder to his firſt and other ſons, &c. in tail, remainder to himſelf in fee, committed treaſon, and afterwards had a ſon and then was attainted; and upon trial at bar in K. B. the court held, that whether the ſon was born before or after the attainder, the contingent remainder to him was not diſcharged by the lands veſting in the crown, during the life of *J. S.*, becauſe of the wife's eſtate, (viz. a veſted eſtate of freehold in remainder,) which was ſufficient to ſupport it. For this eſtate of the wife, it ſeems, was not turned to a right or affected by the forfeiture of the huſband, nor the crown thereby in poſſeſſion of any other eſtate than what *J. S.* was entitled to at the time. as appears by another caſe, of Linch v. Coote, Salk. 469. where tenant for life, remainder to his firſt ſon in tail, remainder to *J. S.* in fee, was attainted of high treaſon, and died without iſſue. And upon its being urged, that the whole fee veſting in the king by 33 H 8. c. 8. without any office finding the ſpecial matter, he in remainder, could not enter, any more than if a general office had been found, which would have veſted a fee; it was held, that no other eſtate veſted in the king by the ſaid act, than the party attainted had; juſt as if a *ſpecial* office had been found; and therefore the remainder-man might enter on the king, the king's eſtate being determined. For the ſtatute ſaved the rights of others; though it was otherwiſe where an office found an eſtate in fee in the party attainted. Peane's C. R. 425. 4th edit.] 2 Jo. 773. Keb. 732. 3 Mo. 196. 374. 389. 391.

"*A.* ſeiſed in fee of lands, after 27 *H.* 8. makes a feoffment in fee to the uſe of *D.* his wife for her life, and if he ſurvives his ſaid wife, then to the uſe of himſelf, and of ſuch woman as he ſhall happen to marry, for their lives, for the jointure of ſuch wife, remainder to *B.* in fee. Afterwards, *B.* and the feoffees by conſent of *A.* join in a feoffment in fee to the uſe of *A.* and his wife for their lives, remainder in *C.* in tail, remainder to *A.* in fee; andthis was by deed and letter of attorney to make livery. Afterwards *B.* levies a fine with proclamation to other uſes, and then *D.* his wife dies, and he marries a ſecond wife, and dies; and ſhe, by the aſſent and command of the firſt feoffees, and after the five years after the fine, enters to raiſe the uſe to herſelf. And by the better opinion her entry was not lawful; for by the ſecond feoffment all the eſtates were diveſted and put to a right. And whether ſuch feoffment were only the diſſeiſin of the attorney, who made the livery, and

Dyer, 339. 42. 198, 9. 2 Leon. 14. Pop. 76. Co. 1. 136. Brent's caſe

"the

" the confirmation of him in remainder, and of the feoffees; or the di
" ſeiſure of all; yet by ſuch joining in the deed of feoffment, the feoffe
[*Vide* Fearne's C. R. 216. 217, 218, 219, 220, &c.] " have barred their *ſcintilla juris*. and cannot enter to revive the future u
" to the ſecond wife. And *A.* by his fine hath barred himſelf to enter
" right of his wife to reverſe the firſt eſtates; and his firſt wife could n
" enter, being covert; and therefore, there being none to enter to revi
" ſuch future uſe, it is by the feoffment deſtroyed, and the ſecond wife
" entry unlawful.

Cro. Eliz. 277. Maſon v. Nevill. " *A.* ſeiſed of lands makes a feoffment in fee to the uſe of himſelf a
" his wife for lives, and after their deaths, to the uſe of *B.* their ſon f
" life. and after his death, that the feoffees ſhould be ſeiſed *ut in eorum pr*
" *tino ſtatu*, upon condition that they ſhould receive the profits, and p
" to *C.* wife of *B.* 20*l per annum* during her life; and after that th
" ſhould be ſeiſed to the uſe of the heirs male of the body of *B.* T
" feoffor and his wife die; *B* enters, and makes a feoffment to *D.*, a
" dies; and after *C.* dies, and then the heir male of the body of *B.* ente
" It was adjudged lawful; and that the feoffment of *B.* was no diſcon
" nuance, nor barred the heir of his entry. But this was without a
" great argument, and no reaſon given for the judgment. However,
" ſeems well given; for by reaſon of the intermediate remainder to
" feoffees, *B.* was not ſeiſed by force of the entail when he entered
Co. Lit. 347 (a). Raym. 37. " made the feoffment, and then, by *Littleton*'s rule, his feoffment ma
" no diſcontinuance, and, by conſequence, as the feoffees might have
" tered preſently for the forfeiture, they being next in remainder, ſo,
" ter the death of *C.* the heir of the body of *B.* may likewiſe enter,
" cauſe then the preceding eſtates are determined. And if the feoffm
" of *B.* made no diſcontinuance, there is nothing to hinder their en
" though they are in of the entail, by deſcent from their father, a
" ſuch entry.

Cro. Eliz. 764. 854. 2 Roll. Abr 611. 792. 794. (4). Wood v. Reignold. " *A.* ſeiſed of lands in fee by indenture covenants with *B.*, in c
" deration of a marriage intended between *A.* and *C.* daughter of *B.*
" ſtand ſeiſed to the uſe of himſelf and his heirs till marriage, and
" to the uſe of himſelf and *C.* and the heirs of his body, remainde
" his own right heirs; and then before the marriage, he makes a
" for 31 years, reſerving rent, to begin after the end of a former
" then *in eſſe*. The marriage takes effect: and in ejectment afte
" death of *A.* it was held, that this leaſe ſhould bind the future uſe t
" wife, as a leaſe upon good conſideration by the feoffees at commo
" ſhould bind *ceſtuy que uſe*, but that ſubject to that leaſe the uſe
" wife ſhould ariſe, becauſe the ſame ſeiſin and freehold continues,
" therefore the uſe to the wife ſhould ariſe out of the reſidue of the
" and ſhe ſhall have the reverſion and rent reſerved upon the leaſe
" wherever the ſtatute finds a ſeiſin to uſes, there, it carries the po
" to them; and notwithſtanding ſuch leaſe for years yet the ſeiſin
" uſes continued.

Cro. Jac. 168 2 Roll. Abr 293. (I). Bold v. Sir Hen. Wynſton. " And yet we have another caſe in our books where it was he
" wife was not at all bound by ſuch leaſe. The caſe was this:—*A.*
" nanted, in conſideration of love as to his ſon, to ſtand ſeiſed to the
" his ſon for life, remainder to the uſe of ſuch woman as he ſhould aft
" ry, for her life; remainder to the firſt and other ſons in that ma
" in tail, *&c.* And after, the ſon proving extravagant and being
" *A.* the father, to diſturb the riſing of the uſe to the future wife,
" a leaſe for 1000 years, and then the ſon marries the gaoler's da

" And yet it was held, that ſhe was not bound by this leaſe, but ſhould " have the land diſcharged of it. And the reaſon given is, becauſe there " being a good eſtate by the firſt limitation to ariſe when the wife is " known, if this be not deſtroyed, this cannot be charged or incumbered, " becauſe it hath relation to the covenant, and therefore the leaſe ſhall be " conſtrued to ariſe out of the reverſion which the covenantor had in him, " and might lawfully charge. But to difference this caſe from the for- " mer, it is to be obſerved, that, here, the covenantor had nothing but " a reverſion in him; he had no eſtate for life, as he had in the caſe pre- " ceding: beſides, this leaſe was made without any conſideration, and " for no other purpoſe, but to defeat the riſing of the uſe to the wife. And " if it ſhould be good in poſſeſſion, being for 1000 years, and no rent re- " ſerved upon it, it would defeat the whole ſettlement; and therefore it " is more reaſonable to conſtrue ſuch leaſe to ariſe out of the reverſion " which the covenantor had and might lawfully charge, than to allow it " good againſt the wife who came in upon ſo valuable a conſideration as " marriage. But, if ſuch leaſe had been made for money, or, if a rent " had been reſerved upon it, then though the leſſor had not any eſtate for " his own life, yet ſuch leaſe had been good againſt the ſettlement; be- " cauſe, though it was made in conſideration of marriage, yet not being with Co 3. " any woman in particular, nor in conſideration of any marriage portion, Swine's " it would be fraudulent and voluntary, as to any ſubſequent purchaſer caſe. " for a more valuable conſideration, as money or rent is.

" *A.* gives lands to the uſe of *B.* for life, remainder to his eldeſt ſon in 2 Roll. Abr " tail, remainder to the right heirs of *B.*; and before the birth of any ſon 794. (5). " *B.* makes a leaſe for years, and then a ſon is born: he ſhall avoid this " leaſe after the death of *B*, for the freehold not being altered, ſo that " the contingent remainder may well take place, this leaſe for years ſhall " not affect it, but ſhall be conſtrued to ariſe out of the eſtates which *B.* " had, and might lawfully charge, and ſhall be ſubject as they would have " been, to open and let in the remainder, when it happens. But, if " ſuch leaſe had been made for a valuable conſideration of money or " rent, then it would come within the rules before mentioned, as I con- " ceive.

" *A.* ſeiſed in fee, levies a fine to the uſe of himſelf for life, remainder Cro. Eliz. " to the uſe of ſuch woman as he ſhould after marry, and ſhould ſurvive 826. " him; remainder to *B.* in tail: then *A.* marries *C.*, and after, by fine, Mo 634. " reciting that he was tenant for life, remainder to ſaid *C.* for life, he and Wells v. " *C.* grant the ſaid lands to a ſtranger for 40 years, if he and his wife, or Fenton. " either of them, ſhould ſo long live: *A.* dies; and if *C.* was barred was Pop. 5. " the queſtion? And *per totam cur.* ſhe was barred by eſtoppel. Yet they " agreed, that if a leaſe be made to one for life, remainder to the right " heirs of *J. S.* who is living, and after his eldeſt ſon grants or levies a " fine of ſuch remainder, yet, after the death of *J. S.* he ſhall enter, be- " cauſe he had nothing in him at the time of the grant or fine, and there- " fore ſuch grant or fine were merely void. And there, two judges againſt " two, held, that the fine had extinguiſhed this future uſe by way of pre- " vention. But a *quære* is made of it, becauſe it was but a grant by tenant " for life, which ends with his death. This is the caſe, as it is reported " by *Moore*. But in *Croke*, the caſe is reported to be, that after ſuch ſet- " tlement the huſband and wife levied a fine to a ſtranger in fee, who " granted and rendered the land to the huſband for life, remainder to the " defendant for 60 years, remainder to the right heirs of the huſband;

" and

" and that the huſband died, and *B.*, who had the remainder in tail by the
" firſt ſettlement, entered and let to the defendant; and that after *C.*
" married again, and ſhe and her huſband let to the plaintiff; and upon
" ſpecial verdict found, it was adjudged for the plaintiff. Which proves,
" that the wife was not bound even by eſtoppel, for then it could never
" have been adjudged for her leſſee the plaintiff; and that the joining of
" the wife in the fine ſignified nothing. But, then, as it ſeems, this muſt
" prove too, that the fine was not levied in fee as it is reported; for then
" clearly the contingent remainder to the wife would have been deſtroyed;
" becauſe by ſuch fine the eſtate for life of the huſband was determined,
" and an entry given to him in the remainder for the forfeiture, before the
" contingent remainder could take place; and then, by all the caſes before
" mentioned, it appears to be for ever deſtroyed. And therefore taking
" it to be only a grant by fine for years, and not for any valuable conſide-
" ration, then it determined by the death of the tenant for life who grant-
" ed it; and though it had been for a valuable conſideration, then it deter-
" mined by the death of the tenant for life who granted it. And indeed,
" admitting it had been for a valuable conſideration, yet I cannot ſee how
" it could have continued longer than his life, or bound the contingent
" uſe; for ſuch leaſe by *ceſtuy que uſe* in poſſeſſion differs from a leaſe by
" feoffees to uſes at common law, or by covenantor to ſtand ſeiſed to uſes;
" for there, in both caſes, the uſe takes effect out of the eſtate which ſhall
" ſerve and ſupply the uſes; and therefore ſhall bind or not bind as
" it happens to be made for a valuable conſideration, or voluntarily,
" as appears before. But, where ſuch leaſe is made by *ceſtuy que*
" *uſe* in poſſeſſion, this takes its effect out of his eſtate only, and by
" conſequence can continue no longer than that does; and then, when
" the freehold is not deſtroyed, the contingent remainder may well veſt
Quære. " nothing being done to diſturb or diſplace its riſing. *Quære* therefore of
" this caſe.

Mo. 743. Barton's caſe. Cro. Eliz. 765. " *A.* covenants upon proper conſiderations to ſtand ſeiſed or make a
" feoffment in fee to the uſe of himſelf for life, and after of part to the uſe
" of *B.* his wife for life, for her jointure, without waſte, and after to the
" right heirs of *A.* provided, that if the heir of *A.* diſturbs *B.*, that then
" the uſe to the right heirs of *A.* ſhall ceaſe, and that then *A.* and his heirs
" or the feoffees, *&c.* and all others ſhall ſtand ſeiſed to the uſe of *B.* and
" her heirs. Afterwards, *A.* makes a leaſe for 100 years, to begin after
" the death of *B.*, rendering 12*l.* rent, and dies. The heir diſturbs *B.*
" and breaks the condition; yet by the two chief juſtices it was held, that
" the future uſe to *B.* in fee was checked by this leaſe, though the leaſe
" was but an *intereſſe termini* till *B.*'s death. *Et quia non potuit ſurgere tempore*
" *mortis* B., by reaſon of the leaſe for years, *it is deſtroyed for ever.*
" But *quære* of this caſe, for by the other caſes preceding, it appears
" that at moſt, ſuch contingent uſes are only bound by the leaſe for years,
" and not that neither, except where they are made for a valuable con-
" ſideration. But here, the reaſon given why this contingent limitation
" to the wife is deſtroyed by making ſuch leaſe for years, is the ſame that
" is given where contingent remainders are deſtroyed by making a feoff-
" ment in fee, whereas the reaſons and operations of the one and the other
Quære. " are very different. *Ideo quære* of this caſe. Note—*Croke* cites the
" ſolution of this caſe, and ſays, the reaſon thereof ſeems to be, becauſe
Cro. Eliz. 765. " the uſe limited to the right heirs was the ancient reverſion, and no new
" eſtate, and then there could not be a condition annexed thereto.

" this ſeems no good reaſon; for an executory uſe may as well be limited " to ariſe upon a condition precedent as an executory deviſe, and then the " ſtatute carries the poſſeſſion after it; and why it may be created by origi- " nal limitation, and not out of the reverſion, after other eſtates, will be " difficult to reconcile, ſince the reverſion is as much the owner's, as ſuch, " as the poſſeſſion was before any limitation at all made; becauſe the firſt " had a fee, though it was but a baſe and determinable fee. But yet in a " will, ſuch limitation has ſometimes been held to be good, not as a di- " rect remainder, but as an executory deviſe. But this is not law, " becauſe it is the affectation of a perpetuity, ſince ſuch contingen- " cies cannot fall till after the entail is ſpent, which is too diſtant to ex- " pect.

" So, a gift at common law, before the ſtatute of *Weſtm.* 2. to one, and " the heirs of his body, and if he died without heirs of his body, to go " over to another, this was a void remainder, becauſe the firſt donee had " a conditional fee, which, after iſſue, he may diſpoſe of for ever, and " bar the donor of his poſſibility of reverter; and therefore ſuch poſſibility " could not be good as a remainder, nor did any formedon in remainder " lie at common law, when all inheritances were fees abſolute, or condi- " tional. Plow. 235. a 339. b. 248, 249. 2 Inſt. 336. Vaugh. 36.

" So, where one deviſed lands in *London* to the prior and convent of " *B. ita quod reddant annuatim decano et capitulo Sancti Pauli* 14 marks, and " if they fail of payment, that their eſtate ſhall ceaſe; and that the " ſaid dean and chapter and their ſucceſſors ſhall have it: it was held by " *Baldwin* and *Fitzherbert*, the greateſt lawyers of the age, as my Lord " *Vaughan* ſays, that this remainder was void; becauſe the firſt deviſe " carrying a fee, nothing remained after to be diſpoſed of; and executo- " ry deviſes, after a fee-ſimple, were in former ages unknown, which is " the reaſon that this caſe is denied by ſome to be law. And it was held, " that, for the condition broken, the heir of the deviſor ſhould enter; of " which more hereafter. Dyer, 33. a. pl. 12. Finch, 46. Swinb. 122. 1 Brook. 234. (2). Cont. Vaugh. 277.

" But this rule, that a fee cannot be limited after a fee, hath been " long ſince exploded, in caſe of deviſes, and of uſes, where the firſt " eſtate, though in fee, is limited to determine upon a contingency that " may happen within the compaſs of a life or lives in being, or ſome rea- " ſonable time after. And the reaſon of giving way to it at firſt ſeems to " have been, to let men into a means of providing for the ſeveral branches " and exigencies of their own family. 3 Chan. Caſes, 19. 22. 31. 36. 49.

" The firſt caſe we meet with to this purpoſe, is this. In debt againſt " *A.* as ſon and heir of *B.*, he pleads *riens per deſcent.* but of the third " part of the manor of *D.* the plaintiff replies, that he had the whole manor " of *D.* by deſcent; and upon iſſue it was found, that the ſaid manor was " held by knight's ſervice, and that *B.* father of the defendant, by his will " in writing deviſed it to his wife, till the defendant his ſon ſhould come " to the age of 24 years, and when he came to the ſaid age of 24 years, " that he ſhould have the whole to him and his heirs for ever, his wife " having a third part thereof during her life; and if her ſaid ſon ſhould " die before the age of 24 years without iſſue, then the whole ſhould be " to the wife for life; and after her death to *C.* in tail, remainder to the " right heirs of the deviſor. It was found that the wife was dead, and " that the ſon had attained his age of 24 years; and it was adjudged that " he had the fee by deſcent, and ſo aſſets; for the entail with the remain- " ders 2 Leon. 11 3 Leon. 64. 70. Dyer, 124. Hynd v. Lyon, Cro. Eliz. 205. 2 Roll. Abr 626, (3). 839. (1). 2 Mod. 291 [*Vide* Scott v. Scott, Ambl. 383. *contra.* But *quære* of that caſe, and whether it can be ſup-

ported either by principle or authority.]

" ders over not being to arise to *A.* unless he died before 24; and so that
" part of the devise being become void by his attaining 24, then it rested
" wholly upon the first part, which being a devise to his son and heir appa-
" rent in fee, is void, and he shall take by descent, notwithstanding such
" devise. And he could not have an estate-tail in the interim till attained he
" 24, and then to have the fee as a remainder, because the entail was only
" to arise to him upon his dying before 24, as a condition precedent; so
" that neither the tail nor the fee could vest in him presently, by force of
" the devise; but it was, as if he had left the fee to descend to him and his
" heirs, and only said, if my son die without issue before 24, then I give
" the lands to my wife for life, and after to *C.* in tail, *&c* which is a
" good executory devise upon the happening of the contingency, and the
" fee, in the mean time, descends, as it would have done if there had been
" no will. And whether by the words, *if his son died without issue before* 24,
" an estate-tail should vest upon such death, or, that they should be only the
" terms and conditions upon which the executory devise was to take place,
" and after no estate at all, seems doubtful; though the case of *Gardiner*
" and *Sheldon*, after mentioned, seems to make for the latter: for, if he
" died before 24, leaving issue, and that being made the condition upon
" which the remainder limited after were to arise, could be no condition
" to vest an entail in himself, because he and his issue, that is, all who
" could take the entail, were to be dead before the entail could vest, and
" then it could not vest for want of persons to take it, which would make
But *vide infra.* " the devise idle and repugnant as to that part: therefore, these words seem
" to make no alteration of the estate the law would cast upon the son by
" descent, but to be wholly relative to the limitations after, as the mode
" upon which they were to take effect, and not to controul the operation
" of the law in the mean time, in giving him the fee by descent. And to
" construe the case otherwise, would make it wholly useless to the purpose
" for which it is cited by my Lord Chancellour *Nottingham* in the Duke of
" *Norfolk*'s case; for there, either it must create an entail to begin when
" all the issue who were to enjoy it were dead; or, it must make an entail
" at large with the remainders over; and then there is no great mystery in
" the case. The first is impossible, and the latter it cannot be, because
" is confined to his dying before 24; for, if he survives that age, it is no
" to take place

Dyer, 330. 1 Vent. 212. 2 Roll. Abr. 829. (3). Vaugh 267. Clache's case.

" One seised of lands in fee by his will in writing, devises *Blackacre* to
" *A.* his daughter and her heirs, and *Whiteacre* to his daughter *B.* and her
" heirs, and if she die before the age of 16 years, living *A*, then *A* shall
" have *Whiteacre* to her and her heirs; and if *A.* die having no issue, living
" *B.*, then *B.* shall have the part of *A.* to her and her heirs; and if both
" die having no issue, then to *J. S.* and his heirs, and dies. *B.* attains
" her age of 16 years, and then dies without issue in the life of *A.* And
" first, it was held, by three justices against *Dyer*, that the daughters had
" an estate-tail upon the whole will, and not a fee determinable upon
" contingency subsequent. 2d. That by the words, *if both die without issue*,
" no cross remainders in tail were created by implication, but that
" on *B*'s death without issue after 16, *J. S.* should have her part presently
" without staying till the death of *A.* without issue.

Cro. Jac. 376. Godb. 264. 2 Roll. Rep. 119. 137.

" A copyholder in fee surrenders to the use of *B.* an infant and his heirs
" and if he dies or marries before the age of 21 years, then he surrenders
" to the use of *C.* and his heirs; this was held a good surrender to the
" use of *C.* upon such contingency, though *B.* had a fee before, be-

" the contingency was to happen within the compaſs of a life, or upon the death of one then in being. But it is ſaid by *Rolle*, that the ſurrenderor died before the contingency happened, in which caſe the uſe could not riſe to *C.*, though it happened after; becauſe, upon the happening of the contingency, as this caſe is, the ſurrender is to operate as a new original ſurrender to the uſe of *C.*, and this cannot be when the perſon who ſhould make it is dead before, any more than attornment after the death of the grantor ſhall avail the grantee of the reverſion. But, if he had ſurrendered to the uſe of his will, and then had, by his will, deviſed ſuch eſtates, they would be good; becauſe the ſurrender was made to ſupply and ſerve all the contingencies and limitations of the will, and the uſe in the mean time veſted in the ſurrenderor and his heirs; whereas the ſurrender in the other caſe would, according to the wording of ſuch inſtrument, operate double as to original ſurrenders. *Quære.*

153. 2 Bulſt. 27. 2 Roll. Abr. 791. 794. Sympſon v. Southern. Note—Several books put this caſe of an infant *in ventre ſa mere*, and turn the defect of this conveyance in the remainder on the want of a perſon

in being to take immediately. [Mr. Fearne referring to this caſe of Sympſon v. Southern, in his Eſſay on Remainders, ſays, that according to Croke it was reſolved, that the ſurrender to the uſe of C. was void, for that a man could not make ſuch a *conditional ſurrender* to operate *in futuro*. On the other hand, Mr. Fearne ſays, the ſame caſe, as reported by Rolle, is cited in *Lex Cuſtumaria* (111.) as an authority, that ſuch future uſes are good, and that a fee may be limited on a fee, upon a contingency, in copyhold eſtates. And this, he ſays, the caſe in Rolle's Abridgment ſeems to leave undecided. But, he adds, in Gilbert's Tenure (260, 261.) it is ſaid, that ſuch a reſolution ſeems not to be grounded on ſo good reaſon, as the contrary reſolution in Croke; for the uſe upon a ſurrender of a copyhold is not like a uſe or truſt at common law: but he who is admitted upon a ſurrender, is admitted to the legal *cuſtomary* eſtate, and is not ſeiſed to a *uſe*; therefore uſes upon ſurrenders are, in general, governed entirely by the ſame rules, as conveyances at common law, in which ſuch limitations were not allowable; and that upon this principle it ſeems a fee upon a fee in caſe of a ſurrender of copyhold is not good, any more than in a conveyance at common law. But the above opinion of Gilbert is, ſays Mr. Fearne, I think, excluded by decided caſes, for the validity of conditional limitaitons in ſurrenders of copyholds, appears to have been admitted in the caſe of Stocker v. Edwards, or Edwards v. Hammond (2 Show. 308. and 3 Lev. 132. where the ſame caſe ſeems to be ſomewhat differently reported. Fearne's C. R. 372. 4th edit. and *vide* Welcock v. Hammond, cited in 3 Co. 20. b. Brian v. Cawſen, 3 Leon 115). And the deciſion in the caſe of Sympſon v Southern may be referred to the point of the *habendum* after the death of the ſurrenderor being void, taking that as the *conditional future operation*, which was denied to the ſurrender. And in the caſe of Paulter v. Cornhill, Cro. Eliz. 361. Beamond, Juſtice, conceived the limitation of a fee upon a fee, as good in ſurrenders of copyholds, as in caſes of land upon a feoffment. So, ſays he, in the caſe of a ſurrender of copyholds, to the intent the lord ſhould admit *A*, whom the ſurrenderor intended to marry, after marriage; until marriage to the uſe of himſelf and his heirs, and after marriage to the uſe of himſelf and *A.* in tail; the whole court of C. B. held. (Bentley v. Delamore, 1 Freem. 267, 268. and *vide* Calth. Reading, 3. pl. for the ſame point; and *vide* Taylor v. Taylor, 1 Atk. 386) that it was good enough to limit a remainder upon a contingent fee in copyholds: as in caſe of mortgages of copyholds a ſurrender *in futuro* is good, for the freehold remains in the lord. Thus far Mr. Fearne; *vide* Fearne's C. R. 416, 417, 418.—But, if we careſully examine the different reports of the caſe of Sympſon v. Southern, and the other authorities to which Mr. Fearne refers, it will be found perhaps that they will not ſupport the poſition they are brought to eſtabliſh, and that the above doctrine of our author, advanced in his *Tenures*, remains unimpeached, and muſt be admitted to be ſound law.—That the caſe of Sympſon v. Southern is reported by Rolle (1 Ro. Rep. 109. 137. 253.) judgment is ſaid to have been given for the party who claimed the ulterior fee. But the report is very obſcure, and contradictory in many places. The court are there ſaid to have been of opinion with Coke; but Coke's argument, both in Rolle and Bulſtrode, ſeems incompatible with ſuch an opinion. In Croke (Cro. Ja. 376.) the judgment is ſaid to have been given for the party claiming under the ſame law, and ſo it is ſaid in Godbolt and Bulſtrode (Godb. 264. 2 Bulſtr. 272.). In Rolle's Abridgments it is firſt noticed with a *dubitatur* (2 Roll. Abr. 791. Uſes (P.), pl. 2.); and afterwards, when it is mentioned as adjudged, it is declared, that the ulterior fee never aroſe, as the contingency did not happen in the life of the ſurrenderor. *Id.* 794. (S. 3.), pl. 8. In *Lex Cuſtumaria* (126. ch. 15.) the ulterior limitatſon is ſaid to have been good: but the author reſts himſelf on the firſt ſtatement in 2 Rolle's Abridgment without inſerting the *dubitatur*. Indeed, he ſeems to differ from that of Rolle, and with Rolle, calls the *ulterior fee* a *remainder*. As therefore it only in Rolle's Reports that the judgment of the court is ſaid to have been given in favour of

the perſon claiming the ulterior fee; and as *Croke*, *Godbolt*, *Bulſtrode*, and even Rolle himſelf in another and better-conſidered work, declare that the judgment was given againſt him; and as the author of *Lex Cuſtumaria* is no authority himſelf, but depends only upon a quotation from Rolle, without noticing the *dubitatur* inſerted by that writer; this caſe of Sympſon v. Southern can ſurely not be regarded as eſtabliſhing the doctrine that a fee may be limited upon a fee in a ſurrender of copyholds.——To proceed then to an examination of the *decided* caſes mentioned by Mr Fearne as ſupporting that doctrine —In the caſe of Stocker v. Edwards, as reported by Shower, a conditional limitation was ſaid to have been good in a ſurrender. But, if the caſe of Stocker v. Edwards be the ſame with that of Edwards v. Hammond as reported by Levinz and Mr. Fearne ſeems to conſider it ſo, it is indeed "ſomewhat differently reported" by the latter writer. In *Shower*, the ſurrender was "to the uſe of the ſurrenderor for life, and after to the uſe of John his young-"eſt ſon, and *the heirs of his body*, if he attained the age of 18 years: and if he died before he at-"tained that age *without iſſue male*, then to his right heirs." Whereas in *Levinz*, the limitation was "to the uſe of the ſurrenderor for life, and afterwards to the uſe of his eldeſt ſon *and his heir*, "if he lived to the age of 21 years: provided, and upon condition, that if he died before 21, "that then it ſhould remain to the ſurrenderor and his heirs." But, what puts an end to the application of the caſe in *Levinz* is, that in that caſe the ſurrender was *to the uſe of a will*; though that important circumſtance is omitted in the tranſlation of Levinz. The words in the original are, that the copyholder ſurrendered *a ſon volunt, e deviſe al uſe luy meſme pur vie, et apres al uſe ſon eigné fitz et ſes heyres, s'il vivra al age de 21 anns*, provided, &c. as above. The caſe of Welcock v. Hammond, cited by Lord Coke, was alſo on a ſurrender to a will, as was the caſe of Brian v. Cawſen, in Leonard, and that of Taylor v. Taylor in Atkins. In the caſe of Paulter v. Cornhill indeed, Beamond, Juſtice, conceived a fee limited upon a fee by a ſurrender to be good enough; for, ſaid he, it ſhall be as a uſe limited upon a feoffment, and theſe uſes ſhall riſe out of the firſt ſurrender. But, as to the point, whether a fee might be ſo limited on a fee, it is obſervable, that we are informed by the reporter, that "the court ſpake not much thereto, but willed to have it "ſpecially found." The caſe of Bentley v. Delamore, in Freeman, indeed, ſo far as it goes, countenances the doctrine, that a fee may be limited on a fee by ſurrender: but that caſe is very looſely given; and it is there ſaid, that "a ſurrender *in futuro* is good; and the miſchief" [here ſeems an omiſſion in the report] "for the freehold remains in the lord" Now the validity of a ſurrender *in futuro* has already been denied by Mr. Fearne himſelf.—The only authority which remains is the paſſage referred to in Calthorpe; and that, to be ſure, ſupports Mr. Fearne's poſition. The words are theſe: "If a copyhold be ſurrendered to the uſe of *J. S* and his heirs, until "til he ſhall marry *A. G.*, and after the ſaid marriage, then to the uſe of them two in tail "ſpecial; if after they do marry, then is the ſurrender to them in tail, and till then, to him in "fee."

Upon the whole, therefore, we find, that the caſe of Sympſon v. Southern militates againſt rather than ſupports the doctrine, that a fee may be limited upon a fee of copyholds by ſurrender; that the paſſage in *Lex Cuſtumaria* cannot be a better authority than the book it reſts upon; and in truth, that the extract it gives is not faithfully given, as it delivers that *abſolutely*, which was originally accompanied with a *dubitatur*; that the caſe of Stocker v. Edwards, in *Shower*, is ſtrongly taken by the report of what Mr. Fearne himſelf conſiders as the ſame caſe in *Levinz*; and that the caſe in *Levinz* was *on a ſurrender to the uſe of a will*; that the caſes of Welcock v. Hammond, Brian v. Cawſen, and Taylor v. Taylor, were on ſurrenders to will alſo; that in the caſe of Paulter v. Cornhill, the opinion of Beamond was not acceded to by the court, but was itſelf founded upon a principle which has been repeatedly denied, namely, that the limitation ſhould be conſidered as a uſe limited on a feoffment. 1 Brownl. 127. 1 P Wms. 17. 1 Ld. Raym. 627. 1 Vez. 29. That the caſe of Bentley v. Delamore is very looſely given, and filled with abſurdity; that it aſſerts that a ſurrender *in futuro* is good, it might eaſily admit the other poſition; that if it is erroneous in the one inſtance, it has no great claim to authority in the other; that the doctrine therefore reſts on the ſolitary paſſage in Calthorpe: is it then too much to ſay, that the main foundations upon which Mr. Fearne has profeſſed to eſtabliſh his doctrine, fail him, and that therefore, notwithſtanding the great authority of his name, we ſhall not be juſtified in pronouncing that a fee may be limited on a fee by a ſurrender of copyholds? Beſides, a ſurrender of copyholds is to be conſtrued as a common law conveyance.—If then, as is univerſally acknowledged, a fee cannot be limited on a fee by a common law conveyance; it follows, as an inevitable conſequence, that a fee cannot be limited on a fee by a ſurrender; for if it may, then a ſurrender is not to be conſtrued as a common law conveyance; which is contrary to our poſition.]

Cro. Jac. 592. Palm. 135. 2 Roll. Rep 218. 425. Dy. 33. a. in marg n.

"One having iſſue, *A.* his only daughter and heir, by will deviſes land "in *D.* to her and her huſband, and her heirs, upon condition, that they "ſhould aſſure lands in *F.* to his executors, and their heirs to perform "his will; and, if they failed, then he deviſed the ſaid lands in *D.* to "his executors and their heirs, and died. It was adjudged to be a "condi-

" condition; for that, by the deſcent to the daughter, being heir, it would " be deſtroyed: but it was held a limitation, or executory deviſe, to his " executors, in caſe the aſſurance was not made; and that they might, for " breach thereof, enter and ſell; for though a fee cannot be limited up- " on a fee abſolute, yet upon a fee determinable it may; and, in this caſe, " it enures as a new original deviſe to take effect, when the firſt deviſees " failed to make the aſſurance. Fulmerton v. Steward, & Cro. Eliz 359. the ſame caſe by the name of Cleer v. Peacock. Swinb. 106. 120.

" One by his will deviſed lands to his mother for life, and after her " death to his brother in fee; provided that, if his wife (being then en- " ſient) be delivered of a ſon, that then the land ſhould remain to him in " fee, and dies. The ſon is born; and it was held, that the fee of the " brother ſhould ceaſe, and veſt in the ſon, by way of executory deviſe, " upon the happening of the contingency. Dyer, 127. a. in margin.

" One by his will deviſes ſeveral rent-charges or annuities out of his " lands to his younger children; and deviſes, that, if his heir paid the ſaid " annuities to his children, that then he ſhould have the ſaid land to him " and his heirs; and if he failed of payment, then his executors ſhould " have the lands; and if they failed to pay them, then his children ſhould " have the lands to them, and the ſurvivor of them, and dies. The heir " makes a feoffment in fee of the lands, and then the annuities were not " paid. It was adjudged, the feoffment has not deſtroyed the contingent " limitations, but that for non-payment they could veſt according to the " will: and there a difference was taken between contingent remainders, " which depend upon a direct limitation, and are to perſons unknown, or " not *in eſſe*, and contingent uſes, or deviſes to perſons *in eſſe*, and known, " which are to take effect upon a collateral condition or contingency; " for theſe cannot be deſtroyed or given away by feoffment, as the others " may; but the land is charged with them into whoſe hands ſoever it " comes. 2 Roll. Abr 793. (2). Purſlow v. Parker. 2 Roll. Rep 219. Palm. 136. Cro. Jac. 144. Meſme caſe *per noſme* of Molineux v. Molineux

" One deviſed lands to his wife till his ſon came to the age of twenty- " one years, and then that his ſaid ſon ſhould have the lands to him and " his heirs; and if he died without iſſue before his ſaid age, then his daugh- " ter ſhould have the ſaid lands to her heirs. This is a good contingent " or executory deviſe to the daughter, if the contingency happens; and, in " the mean time, the fee deſcends to the ſon and heir, and if he lives till " twenty-one, though he after die without iſſue, or leave iſſue, though he " die before twenty-one, yet the daughter is not to have the lands; becauſe " he is to die without iſſue, and before twenty-one, elſe the daughter can- " not take. 2. Roll. Rep 297. 217. Palm. 132. Boulton's caſe cited to be reported by Lord Chancellour Egerton, 6 &, 7 Eliz.

" One having iſſue three ſons, *A.*, *B*, and *C.*, deviſes his lands to " his ſon *A.*, after the death of his wife, to him and the heirs of his body " lawfully begotten, in fee-ſimple; and if he die in the lifetime of his wife, " that then his ſon *C.* ſhould be his heir, and dies. *A.* hath iſſue, and " dies in the lifetime of the wife. It was adjudged, that the iſſue ſhould " have the land after the death of the wife, and not *C.*, for it is in effect " a deviſe to the wife for life, remainder to *A.* in tail, remainder to *C.* in " fee, upon the contingency of *A.*'s dying in the life of the wife, and does " not abridge the eſtate-tail expreſsly given to *A.* by his dying in the life " of the wife. Swinb. 116. *Qu.* If the wife has an eſtate for life by this implication? [It ſhould ſeem ſhe clearly hath.]

" *Ceſtui que uſe*, 12 *Ed.* 4, by will deviſes lands to *B.* his ſon and his " heirs for ever, provided, that if he die without iſſue, living his executors, " that the land ſhould be ſold by his executors, and dies; then the execu- Dyer, 354 a. pl. 33.

" tors

" tors die, and after, the deviſee being dead likewiſe, the heir of his body
" brought a formedon, ſuppoſing it to be an entail; the tenant pleads *ne*
" *dona pas*; and, upon iſſue joined, the court was of opinion, that it was
" no entail, *&c.*; and upon this, and ſome of the foregoing caſes, was
" the following judgment given.

Cro. Jac. 590. Palm. 131. 2 Roll. Rep 216. 1 11. Abr. 61. (9). 835. p. (2). 2 Roll. Rep 426. Vaugh. 272 Pells v. Brown. 4 Mod. 283 Swinb. 124. 2 Leon. 111.

" One having iſſue three ſons, *A.*, *B.*, *C.*, by his will in writing devi-
"ſes lands to *B.*, his ſecond ſon, and his heirs for ever; and if *B.* die
" without iſſue, living *A.*, then *A.* to have thoſe lands to him and his heirs
" for ever. *B.* enters, and ſuffers a common recovery to the uſe of him-
" ſelf and his heirs, and then deviſes thoſe lands to the plaintiff and his
" heirs, and dies without iſſue, living *A.* It was adjudged, firſt, that *B.*
" had a fee-ſimple by the deviſe to him and his heirs for ever; and that
" the other words did not ſo correct or qualify it, as to make it an eſtate-
" tail, not being, *if he die without iſſue generally*, but upon the contingency
" of his dying without iſſue, living *A.*; ſo that if he ſurvived *A.*, or died
" in the life of *A.*, leaving iſſue, *A*, was to have nothing: and this being
" a contingency to happen within the compaſs of lives then in being, though
" the firſt deviſe was a fee, yet the limitation over, upon ſuch contingen-
" cy, was good, and not within the danger of a perpetuity; for the limi-
" tation to *A.* is not a remainder directly, which cannot be after a fee, but
" it takes effect by executory deviſe, and upon determination of the firſt
" eſtate, by the happening of the contingency, carries over the land
" to the other. Secondly, it was adjudged, that this, being a mere col-
" lateral poſſibility, was not bound by the recovery, unleſs he to whom it
" was limited had been party by way of voucher; for it had no exiſtence
" at all, when the recovery was ſuffered, and therefore the recompence
" in value could not extend to it, any more than to a remainder limited to
" the right heirs of *J. S.* who is then living; for though that remainder
" be carved out of the eſtate of the donor or leſſor, yet it cannot then veſt
" for want of a perſon capable to take it: or, it is rather to be reſembled
" to an eſtate to *B.* and his heirs, ſo long as *B.* hath heirs of his body, in
" which caſe a recovery ſuffered by *A.* ſhall not bar the poſſibility of the
" reverter to the donor, it not having any real exiſtence as a reverſion or
" remainder, but only as a mere poſſibility; and therefore, whoever comes
" into the land, takes it ſubject to ſuch poſſibility, which like an infection
" ſticks to it, and can no ways be drawn out without the concurrence of
" him who is to have the benefit thereof. And the reaſon why a recovery
" will not bar theſe contingent intereſts is, becauſe the recovery will not
" bar any perſons but ſuch as are in being to make defence, becauſe ſuch
" perſons are preſumed to call in the warranty, and to receive a recompence
" from the warrantor.

Dyer, 4. in margin. 3 Chan. Caſ. 22.

" So, where a man deviſed to *A.* for life, remainder to *B.* and his heirs
" and if *B.* die without heirs, then to *A.* and his heirs: it is ſaid to be
" ruled by *Fleming*, Ch. J. that if *B.* die without heirs, *A.* ſhall have the
" land. But this caſe ſeems to be no law, and is contradicted by another
" caſe which was ſtronger, and yet adjudged otherwiſe, where one de-
" ſed lands to *A.* and his heirs, and if he died before 21 years of age
" then he deviſed the ſaid lands to *B.* and died. *A.* entered, and had
" iſſue a daughter, and died before twenty-one. It was adjudged, that
" the daughter ſhould have the land. So, where one limited an eſtate to
" a man and his heirs, and if he died without heirs in the life of *J.*
" then to *J. D.* and his heirs; this was held a void limitation, though
" was brought within the compaſs of a life in being: and that the
" ſhould

" ſhould have it by eſcheat, *per North*, Ch. J.; for in this laſt caſe it " was a direct limitation after a fee, and was not to abridge the fee at all, " but only a proviſion, that if the fee were out in ſuch a time, another " ſhould have the land, which would elude the ſtatute of *quia emptores*, &c. " and defeat the lords paramount of their ſeignories, and ſo for the firſt caſe, " which is a direct perpetuity. But for the ſecond caſe, it ſeems now to " be law, and is within the reaſon of other caſes, where ſuch executory " limitations in wills have been allowed good: therefore, where one de- " viſed lands to his wife for life, remainder to his ſon and his heirs; and " if he died before his age of twenty-one years, then to remain to *J. S.* in " fee; the ſon entered, levied a fine, and died before twenty-one; it was " adjudged, that *J. S.* ſhould have the land; becauſe, ſay the books, it was " a plain limitation. Cro. Eliz. 142. Mills v. Snowball. 1 Sid. 148. 1 Keb. 531.

" But, where one deviſed lands to his ſon and heir, and if he died be- " fore his age of twenty-one years and without iſſue of his body then living, " then to remain over; he ſurvived twenty-one years, and then ſold the " land, and died; it was adjudged a good ſale, becauſe he had the fee " preſently; for the eſtate-tail was limited to commence upon a contingen- " cy ſubſequent, which did not happen. Collinſon v. Wright. Cro. Jac. 695. [*Vide ſupra*, vol. 4. pag. 295.]

" One having iſſue four ſons, deviſes lands to *B* (one of them) and his " heirs for ever; and if he dies within the age of twenty-one years, or " without iſſue, that then the land ſhall be equally divided between his three " other ſons: *B* hath iſſue, the defendant *C.*, and dies within age; the three " ſons enter, and let to the plaintiff. It was adjudged *per totam curiam*, " that this remainder, upon the contingency of his dying before the age of " twenty-one years, was utterly void, having before given him a fee-ſimple, " and then it is, as if the limitation were ſingle, that if he died without " iſſue, which explains the former limitation to him and his heirs, and " ſhews what heirs the teſtator meant, and ſo makes it an entail. And two " juſtices held, that if the remainder might begin upon the firſt limitation, " yet, by the words and intent of the deviſor, this cannot begin till the " other part of the limitation be alſo performed, *viz.* that he die without " iſſue; and that *or* ſhall be taken for *and*; for the words being *if he died " without iſſue, or died within age, then*, &c. This word *then* ſhews the " beginning of the remainder, *viz.* that it ſhall be, *when* he dies without " iſſue, and not before; and ſo all one, whether it be taken as a copula- " tive or a diſjunctive. But this caſe ſeems not law now; for by the other " caſes it appears, that in caſe of a will ſuch limitation, even upon the firſt " part, is good by way of executory deviſe. And there is a caſe cited in " *Rolle* which ſeems to be the ſame caſe, and is reported only upon the " firſt part of the diſjunctive; and adjudged good, not as a condition, " but as an executory deviſe. And as to the other part of the diſjunctive " it is not taken notice of, becauſe on the making an entail, there could " be no queſtion of the remainder. And another caſe of one *Ockle*, 9 *Eliz.* " is there cited, where a man deviſed lands to his grandchild and his " heirs, with a proviſo, that if he died before payment of ſuch a ſum, or " before he came to the age of thirty years, that then another ſhould have " the lands; and adjudged, that upon the happening of the contingency, " the other ſhould have the land. Soulle v. Gerrard, Cro Eliz. 525. Moore, 422. S. C. by the name of Sowill v. Garret. [Walſh v. Paterſon, 3 Atk. 194. S.C. cited.] 2 Roll. Rep. 220. Hoe v. Garrell. Palm. 136. Swinb. 116. 2 Roll Rep. 220.

" One having iſſue two ſons, *B.* and *C.*, by divers venters, deviſes " *Blackacre* to *B.* and his heirs, and *Whiteacre* to *C.* and his heirs, provi- " ded that if either of his ſaid ſons die before marriage or twenty-one, and " without iſſue, then he gives his ſaid lands, ſo given, to ſuch ſon who " ſhall 1 Roll. Abr. 835. Hanbury v. Cockrell. Hardr. 150. S. C. cited & *que ſuit*

Contingent Remainder. Quære?

" ſhall ſo die before marriage, or before twenty-one, and without iſſue, " to ſuch of his ſaid two ſons as ſhall ſurvive the other, and dies; *B.* mar- " ries, and hath iſſue a daughter, and dies; and after *C.* attains his full " age, and dies, without iſſue, before marriage. In this caſe it was ad- " judged, that *B.* and *C.* had no eſtate-tail, but a fee determinable upon " the contingency of death before marriage at any time, or after marriage, " and before twenty-one, and without iſſue; ſo that if they were married " under age, or attained full age, though not married, or had iſſue upon " marriage at any time, the limitation over was not to take place, and then " to the ſurvivor for life only.

Vide the caſe.

1 Roll. Rep. 137. 2 Bulſt. 273. Lady Ruſſell's caſe.

" One makes a feoffment in fee to the uſe of himſelf and his heirs, and " when *J. S.* pays ſuch a ſum of money, then to the uſe of him and " his heirs; or, when he marries ſuch a woman, or, when he comes to " full age, then to the uſe of him in fee. This was adjudged a good re- " mainder in fee upon the happening of the contingency, though in the " mean time the feoffor had the whole fee ſimple in him; or rather, this " takes effect by way of ſpringing uſe, as appears in the caſe of *Lloyd* and " *Carew* hereafter mentioned.

Mo. pl. 201.

" One deviſed lands to his eldeſt ſon in tail, remainder to his youngeſt " ſon in tail, remainder to his daughter in tail, and if they all died without " iſſue, that the land ſhould be ſold by his executors. The eldeſt " died without iſſue; then the youngeſt entered, and ſuffered a common " recovery, and died without iſſue; and the daughter likewiſe died without " iſſue. It was held clearly, that the executors were barred, and could " not make ſale according to the will; forthis was only a plain limita- " tion or power to them to ſell after the former eſtates tail ſpent, and no " contingency or executory deviſe; and therefore was ſubject to be barred " as other remainders expectant upon eſtates tail are.

9 H. 6, 74. 20 Roll. Rep. 217. Palm. 134.

" One deviſed lands to *A.* for life, and if he died without iſſue, then " *B.* ſhould have the lands. In this caſe, *A.* hath but an eſtate for life " by expreſs words, and therefore ſhall have no greater eſtate by impli- " cation againſt the expreſs words; but thoſe words, *if he die without iſſue*, " are only a condition, upon the happening or not happening whereof the " remainder to *B.* is to veſt or not veſt; and, being uſed only for that pur- " poſe, ſeem to be confined to his having no iſſue at the time of his death " and then in the mean time the fee deſcends to the heir at law.

Mo. pl. 939. Millinder v. Robinſon, Swinb. 112, 113. 1 Roll. Abr. 837. (12). 4 Mod. 258.

" So, where one deviſed lands to his brother *B.*, and if he died, hav- " ing no ſon, that the land ſhould remain to *C.* for life; and if he die " without iſſue, having no ſon, that it ſhould remain to the right heirs o " the deviſor: by this will, *B.* hath an eſtate-tail, and *C.* only for life " or at moſt but for him and the heirs female of his body. And th " words, *having no ſon*, are a kind of condition precedent, upon the fu " filling or failing whereof the remainder limited to his own right heirs " to take effect by the will; for, if he had a ſon, he cannot die without " ſue; and therefore it muſt be intended ſuch iſſue as he may die wit " out, though he hath a ſon, *viz.* iſſue female; and if the words, *hav* " *no ſon*, make the contingency, the other words, *if he die without iſ* " may well create an entail female; ſince there is no deviſe expreſsly " life, as in the other caſe, but only by conſtruction of law. And if t " words, *die without iſſue*, be not ſo conſtrued, they are uſeleſs and id

1 Roll. Abr. 837. pl. 12. The ſame is alſo ſaid in Moore's Report.

" But one book ſays, that the ſon hath an eſtate tail to the heirs male " his body. But *quære* of this

" Copyh

" Copyhold land is ſurrendered to the uſe of *A.* and *B.*, and of the " longer liver of them, and for want of iſſue of *B.* of his body lawfully " begotten, to remain to *C.*: adjudged, that *B.* had but an eſtate for life " by the words of the ſurrender, and then he ſhall not have a greater " eſtate by implication in a ſurrender or conveyance, though in a will it " would, perhaps, be otherwiſe; therefore the words, *for want of iſſue*, " are the condition upon which the remainder to *C.* is to ariſe or not " ariſe. And ſo it is, if a leaſe be made to *A*, for life, and if he die " without iſſue, that it ſhall remain to *B.* &c.

Cro. Car. 366. 1 Roll. Abr. 839. (7). Vaugh. 291. Seagoo v. Honc. *Vide* Allen v. Naſh. 1 Brownl. 127. 1 Mod. 52.

" One deviſes lands to his ſon *A.* and his heirs, and deviſes other lands " to his ſon *B.* and his heirs, and that the ſurvivor of them ſhall be heir " to the other, if either of them die without iſſue. This makes an eſtate " tail, and not a fee determinable upon their reſpective deaths without iſ- " ſue; becauſe ſuch dying without iſſue is not confined to any time. " And though it was objected that theſe words are uſeleſs, becauſe if one " died without iſſue, the other would be his heir of courſe, and then the " fee given by the firſt words ſhould ſtand, yet it was adjudged *ut ſupra*, " becauſe *non conſtat*, but tha the might have other children who might be " heirs to them. Note; thebook ſays the other children by other venters. " But *quere* of that, for they could not be heirs to them.

Cro. Jac. 695. Chadock v. Cowley. [Fearne, 370. 4th edit. S. C.]

" One having a wife, a ſon, and three daughters, deviſes lands to the " ſon after the death of the wife, and if the three daughters ſurvive the " wife, and the ſon, and his heirs, then to them for their lives. This is " a good remainder to the daughters, and the ſon hath but an eſtate tail; " for if he ſhould have a fee, then the remainder would be void and idle, " for they cannot ſurvive him and his heirs, unleſs it be meant heirs of his " body, for they themſelves would be his heirs, and conſequently cannot " ſurvive themſelves; therefore it muſt be, ſuch heirs as they may ſurvive, " that is, heirs of his body, which in a will gives him an eſtate tail by im- " plication. So, if a man hath iſſue two ſons, and deviſes to the youngeſt " and his heirs, and if he die without heirs, to the eldeſt in fee; this " makes an eſtate tail in the youngeſt, becauſe otherwiſe the remainder " would be void, the eldeſt being heir to him. And the diverſity is, " when ſuch remainder is limited to him who will be heir, there, by " a neceſſary implication, by the word *heirs* in the firſt part of the " deviſe muſt be meant *heirs of his body*, and where ſuch deviſe is " over to a ſtranger, which carries no ſuch neceſſary implication in " the firſt part of the deviſe, it makes the remainder void and againſt " law.

Cro. Jac. 415. 1 Roll. Rep. 398. 436. 3 Bulſt. 192. Webb v. Herring, Cro. Car. 58. Swinb. 122. accord. *per* Cro. and Yelverton v. Richardſon, who held it a fee; but Vaugh. 270. holds with the other opinion. 2 Roll. Rep. 423. Swinb. 111. 120.

" If an alien be made denizen, and lands be given to him and his heirs, " remainder over to another; or to a baſtard and his heirs, with ſuch re- " mainder over; theſe are good remainders, and the denizen or baſtard " have only an eſtate tail to them and the heirs of their body, becauſe they " can have no other heirs inheritable.

3 Bulſt. 195. 1 Roll. Rep. 436.

" One having iſſue two ſons *B.* and *C.*, and two daughters, deviſes " lands to *C.* in tail, if he ſhould live to his age of twenty-four years, up- " on condition that he ſhould pay 100*l.* to his two daughters; and if *C.* " died without heirs, then if *B.* did not pay the ſaid 100*l.* that it ſhould " remain to his daughters and their heirs. And whether this was a condi- " tion for breach whereof the heirs ſhould enter, or a limitation, that for " non-

Cro. Eliz. 376. Baldwin v. Wiſeman, [Owen, 112. S. C. Gouldſh. 152. pl. 90. S. C.]

" non-payment would carry the lands to the daughters, was the queſtion? " And it was adjudged a condition, and that for breach thereof *B.* the " heir ſhould enter. But this judgment being in *C.*, *B.* was after reverſ- " ed in error in *B. R.*, as appears in *Rolle*, where the caſe is put ſomewhat
1 Roll. Abr. 411. pl 3. " different; for there, after the deviſe to *C.* &c. it goes on, *and if* C. " *dies before twenty-four*, (not ſaying without heirs, which, in this caſe, " would give him an entail, the limitation over being to *B* his brother, " who would be his heir for want of iſſue,) *then I will that* B. *my ſon and* " *heir ſhall have the ſaid lands to him and his heirs, he paying as* C. *ſhould* " *have done; and if* C. *and* B. *do not pay, then to the daughters*, &c. it was " held, that for non-payment by *C.*, *B.* ſhould be in by limitation, and " not by the condition, for then it would defeat the portions to the daugh- " ers, and the future deviſe to them too, and therefore the judgment which " was given was reverſed.

Cro. Eliz. 361. Paulter v. Cornhill. *Vide ſupra.* " Copyholder ſurrenders to the uſe of *A*, and his heirs, upon condition " to pay 100*l.* to *B.*, and if he fails, that it ſhall be to the uſe of *B.*: if " this was a good limitation to *B.* ſo as there ſhould be a fee upon a fee, " was the queſtion? And *Beaumond* thought, that it was good enough, " and ſhould be as a uſe limited upon a feoffment; ſo theſe executory uſes " ariſe out of the firſt ſurrender, and executory uſes may carry a fee after a " fee as well as executory deviſes.

Cro. Car. 575. 1 Jo. 452. Mayor and Commonalty of London v. Alfred. [*Vide* Fearne's C. R. 477. 4th edit.] " *A.* ſeiſed of lands in *London*, where by cuſtom they may deviſe in " mortmain, erects an alms-houſe, &c., and then deviſes the ſaid lands " to ſix perſons and their heirs and aſſigns, upon condition and to the in- " tent to pay out of the iſſues and profits thereof certain annual ſums to " the poor there, &c.; and if any part of the ſaid purpoſes remain unper- " formed, then he deviſes the ſaid lands to *B.* and the heirs male of his " body, upon condition and to the intent to perform all the ſaid truſts; " and if he fails for two months, then he deviſes the ſaid lands to the " mayor and commonalty of *London* upon the ſame conditions; and if they " fail, that then his heir ſhould enter and perform the ſame; and dies. The " deviſees enter, and for breach of the condition, the heir enters, and then " one *C.* enters, and gets a bargain and ſale from the firſt deviſees of " their parts, and levies a fine with proclamations, and long after, the " mayor and commonalty having notice of the will, entered, upon whom " *C.* reentered, &c.; and the court held clearly that, admitting theſe li- " mitations good, they were barred by the fine and proclamations; but " they inclined, the mayor, &c. could take nothing by the will, the de-
3 Mod. 29. " viſe to *B.* being but a poſſibility; and if the deviſe over to the may- " or, &c. ſhould be good, it would be a poſſibility upon a poſſibility, " which the law will not allow. But *quære*, if there were twenty poſſibili- " ties one after another, yet, if they were limited to take effect withi " the compaſs of lives then in being, or a reaſonable time after, if the " might not be allowed, ſince then there could be no inconvenience u " ged therefrom, which is the great argument upon which they have bee " condemned.

Hutton, 60. Howell v. Anger. " One having iſſue two ſons, *A.* and *B*, by his will deviſes *Blackacre* " to *C.* his wife for life, and after her death to *B.* and his heirs in fe " under the conditions after declared, and deviſes *Whiteacre* likewiſe " his ſaid wife for life, and after her death to *A.* and his heirs under t " condition after limited; and if *C.* his wife died before the legacies pai " then he willed that they ſhould be paid by *A.* and *B.* out of the lan " given them, and *if either of my ſons die before they enter, or before the leg*

" c

" *cies paid, then I will that the longer liver ſhall enjoy both parts to him and his* " *heirs; and if both die before they enter, then my executors, or one of them,* " *to take the profits till they be paid.* A year after the teſtator dies, *C.* en- " ters. *A.* by deed releaſes to *B.* all his right, *&c.* with warranty; *B.* " deviſes *Blackacre* to *D.* his wife, and dies in the life of *C.*, and before " the legacies paid; then *C.* dies, and *A.* enters into *Blackacre*; and if " this entry was lawful, was the queſtion? One point was, if this limita- " tion of a fee after a fee were good; and *Pell* and *Brown*'s caſe was cited " to ſhew that it was, and that it ſhould operate as a future executory de- " viſe; as, when one deviſes, that if his ſon and heir die before marriage, " or twenty one, that then *J. S.* ſhall have the land, this is good as an " executory deviſe. But this point was not adjudged; becauſe they all " agreed, that be it a condition or not, the releaſe of *A. has diſcharged it,* Co. 1048. " as in *Lampett*'s caſe, and that this *was without queſtion an intereſt* in *B.* Lampett's " though not executed; and this releaſe with warranty barrs *A.* And the caſe. Cro. " deviſe of *Blackacre* to *B.* is upon condition, and this deſcending upon *A.* Eliz. 863. " is without queſtion barred by his releaſe. Note; theſe limitations ſeem Brome v. " to be all good for the reaſons mentioned in the preceding caſe: but Car. " *quare-*

" One having three ſons, *A.*, *B.*, and *C.*, and being ſeiſed of copy- 2 Leon. 68. " hold lands which he had ſurrendered to the uſe of his will deviſes *Black-* 3 Leon. 115. " *acre* to *A.*, *Whiteacre* to *B.*, and *Greenacre* to *C.*, *and if the ſaid* A. B. Brian and " *or* C. *live till they be of lawful age, and have iſſue of their bodies lawfully be-* Cawſen. " *gotten, then I give the ſaid premiſes to them and their heirs in manner aforeſaid* " *to give and ſell at their pleaſure; but, if it fortune one of them to die without* " *iſſue of his body lawfully begotten, then I will that the other brother or bro-* " *thers have all the ſaid premiſes in manner aforeſaid; and if it fortune the* " *third to die without iſſue in the like manner, then I will that the ſaid premi-* " *ſes* be ſold by my executors, *and the money given to the poor.* The teſta- tor dies: *A. B.* and *C.* are admitted to their parts: *A.* attains full age and hath iſſue: *A.* ſurrenders his part of the whole to the uſe of *B.* and his heirs, who is admitted accordingly: *B.* attains full age: then *A.* dies, and *B.* dies without iſſue. It was adjudged, that no eſtate tail was created by his will, but the fee ſimple veſted and ſettled in them when they came to their lawful age and had iſſue; and that the words, *if they live till*, &c. are words of condition, and no implication to make an eſtate tail, and then the diſpoſition over upon ſuch condition, *&c.* viz. *if the third died without iſſue* is void, being not confined to any time certain; and therefore as to *C.*'s part, he dying within age, and without iſſue, this came to *A.* and *B.*; then *A.* living to full age and having iſſue, his ſurrender of *Blackacre* and the moiety of *Greenacre* to *B.* was good; and when *B.* after died without iſſue, though of full age, yet, as to his own part, which was *Whiteacre* and the moiety of *Greenacre*, this belonged to the heir at law of the deviſor (the executors who ſhould ſell being dead before). But, as to *Blackacre* and the other moiety of *Greenacre*, theſe belonged to the heirs of *B.*, as being *A.*'s part, who lived to twenty one, and had iſſue, and therefore had the fee, and by his ſurrender to the uſe of *B.* made *B.* a good title thereto, which belonged to his own heirs, and not to the heirs of the deviſor.

" One having three ſons, *A. B.* and *C.* and alſo three daughters, and Cro. Eliz. " being ſeiſed of *Blackacre*, *Whiteacre*, and *Greenacre*, deviſes all to his 497. " wife for life, and after her death that *Blackacre* be to *A.*, *Whiteacre* to *B.* Mo. pl. 656. Bacon v. " and Hill.

" and *Greenacre* to *C.*; and if one or two of his ſons die, that then his or
" their parts ſhould be to the ſurvivors; and deviſes to his three daughters
" 10*l.* each, to be paid out of his lands by every of his ſons, as ſoon as they
" ſhould enter their parts, after the death of the mother, provided *that if it*
" *fortune any of my ſaid ſons to marry and have iſſue before he enters his part, then*
" *I will that his part ſhall remain to the heir of his body and not to remain to his*
" *other brothers as aforeſaid.* The teſtator dies; then the wife dies, and the
" ſons enter, and after *B.* dies having iſſue the defendant; and then *A.* dies
" having iſſue the plaintiff. It was adjudged forthe plaintiffs, for the firſt
" words gave them but an eſtate for life, and the laſt clauſe gives no eſtate
Supra. " tail, unleſs they had iſſue and died before entry, which is a condition pre-
" cedent to the veſting of the tail; and though 10*l.* a piece be deviſed
" to be paid out of their parts; yet that ſhall not enlarge their eſtates by
2 Keb. 189. 192. 261. Wright v. Hiccocks. " implication, againſt the expreſs words.

" *A.* ſeiſed of lands in fee, having a brother named *B.*, who had iſſue
" *C.* and *D.* his ſons, and *E.* his daughter, by will deviſes to *B.* his bro-
" ther, if he were living at the time of his deceaſe, and his heirs; and if
" *C.* were living at the time of his death, and *B.* then dead, then he de-
" viſes to *C.* and his heirs; and after deviſes to *D.* in the ſame form;
" if no iſſue male be left from *B.*, and that *E.* daughter of *B.* ſurvive,
" and outlive *B. C.* and *D.* and it ſhould happen ſhe only ſhould be alive
" at the time of his death, then he gave to her and her heirs; *and if* B.
" C. D. *and* E. *die, ſo as no iſſue remain to* B., *then I will that* F. (*a ſtran-*
" *ger*) *ſhall inherit as aforeſaid*, be it that it happen my *ſaid brother* B. *to*
" *die without iſſue, either before my death, or at any time after*; and dies
" *B.* ſurvived him, then *C.* died, leaving iſſue two daughters, the plain-
" tiffs, and after *B.* died, and if *D.* or the daughters of *C.* ſhould have
" the land was the queſtion? and the better opinion ſeems for the daugh-
" ters; for when it was deviſed to *B.* and his heirs, if he were living at
" the time of the death of *A.* the deviſor, and he was ſo living, though
" theſe words give him a fee upon the happening of the contingency, viz.
" his ſurviving *A.*, and ſo to the others; yet, by the words after, if *B.*
" *C. D.* and *E.* die without iſſue, either before his death or after, gene-
" rally, without confining ſuch dying without iſſue to any time certain
" theſe words, in a will, plainly ſhew what heirs of *B.*, and ſo of the
" reſt, the teſtator meant. *viz.* the iſſue of their bodies generally, and
" make an eſtate in tail general to *B.*; and, by conſequence, it muſt go
" to the daughters of *C.*, his ſon and heir, before it can go to *D.* or *E.*
" the youngeſt ſon and daughter of *B.*, or to *F.* And the words, *if*
" *iſſue male be left of* B., do not give an eſtate in tail male ſo as to go
" *D.* the youngeſt ſon, upon the death of *C.* without iſſue male of *B.*
" and to be fulfilled in the life of *A.* the teſtator before the deviſe to
" of them can take effect; and, by conſequence, cannot operate to qual
" any eſtate before given, becauſe no eſtate is before given that can
" place till after the death of *A.* the teſtator, though they operate
" make the veſting of the remainder to *E.* contingent, and to take
" upon failure of iſſue male of *B.* in the life of *A.* the teſtator; and
" the firſt deviſe to *B.* and his heirs, if he be living at the time of the
" of *A.* can be reſtrained and qualified only by the laſt clauſe, wh
" gives it to *K.* in caſe *B. C. D.* and *E.* die, ſo as no iſſue be left of
" *be it that* B. *die without iſſue, either before or after*, which words give
" eſtate in tail general to *B.*, by implication, and, by conſequence,
" daughters of his eldeſt ſon are to be preferred, and *D.* and *E.* can
" come in after either, by virtue of the limitation made to them immedi-
"

" ly, or as the next branch of the iſſue of the body of *B.* And if it had " not been for the laſt clauſe, which governs and goes through all the prece- " ding limitations, then, by the firſt clauſe, which gives it to *B.* and his heirs, " if he were living at the death of *A.*, the whole fee would have veſted in " *B.* upon the happening of that contingency, and, by conſequence, all the " limitations after which were to ariſe, but upon failure of the firſt, would " have been prevented and deſtroyed: and it is, in effect, no more now " than a deviſe to *B.* and his heirs, if he ſurvive the teſtator; and if he " die without iſſue, either in the life of the teſtator or after his death, " then to *F.*, &c., which is a plain entail, and tee remainders are all " good, for all the contingency that is in the caſe is precedent to the veſt- " ing of any eſtate at all; and had it not been for the laſt words, *be it* " *that B. die without iſſue*, the limitation over to *F.* had been totally void, " and which-ſoever of the deviſees had been living on *A.*'s death had taken " the whole fee. And if the words, *if no male iſſue be left of* B., ſhould " create an eſtate in tail male *to B.*, then the words after, *be it that it* " *happen* B. *to die without iſſue, either before or after my death*, would not " enlarge the eſtate in tail male before given, and make it an eſtate in tail " general to give it by way of remainder to the iſſue female of *B.*, as has " been adjudged; and ſo the iſſue female would be quite excluded, which " would be againſt the intent of the will, which was, that *F.* ſhould not " take till the failure of iſſue of *B.*

Dyer, 171. Mo. 13. Frencham's caſe.

" *A.*, ſeiſed in fee, makes a feoffment in fee to the uſe of himſelf for " life, remainder to the feoffees for 80 years, if *B.*, and *C.* his wife ſo long " live, and if *C.* ſurvive *B.*, then to the uſe of *C* for life, and after her " death to the uſe of the firſt ſon of *B.* and *C.* in tail; and for default of " ſuch iſſue, to the uſe of *D.* and *E.* and the heirs of their bodies, re- " mainder to the right heirs of *A.*; then *A.* dies, and *C.* dies, leaving a " ſon, who dies without iſſue, and thereupon *D.* and *E.* enter and make a " leaſe to the plaintiff, upon whom the defendant, as ſon and heir of *A*, " enters: and if the remainder in tail to the firſt ſon of *B.* and *C.*, and " the remainder to *D.* and *E.* were executed, or were contingent upon " the eſtate for life to *C.* was the queſtion? and adjudged, that they were " executed and not contingent; for though the eſtate for life to *C.* was " contingent, *viz.* if ſhe ſurvived her huſband; yet this ſhall not hinder " the veſting of the remainders limited after, but they ſhall take place in " the perſons *in eſſe*; and when that contingency happens, they, being li- " mited by way of uſe, ſhall open to let in the contingent remainder to the " wife. And a caſe is there cited of the Earl *Derby*, where a feoffment " was made to the uſe of *A.* in tail, remainder to the feoffees for eighty " years, if *B.* ſo long live; and after his deceaſe, to the uſe of *C.* and the " heirs male of his body, remainder to the uſe of *D*; and adjudged, that " the remainders veſted preſently, and that the poſſibility of *B.*'s outliving " the eighty years, and ſo there would be no particular eſtate to ſupport " the remainders, which are not to take effect till his death, that yet this " poſſibility would not make the remainders contingent. *Quære* of theſe " caſes.

Hutt. 118. Napper v. Saunders. Earl of Derby's caſe. [So, it was ſaid by Hale C. J. in the caſe of Weale v. Lower. (Pollexf. 67.) that if a feoffment be made to the uſe of *A.* for 99 years, if he ſhall ſo long live, and after his death to the uſe of *B.* in fee, this ſhall not be contingent, but it ſhall be preſumed his life will not exceed 99 years;

that it had been otherwiſe, if it had been made but for 21 years.--In a caſe of this nature in Chan- (Beverley v Beverley, 2. Vern. 131.) where *A.* deviſed lands to *B.* his eldeſt ſon, for the term 99 years, if he ſhould ſo long live, and from and after his deceaſe to his grandſon *D* (ſon of the ſaid ſon) in tail. *B.* and *D.* ſuffered a recovery; an objection was taken to the recovery for that the deviſe to *D.* being only for 60 years if he ſhould ſo long live, and after his deceaſe to *D.*, the freehold during the life of *B.* was in abeyance. It was argued that the limitation of the eſtate-tail was good, expec- tant on the term of 60 years; and Lord Derby's caſe was cited, as in point, that the deviſe over, to *D.* and immediately after the deceaſe of *B.* ought to be intended of his dying within the term; which was highly preſumable, *B.* being then upwards of 40 years of age. But the court ſaid, it would

would be hard to make such construction on the words of the will, as to say, where land is limited to a man for 60 years, if he shall so long live, and from and after his decease to another, that it must be meant from and after his decease *within the term*; for suppose he out-lived the term, should the remainder-man take in the lifetime of the first devisee? That would be a construction contrary to the words and intention of the testator. *Vide* Fearne's C. R. 24. 4th edit.]

4 Mod 255. Goodright v. Cornish. "*A.*, seised in fee, having issue two sons, *B.* and *C.*, devises lands to "*B.* for fifty years, if he should so long live, and after the determination "thereof, then to the heirs male of the body of *B.*; and for want of such "issue to *C.* in tail, remainder to his own right heirs, and dies: *B.* enters, "and suffers a common recovery, to the use of himself for life, and to "the heirs male of his body, remainder to the defendant and his heirs, "and then dies without issue: *C.* enters, and if *B.* had an estate-tail was "the question? for then the recovery barred that, and the remainder to "*C.* It was argued for *C.*, that *B.* had no estate-tail; for, first, he having but an estate for years, this cannot so close with the remainder to the "heirs male of his body as to make an estate-tail in himself. Secondly, "he shall not have an estate for life by implication to make out such an "entail, because he hath an estate but for years by express limitation; and "without an apparent intent of the testator, no other estate shall be raised
4 Leon. 21. "by implication. Thirdly, this cannot be good by way of remainder to "the heirs male of his body, because this would be a contingent remainder "of the freehold and inheritance, which an estate for years is not sufficient to support. Therefore, Fourthly, this is an executory devise to "the heirs male of the body of *B.*; as if one covenant to stand seised for "twenty years, remainder to the heirs of the body of the covenantor, "this is an executory remainder, and not to be barred by a common recovery. For the defendant it was urged, that such construction ought "to be made, that all the will may take effect; and it is a known rule in "law, that it shall never be construed an executory devise, if it will admit of any other construction; and therefore this shall be construed an "estate-tail in *B.* and an estate for life, raised by implication to him by "reason of the words, *for want of such issue*, which of themselves make "an estate-tail in a will. And there is no difference, whether those words "follow an estate for life or years, if the limitation be to the heirs. And "now *B.*, being heir at law, so much of the old inheritable estate shall "arise to him by implication as may make him tenant for life, and then "he hath an estate-tail executed in him; and to construe it an executory "devise would be to introduce a perpetuity above the power of a common "recovery to dock; and the court held—This could not be good as an "executory devise, for then the limitation over would be void; (*quere* "of this reason;) therefore it must be a contingent remainder, and then "it is void, because the estate for years is not sufficient to support it. "Note; then it follows, that afterwards judgment was given for the plaintiff, *viz.* *C.*, which proves, that they held it no estate-tail in *B.*; for "then, by the recovery, that and the remainder to *C.* would have been "barred, and, by consequence, it would have been adjudged for the defendant who claimed under the recovery. Secondly, this proves, that it "was held an executory devise, if the reason there given be good, that "then the remainder over would be void; which I should think is a non "*sequitur*; for if it were an executory devise to the heirs male of the body of "*B.*, yet it would only give them an estate-tail, which will bear a remainder over

" over; but, being a contingent remainder, and *B.* having only an eſtate " for years, the recovery was a forfeiture of *B.*'s eſtate for years, where- " of *C.*, who was next in remainder, for want of iſſue male of *B.*, may at " any time take advantage by entry.

" The laſt caſe I ſhall here mention, to ſhew how far a limitation " after a fee has been carried, was, in ſhort, but thus: *A.* and *B.*, two " ſiſters, ſeiſed of lands in fee for 4000*l.* paid *A.* by *C.*; and in conſider- " ation of a marriage intended, and afterwards had between *B.* and *C.* " by leaſe and releaſe, convey all their lands to the uſe of *B.* and *C.* for " their lives, remainder to their firſt and other ſons in tail male ſucceſſive- " ly, remainder to the daughters of *B.* and *C.* in tail, remainder to the " right heirs of *C.*, provided that, if there be no iſſue between *B.* and *C.* " living at the death of the ſurvivor of them, and that the heirs of B. " ſhould, within twelve months after the death of *B.* and *C.*, dying with- " out iſſue as aforeſaid, pay to the heirs or aſſigns of *C.* 4000*l.*, then " the remainder in fee ſo limited to *C.* and his heirs ſhould ceaſe, and " that then the premiſes ſhould remain to the right heirs of *B.* for ever. " Afterwards *B.* and *C.*, for extinguiſhing any other right or title which " *B.* or her heirs then had, or after might have, by any ſettlement, provi- " ſo, &c. on payment of 4000*l.* or otherwiſe to the heirs of *C.* levy a " fine of the ſaid lands to the uſe of *C.* and his heirs, and direct the " truſtees of the firſt ſettlement to convey accordingly: then *C.* deviſes " the ſaid lands to *D.* his brother, ſubject to his debts, which were " near 5000*l.*, and after *B.* and *C.* die without iſſue, and *A.*, the ſiſter " and heir of *B.*, brings a bill in Chancery againſt *D.*, the brother and " heir of *C.*, and againſt the truſtees, to have the conveyance of the " lands, on payment of 4000*l.*, purſuant to the proviſo. And this bill " being diſmiſſed, an appeal was brought in parliament, and for the de- " fendant or reſpondent it was inſiſted, that the proviſo was void, the " fee being before limited to *C.* and his heirs, and ſo not capable of a " further limitation, unleſs to happen in the life of one or more perſons " in being at the time of the ſettlement, which is the furtheſt the judges " have ever gone in allowing contingent limitations upon a fee: and if " they ſhould be extended to contingencies to happen within twelve " months after the death of one or more perſon or perſons in being, they " may as well be extended to contingencies to happen within 1000 years, " and ſo all the inconveniencies of a perpetuity will be let in, and the " owner of the fee ſimple, thus clogged, will be no more capable of " providing for the neceſſities and accidents of his family, than a bare " tenant for life. Secondly, if this limitation were good, then the " eſtate limited to the heirs of *B.* were virtually in her, and her heirs " muſt claim by deſcent from her and not as purchaſers; and then that " eſtate is barred by the fine, the deſign of limiting ſuch power to the " heirs not being to exclude the anceſtor; but becauſe the power could " not, in its nature, be executed till after the death of the anceſtor, it " being to take effect upon a contingency that was not to happen till after " that time, and that, by this means, *C.* would not only have no portion " with *B.*, but *D.*, his brother, would loſe all the money he paid for the " debts of *C.*, which were charged on the ſaid lands. For the appellants " it was urged, that the proviſo was not void, that it was within the rea- " ſon of the contingent limitations allowed in the Duke of *Norfolk*'s " caſe, where it is ſaid, that future intereſts, ſpringing truſts, or truſts " executory, and remainders that are to ariſe upon contingencies, are

Caſes in Parliament, 137. Lloyd and others v. Carew.

3 Chan. Ca. 31. 32. 36.

" quite

" quite out of the rule aud reaſons of perpetuities, if they are not of re-
" mote conſideration, but ſuch as will ſpeedily wear out: that though
" there can be no remainders limited after a fee ſimple, yet there may a
" contingent fee ſimple ariſe out of the firſt fee: that the *ultimum quod ſit*
" of a fee upon a fee is not yet plainly determined; that there could not,
" in any reaſon, be any difference between a contingency to happen dur-
" ing a life or lives in being, and within one year after, the reaſon of al-
" lowing them to be good, if confined to lives in being, or upon their
" extinction, was becauſe no inconvenience could follow; and the ſame
" rule will hold to a year after: and that the true rule to ſet bounds to
" them is when they prove inconvenient, and not otherwiſe: that this
" ſettlement was made by good advice. Secondly, that the fine could
" not bar the benefit of this proviſo, becauſe the ſame never was nor
" could be in *B.* who levied it; and the decree of diſmiſſion was reverſed.
" Note; Mr. *Pooley*, who argued this caſe, added alſo this reaſon, that
" if the proviſo had been, that if *B* die without iſſue living at the death
" of the ſurvivor of them, then if the heirs of *B.* do, upon the death of
" ſuch ſurvivor without iſſue, pay 1000*l.* to the heirs of *C.*, then, *&c.*;
" this, you agree, had been good, but being extended to a year after, it
" is otherwiſe, and may as well be 4000 years after: to this he ſaid, if
" the proviſo had been ſo worded, it would have been impoſſible to have
" been performed; for then the heirs of *B.*, who could not be known
" till her death would have been obliged to have carried always 4000*l.*
" about them ready to pay, and to have the heirs of *C.*, who likewiſe
" could not be known till his death, always ready to receive it upon the
" inſtant of the death of the ſurvivor. And it might happen, that nei-
" ther the one who was ready to pay it, nor the other who was ready to
" receive it, might be heirs of *B.* and *C.*, and ſurely when the heirs of
" neither could be known till their deaths, twelve months was but a rea-
" ſonable time to procure and pay ſo great a ſum as 4000*l.* Which ar-
" gument ſhews, that the limitation of a fee after a fee upon a contin-
" gency, to happen within one or more life or lives in being, or upon
" their deaths, being allowed to be good, may be extended further
" when, as the limitation may happen to be, it would be inconvenient
" and impoſſible to be performed within ſuch a time; and that inconveni-
" ence is to be the only bound to theſe limitations. But here it is ſo far
" from being inconvenient, that it would be inconvenient and impoſſible
" to be performed otherwiſe.

1 Lev. 135. 1 Sid. 153. Raym. 162. 1 Keb. 567. &c. Snow. v. Cutler.

" Huſband ſeiſed of lands to the uſe of himſelf and his wife, and the
" heirs of the huſband, by will deviſes thus: *The lands which are A*
" *for life, I deviſe them to the heirs of the body of my wife, if they ſhall*
" *of the age of* 14 *years at her death.* The deviſor dies without iſſue: the
" wife hath iſſue by a ſecond huſband: then ſhe and her huſband ſuffer
" a common recovery; and then the wife dies, the iſſue being about
" years of age. And two queſtions are made: 1ſt, If this deviſe to the
" heirs of the body of the wife was good? And in this caſe the co
" was divided; for by two juſtices this is void, being a preſent devi
" to the heirs of the body of the wife, who being alive could not ha
" heirs: and ſo it is, as if a deviſe were to the heirs of *J. S.* who is
" ving, which is clearly void: And though *J. S.* had an eſtate for life,
" the wife had here, yet the deviſe would not be good, becauſe it is
" by way of a remainder, but is a diſtinct preſent deviſe. And it
" ſaid, that this was a contingency upon a contingency, *viz.* If the
" ſho

" ſhould have heirs of her body, and alſo if they ſhould be 14 years of age " at her death; and therefore not to be allowed. But it was held by " two other juſtices, (and, as it ſeems, it is the better opinion,) that the " deviſe was good as an executory deviſe. They agreed to the caſe of " the deviſe to the heirs of *J. S.* though he had an eſtate for life, becauſe " intended a preſent deviſe without other words, but, when the intent ap- " pears, that it ſhall take effect *in futuro*, it is otherwiſe. And here the " deviſor recites, that the lands were his wife's for her life, and therefore " he did not intend the deviſe to take effect till after her death; as when " lands are deviſed to *A.* after the death of *B.*, or to the heir of *J. S.* " which ſhall be born, theſe are good executory deviſes, and the land " ſhall deſcend in the mean time to the heirs at law of the deviſor. So, " a deviſe to a perſon that ſhall marry his daughter, *&c.* And in caſe of " executory deviſes, it is not neceſſary there ſhould be a deviſee *in eſſe* at " the death of the teſtator; and the contingency is frequent and ordinary, " and confined to one life, and ſo not within the danger of a perpetuity, " as it would be, if it were after ſuch a one's death without iſſue. And " all the court held clearly, that if the deviſe were good at all, it muſt be " as an executory deviſe, and not as a remainder; for though the wife " hath an eſtate for life, yet this is a new original deviſe, to take effect af- " ter her death, and not as a remainder joined to her eſtate. Alſo, as to " the ſecond point all held, that if this was an executory deviſe, it was " not barred by the common recovery, according to *Pell* and *Brown*'s " caſe; for it hath no exiſtence at all till the contingency happens, and " therefore there can be no recompence in value; for a valuation cannot " be put upon that which is not.

" Huſband ſeiſed of lands in fee, in right of his wife, he and his wife by indenture covenant to levy a fine to the uſe of the heirs of the huſband upon the body of the wife to be gotten, remainder to the right heirs of the huſband: the fine is levied accordingly, and after they have iſſue a ſon, who died without iſſue in the life of the baron and feme; and then the feme dies; and after the huſband dies without iſſue: and if the heirs of the huſband, or the heirs of the wife ſhould have the land, was the queſtion? And for the heirs of the huſband it was argued, that this ſettlement being by way of uſe, was like a will to be conſtrued according to the intent of the parties: and there the huſband would have an eſtate for life by implication, which being united to the eſtate limited to the heirs of his body, it would make an eſtate-tail in him: and for this was cited *Pibus* v. *Mitford*, where upon a covenant to ſtand ſeiſed to the uſe of the heirs male of his body, on the body of his ſecond wife, it was adjudged, that this limitation carried an uſe to himſelf, in whom all his heirs were included; and therefore, he having an eſtate for life by implication, till the future uſe came *in eſſe*, made the whole an eſtate-tail in himſelf: ſo here. And though the eſtate here was the wife's, yet ſuch uſe to the huſband might well ariſe by implication, becauſe both joined in the deed and fine though it could not reſult back to the huſband, becauſe he had none before. Beſides, it was urged, that he had an eſtate for life as tenant by the curteſy. 2dly, if no eſtate ariſes to the huſband by implication, yet it ſhould be good to the heirs of his body by way of ſpringing uſe, and the eſtate, in the mean time, ſhould remain in the feme and her huſband, till the death of the huſband: and that it was no more, than if the deed had declared the uſe after 20 years or other future time, to the heirs of the body of the huſband. But on

4 Mod. 153. Caſes in Parliament, 104. Davis v. Speed. [Fearne's C. R. 63. 428. S. C.]

1 Mod. 98. 121. 159. 226. 237. 2 Mod. 207. 1 Leon. 75. Raym. 228. 318. 3 Keb. 129, 139. 1 Rol. Rep. 240.

" the other hand it was argued and adjudged, that here being no particu-
" lar eſtate to ſupport this laſt remainder, it was void, and then the fine
" was to the uſe of the wife and her heirs, ſhe being owner of the eſtate:
" that here was no particular eſtate was plain, becauſe the heirs of the
" body of the huſband were limited to take preſently, and that during his
" life they cannot do. 2dly, If it was intended the heirs of the body of
" the huſband ſhould take *in futuro*, that there muſt be an eſtate ſomewhere
" to ſupport the limitation till it could take effect: that here was no ſuch
" eſtate to the huſband expreſſed; and implied it could not be, for if any
" eſtate ſhould ariſe by implication, it muſt be to the wife who was owner
" of the whole; and then, ſhe dying before her huſband, there again an
" eſtate was wanted to ſupport the remainders during his life. That this
" was a caſe of a deed executed in the life of the parties, and not of a will
" where large allowances are made in favour of ſuppoſed intentions by rea-
" ſon of perſons being ſurpriſed by ſickneſs and wanting counſel; but the
" rules of law always govern in conſtruction of deeds. That the notion of
" a ſpringing contingent uſe is hardly intelligible in itſelf, and by no
" means applicable in this caſe; becauſe no words here have a relation to
" a future time or contingency; and to allow ſuch limitations in deeds
" would make them as uncertain as wills, create intentions not expreſſed,
" raiſe uſes by implications never intended, and in ſhort deſtroy all the dif-
" ference between good and bad conveyances; produce a confuſion in pro-
" perty, and render all purchaſes unſafe and precarious. And therefore
" the judgment for the heirs of the wife was affirmed.

Vau 259. 261. 270. 271. Gardner v. Sheldon.

" One having iſſue a ſon who was heir apparent, and two daughters
" deviſes in theſe words, *If it happen my ſon* B. *and my two daughters*
" *die without iſſue of their bodies lawfully begotten*, then all my lands ſhall b
" and remain to my nephew *D.* and his heirs for ever. The deviſor die
" and it was held, that here was no expreſs eſtate given; nor was the
" any by implication; becauſe then it muſt be either a joint eſtate for lif
" with ſeveral inheritances in tail, or ſeveral eſtates-tail in ſucceſſion o
" after another. The laſt it cannot be, becauſe uncertain which ſhall ta
" firſt, which next. And the firſt it ſhall not be becauſe the heir at l
" ſhall not be diſinherited without a neceſſary implication, which in th
" caſe there is not: for it is only a deſignation and appointment of t
" time when the land ſhall come to the nephew; as if he had deviſed thu
" *I leave my land to deſcend, or I give my land to my ſon and heirs, till be*
" *my two daughters die without iſſue, or ſo long as any heirs of the body of*
" *and my two daughters ſhall be living, and then, or for want of ſuch be*
" *I deviſe the ſame to my nephew:* this is good as a future and execute
" deviſe, and in the meantime the land ſhall deſcend to the heir at l
" he having made no diſpoſition thereof. So, a deviſe that *J. S.* ſ

2 Saund. 111.

" have his lands after 20 years, *&c.* is good for the ſame reaſons.

1 Sid. 445. 2 Keb. 60. Allen v. Rivington.

" One by will deviſes thus: *I give to my daughter* A. *my lands in* B.
" *my ſon* C. *happen to have no iſſue male, after the death of my wife*; an
" *my ſon* C. *have iſſue male, then the ſaid* A. *to have* 5*l. only, in lieu of*
" *ſaid lands*; and dies: *C.* hath iſſue male: the wife dies: and
" that, the iſſue male dies without iſſue; and then *C.* dies: and one de
" was, if *A.* ſhould have an eſtate for life by the deviſe, becauſe at
" time of the death of the wife *C.* had iſſue male, though that iſſue
" failed, *viz.* If this was a remainder to *A.*, or a contingent, or con-

Supra 761.

" onal deviſe? And it was ſaid, that if I deviſe lands to *J. S.* if my
" die without iſſue, that this is a conditional deviſe, and *J. S.*
" not

" nothing till the contingency happens. (But *quære* of that caſe, for that " deviſe tends to a perpetuity, and therefore is not to be allowed?) And " the court were of opinion, that the deviſe was conditional, and that *C.* " having iſſue male at the time of the death of the wife, *A.* is only to have " the 5*l.* and not the land Note alſo; *Keeling* was of opinion, that this " was an eſtate-tail in *C.*; but *Twiſden contra*, that nothing was given to " *C.* more than to a mere ſtranger. And this ſeems moſt conſonant to " the caſes before mentioned. And then it was no more than an execu- " tory deviſe to *A.*, if the ſon died without iſſue, which gives no more " eſtate to the ſon, than if he were a ſtranger; nor alters any eſtate " which the law gives him, if he were heir at law. But by reaſon of " the words, *If he have no iſſue male after the death of the wife*; *and if he* " *have, then* A. *to have* 5l. *only*; theſe words make the executory de- " viſe to *A.* conditional; and in this caſe the ſon having iſſue after the " death of the wife, whereby the 5*l.* became due, *A.* cannot after have " the land, though that iſſue fails; becauſe a recompence was provided " for each ſide of the contingency; and when one has taken place, the " other is ſhut out, as if it had not been mentioned.

" *A.* hath iſſue *B.* her ſon by a firſt huſband, and *C.* and *D.* her ſon " and daughter by *E.* a ſecond huſband. *F.* the brother of *A.* being ſeiſ- 2 Mod. 289. " ed in fee of lands, deviſes them to *A* his ſiſter and heir for ſo long time, Taylor v. " and until her ſon *C.* ſhould attain his full age of 21 years, and after he Byddall. " ſhall have attained his ſaid age, then to him and his heirs for ever; and " if he die before his age of 21 years, then to the heirs of the body of *E.* " and to their heirs for ever, as they ſhould attain their reſpective ages of " 21 years. *F.* dies, and *C.* dies, and the queſtion was, if *B.* as heir to " *A.*, or *D.* either as heir to *C.* her brother, or as heir of the body of *E.* " ſhould have the land? And for *B.* it was argued, that nothing veſted in " *C* till he attained 21; but the freehold and inheritance in the mean time " deſcended to the heir at law of *F.*, for *A.* had but an eſtate for years, " viz. till *C.* attained 21: then *A.* having but an eſtate for years, and *C.* " nothing till 21, theſe muſt in the mean time deſcend to the heir at law " of *F.*, and there it ſhall continue, becauſe the contingency never hap- " pened, *C.* dying before 21. Alſo, the deviſe to *C.* being but contin- " gent, *viz.* if he attained 21, the eſtate for years of *A.* was not ſufficient " to ſupport it; and for that reaſon it was void. And *D.* cannot take as " heir of *C.*, and then the land deſcends to the heir at law of *F.* 2dly, " *D.* cannot take by the deviſe to the heirs of the body of *E.*, for admit- " ting it to be an executory deviſe, yet *E.* her father being alive when it " was to veſt, there is no perſon within the deſcription to take it, for *non* " *habet hæres viventis*; and there alſo it deſcends to the heir of *F.*, which is " *B.* the plaintiff. But for *D.* the defendant it was argued, that the fee " veſted preſently in *C.*, there being only an eſtate for years in *A.*; and " they relied upon *Boraſton*'s caſe, where there was a like deviſe: and " there, from *C.* it deſcended to *D.* as his ſiſter and heir. 2dly, If not 3 Co. 19. " as heir to him, yet as heir of the body of *E.* by way of executory deviſe, Boraſton's " which needs no particular eſtate to ſupport it; for though *E.* her father caſe. " was living at the death of *C.*, yet he was dead before *D.* attained 21, " when only ſhe was to take; and the eſtate in the mean time deſcends to " the heir at law of the deviſor; and without making it an executory de- " viſe it would be void, being limited after the fee to *C.*, and therefore it " cannot be good as a remainder, but the eſtate of *C.* which was veſted be-

" ing now diveſted by virtue of the original condition, he dying before
" 21, it returns to the heir at law of the deviſor till the full age of
" the heir of *E.*, and until *E.*'s death, though it be after their full age,
" and then it is carried over to the heir of *C.* by virtue of the executory
" deviſe.

Cro. Eliz. 668 Smith v. Warren.

" *A.* tenant for life levies a fine *come ceo*, &c. to the reverſioner, to the
" uſe of the conuſee and his heirs, upon condition to pay to *A.* 4*l.* annual-
" ly, and that for default of payment it ſhould be to the uſe of *A.* for life:
" ths conuſee makes a feoffment over, and then there is a default in pay-
" ment of the 4*l.* And if by this feoffment the future uſe was deſtroyed,
" was the queſtion? And *per cur.*—It is not: for this is a charge or
" burden upon the lands, which goes with the lands into whoſe hands
" ſoever they come. And one judge thought that it was a condition
" being to ariſe to the conuſee himſelf who levied the fine; but if it had
" been to have ariſen to a ſtranger upon condition, the non-perfor-
" mance thereof would have created a ſpringing uſe to him, for it is mere-
" ly a tie and charge upon the land which is not deſtroyed by the feoff-
" ment."

(H) Of Remainders that ariſe on Conditions precedent or ſubſequent.

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(*It is laid*) [1 Br. 155. a. pl. 83. 253. a. pl. 18. Perk. ſect. 831. Litt. ſect. 721. Co. Litt. 378. Co. 86. 88. Plow. 25, 29. 33. a. 35. 10 Co. 86. b. Dr. and Student. Lib. 2. c. 20. fol. 192. 206. Roll. Abr. 474.]

" But, becauſe the reaſoning holds only where livery of ſeiſin is requi-
" ſite, and yet the law ſeems to be the ſame in other caſes where no livery
" is requiſite, as upon a leaſe for years, grant of an advowſon, com-
" mon, rent *in eſſe*, &c. therefore it will be neceſſary to conſider the fol-
" lowing diſtinctions, for the better explanation and underſtanding both
" of:

" 1ſt, The firſt diſtinction to be obſerved, is between a condition and
" a limitation: and in caſe of the condition, when it precedes the veſting
" the remainder as the cauſe thereof, and is annexed to the firſt eſtate,
" and where it is annexed to the firſt eſtate abſolutely without any regard
" to the remainder.

" 2d, Between a deed and a will, where in both the ſame words of con-
" dition are made uſe of for the veſting of the remainder.

" 3d, Between a limitation over in ſuch caſe of a will, and where a
" limitation is made over.

" 4th, Between remainders that are to ariſe upon conditions agreeable
" to the rules of law, and ſuch as are to ariſe upon conditions repugnant
" and againſt the rules of the law.

" 5th, Between ſuch words as actually make a condition, and ſuch
" are only deſcriptive of the time and manner when and how the remainder
" are to ariſe and take place.

' 1. Between a Condition and a Limitation, and in caſe of the Condition
' when it precedes the veſting of the Remainder as the Cauſe thereof,
' is annexed to the firſt Eſtate; and when it is annexed abſolutely
' out any Regard to the Remainder.'

" But in case of the condition when a remainder limited thereafter shall " be good, and when not, depends upon the difference first mentioned: " in the one instance, the remainder can never take effect by reason of the " condition, but in the other, the remainder takes effect presently, and there- " by destroys the condition.

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(*As where*) [*Vide* Fearne's C R. 395. &c.]

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(*But now if*) [Fearne's C. R. 405. &c.]

2. Distinction between a Deed and a Will, when in both the same Words of Condition are made use of for vesting the Remainder.

" This is true; but this in strictness was no manner of condition, but " only a designation of the time when, and the manner how, the future " executory devise to the daughters was to take effect, as will appear here- " after."

" *Cestui que use* in fee before 27 *H.* 8. devises his lands to his wife for " life, *ita quod non faceret aut permitteret aliquod vastum*, the remainder af- " ter her death to his second son in tail, and dies; and after the statute " the wife commits waste. A *quære* is made, Whether the feoffees, or " heir of the devisor, or he in remainder should enter for the condition " broken? And if, by entry of the heir or feoffees, the remainder be " destroyed? No resolution is given in it; but, by the laws before- " mentioned, it seems clear, that if the heir does enter for the condition " broken, and hold during the life of the wife, yet after her death the " remainder to the second son will be good, by way of executory devise; " for the remainder, not being to take effect by express words till after " her death, he in remainder cannot enter upon breach of the condition by " making it a limitation, till she does waste, and to vest presently upon " such waste committed.

Dyer, 117. b. Hubby's case.

(*A. having issue three sons*) And it was said, that this had received as " many resolutions as ever any point did, and nothing but the opinion " Co. 10. 40. against it, which was held not to be law; and that *Coke* " himself was of another opinion in *Welcock*'s and *Hammond*'s case, where " the doubt in *Dyer*, 316. *so.* 5. which was upon express condition " was well resolved by construing it to be a limitation. Also, admit- " ting it to be a condition, yet *C.*, who was the *hæres factus* by the " limitation of the remainder to her, ought to enter for breach there- " of."

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2 Roll Rep. 225. 1 Ventr. 203. 2 Mod. 26.

" And this construction hath been made, not only in cases of last wills " and testaments, but hath likewise obtained in conveyances to uses, as ap- " pears by several cases before mentioned."

" *A.* by lease and release settles lands to the use of himself for life, re- " mainder to *B.* for life, remainder to the first, second, and other sons of " *B.* in tail, remainder to *C.* for life, remainder to his first, second, and " other sons in tail; provided that if *B.* married without the consent of " *A.* during his life, and after his death, of *D.*, *E.*, and *F.*, then the " uses limited to *B.* and his sons to cease, and then to the use of *C.* " *B.* marries without such consent, and *C.* enters, and upon a bill brought " in Chancery by *B.* to be relieved for want of notice of the settlement, " they were dismissed to law. Which argues that the use to *B.* and his " sons was determined by limitation, and the use in remainder to *C.*, " which carried the possession after it, was well vested, and therefore they " were sent to law."

2 Chan. C. 109. Booth v. Booth.

' 3. Distinction

'3. Distinction between a Limitation over in case of a Will, and where 'no Limitation is made over.

"The third distinction I observed, was between a limitation over in "case of a conditional devise in a will, and where no limitation was made "over upon breach of the condition; and both parts of this distinction sufficiently appear from the laws already mentioned under the 1st and 2d "head; I shall therefore only add the two following cases for further illustration thereof. The first whereof was this:"

'4. Distinction between Remainders that are to arise upon Conditions "agreeable to the Rules of Law, and such as are to arise upon Conditions 'repugnant and against the Rules of Law.

"As to the first part hereof, how far remainders upon such conditions "and so far as they may be called conditions, which do not go in restraint "and abridgment of the first estate, are good, will appear under the 5th "and last distinction. But as to the remainders that are to arise upon "conditions repugnant, and against the rules of law, this has been already "cleared in part under the first distinction, and will now fully appear by "the cases following:"

Page 325 (*One devises lands to his son*) *Note;* This case appears in *Croke* to be "adjudged in *C. B.* and *B. R.* for the daughter of *A.* but in *Moore* it is "said, that in error afterwards brought in *B. R.* the judgment was reversed, but no reasons for the reversal are there mentioned. This case "agrees with the case of *Alton* v. *Hare* above mentioned, where it was "holden, that without an attempt to alien, the remainder was not to arise, "and upon that point only judgment was there given, without entering "into the nature or validity of the limitation, which by the foregoing "cases appears to be clearly against the law."

Plow. 402. Newis v. Lark, or Scholastica's case. Mo. 543. pl. 721.

These cases being so adjudged, though none of them do in express terms "deny *Scholastica's* case to be law, yet the resolution of that case can but "ly stand, as it tends as directly to a perpetuity as any of them. The "case was this:—A man devised lands to his eldest son in tail, remainder to his youngest son in tail, remainder over in tail, remainder to "own right heirs; and if any of the entails do wrong, vex, or molest "other of them for the said lands, or mortgage, bargain, and sell the "lands, or otherwise incumber them, *&c.* that then every such person "and his and their heirs, shall forthwith be excluded and discharged "touching the said entail; and that the conveyance of the entail of the "said lands against him or them shall be of no force, but that it shall "scend and come to the party next in tail to him, as if such disorderly "person had never been mentioned in the will. The eldest son enters "and avoids a fine, and suffers a common recovery, and the youngest "enters upon him. It was adjudged that his entry was lawful, and that "the estate of every one in remainder was subject to the limitation to them "by alienation. And that the next in remainder might enter; for that "was not a condition, because then it would descend to the eldest "himself, and by his alienation would pass extinguished in the land; but "being a limitation, it is as if it were devised to every of them till "aliened, and so by alienation their estate *ipso facto* determines, and it "upon him in the remainder before entry. And for construction of "condition by a limitation in a will, this case seems to have led the

" to all the caſes that have followed upon it. But for the nature of the
" condition, all the caſes before mentioned ſeem to condemn it. And my
" Lord *Coke* ſays, that a contrary judgment was given in the ſame caſe af-
" terwards by *Popham* and two juſtices, though *Moor* in reporting the
" ſame caſe mentions it to have been adjudged by *Popham* and two juſtices,
" according to the reſolution in the Commentaries. But the caſe at this
" day by good opinion is held to be no law, as being introductive of a per-
" petuity which the law condemns,"

10 Co. 42. [*Vide* Bateman v. Allen, Cro. Eliz. 437. and Fearne's C. R. 386 s 4th edit.]

' 5. Diſtinction between ſuch Words as actually make a condition, and ' ſuch as are only deſcriptive of the Time and Manner when and how the ' Remainders are to ariſe.

" The fifth and laſt diſtinction I ſhall mention is, between ſuch words
" as actually make a condition, and ſuch as are only deſcriptive of the time
" when, and manner how, the remainders are to ariſe and take place.
" And this is the more neceſſary, becauſe in ſeveral of the foregoing and
" other caſes great diſputes have ariſen, when the word condition has
" been in the deed or will, though in reality there has been no manner of
" condition at all; for a condition, as appears before, properly and ſtrict-
" ly taken muſt go in reſtraint and abridgment of the eſtate firſt given,
" otherwiſe it is no condition, but only a modus or particular qualification
" whereby ſuch a perſon is to entitle himſelf to the eſtate in remainder,
" and has no manner of relation to the firſt eſtate either to ſhorten or
" abridge it."

(*So where A. upon*) " *Note;* A caſe was cited 13 *Car.* 1 between Page 327
" *Brett* and *Pildredge*, where a farther upon marriage of his daughter
" made a proviſion, that if his daughter died without iſſue within two
" years, that then her huſband ſhould repay 500*l.* of her portion: the
" daughter had iſſue; and after, ſhe and the iſſue died within the two
" years. It was adjudged, that the huſband ſhould not repay the 500*l.*
" becauſe by the having of iſſue the condition was fulfilled. *Note*; My
" Lord Chief Juſtice *Holt*, in the caſe next after mentioned, ſaid, that
" the principal caſe of *Goodyer* v. *Clerk* was not put right in any of the
" books but *Keble*, for the true caſe was, that the huſband before mar-
" riage, by a ſeparate deed, made a leaſe for 100 years, to begin after
" his death without iſſue male on the body of his intended wife, in truſt,
" for raiſing portions for daughters; and after made a ſettlement by leaſe
" and releaſe, to the uſe of himſelf and his wife, and firſt and other ſons,
" in the uſual form, *&c.* And he ſaid, this term being not ſubſequent
" to nor depending upon the eſtates limited by the ſettlement, but pre-
" cedent in its creation, could not be barred by any fine or common re-
" covery under the ſettlement. And though he did not deny but ſuch
" leaſe was good, yet he thought it a very dangerous practice; and if
" ſuch leaſes were countenanced, no purchaſer under ſuch ſettlement
" would be ſafe. But note; though ſuch leaſe cannot be barred by a
" common recovery, becauſe being precedent to the eſtate-tail, the re-
" compence in value cannot extend to it, nor can he who recovers againſt
" the tenant in tail be ſuppoſed to have any right againſt the termor, who
" comes in paramount the eſtate-tail; yet it appears by the books, that 1 Keb. 247.
" *Maxwood*, *Barnſley*, and *Twiſden* held, that if a common recovery be 248. 463.
" againſt the tenant in tail, ſuch leſſee for years *in futuro*, or upon a con- 1 Sid. 102.
" tingency, ſhall not be admitted to falſify within 21 *H.* 8. *c.* 15. to de- Cro. Jac. 592 Sir T. Raym. 29.
" feat 1 Co. 62 b.

" feat the recovery; and then it remains at common law, and his term " is ſubject to the power of the tenant in tail, as it was before that ſta- " tute; which ſufficiently takes off the objection from the danger of in- " troducing perpetuities by the allowing of ſuch leaſes. And in another " book it is held, That if there be *A* tenant in tail, remainder to *B.* in " tail, and *B* make a leaſe for years, or grant a rent-charge, ſuch leſſee " or grantee cannot falſify a common recovery had againſt the firſt tenant " in tail; becauſe he who ſuffered the recovery was not chargeable with " the leaſe or rent. And though on the other hand it may be objected, " that by this conſtruction all proviſions for daughters or younger chil- " dren made by ſuch precedent leaſe for years may be defeated; to this " it is anſwered, that the Court of Chancery will no doubt ſupport ſuch " leaſes according to the truſt thereof declared for daughters or younger " children, but no further; and when that is ſatisfied, the term will then " fall of courſe for want of power to falſify by the common law, and a fur- " ther ſupport in equity.

Trin. 1706. in B. R. Stroud v. Andrews. [S. C, Rep. temp. Holt, 625. and 11 Mod. 88. But the report here is apparently from a different hand, and is in ſome reſpects more full.]

" One makes a ſettlement upon marriage to the uſe of himſelf for life, " remainder to truſtees to ſupport the contingent remainders during his " life, remainder to his wife for life for her jointure, remainder to his " firſt and other ſons in tail male ſucceſſively; and then follows this " clauſe—And in default of ſuch iſſue, and in caſe he (the huſband) ſhall " die or be dead without iſſue male of his body on the body of his wife " born, or *in ventre ſa mere*, at the time of his death, having one or more " daughter or daughters, then to truſtees for 500 years, in truſt to raiſe " portions for ſuch daughter or daughters, alſo yearly maintenances to be " paid half-yearly from the death of the wife. The huſband has iſſue male " by his wife, and alſo daughters, and dies; then the iſſue male dies " without iſſue; and if the term ſhould ariſe, was the queſtion? It was " argued by Serjeant *Parker*, that it ſhould not, becauſe it was to ariſe " upon a condition precedent; for the having no iſſue male was reſtrained " to a particular time, *viz.* the time of his death, which here did not " happen. He agreed, if it had been, that if he die without iſſue male " generally, there, iſſue is *nomen collectivum*; and though he has iſſue, " yet if ſuch iſſue male after die without iſſue, either in his life time or at " any time after, yet the term ſhould ariſe, but not in this caſe, and cited " the laws beforementioned. *Raymond* argued, that here was no contin- " gency, but a plain limitation of the term after failure of iſſue male, when- " ever that happened; for when he ſays *and in default of ſuch iſſue*, it " plain, if he had gone no further, it had been ſo then, when by thoſe " words the term would have been well raiſed, the ſubſequent words " which are but tautology and a repetition of the ſame thing, ſhall not hin- " der it from riſing: for that would be to make one part of the dee " deſtroy and ſubvert the other; and the words following, *and in caſe h* " *ſhall die or be dead without iſſue male of his body on the body of his wif* " *born*, if it had gone no further, are but a repetition of the former word " *and in default of ſuch iſſue*. But then, if the words, *or in ventre ſa mer* " *at the time of his death*, ſhall be joined to all the foregoing words an " be taken as part of them, then it deſtroys and contradicts them; f " then all that is before ſpoken of iſſue male is to be confined to h " death, as the operative words which govern and go through the whol " ſentence; therefore, he argued, that the words, *at the time of h* " *death*, ſhould be reſtrained and confined only to the words next imm

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" diately before, *viz. or in ventre ſa mere*, for otherwiſe it is not to be " known what he meant by *ventre ſa mere*, nor at what time ſuch iſſue " male was to be *in ventre ſa mere*, for all iſſues are *in ventre ſa mere* at " one time or other; therefore to make ſenſe of the deed, thoſe words " muſt be reſtrained, and then the whole is conſiſtent and eaſy, and runs " thus – *and in default of ſuch iſſue, and in caſe he ſhall die or be dead with-* " *out iſſue male* generally, or *ſha'l die or be dead without iſſue male in ventre* " *ſa mere at the time of his death*; and then whether the iſſue male die at " his death, or being *in ventre ſa mere* at his death, and born after, die " without iſſue male, the term ſhall ariſe, and no condition in it, but a " plain limitation of a term in remainder. But my Lord Ch. J. *Holt* " ſaid, that by ſuch conſtruction you deſtroy the laſt words, which are " reſtrictive and explanatory of the foregoing, and tied down to the time " of his death. Alſo, the maintenances being appointed to be paid " half-yearly from the death of the mother, ſhew, that ſuch main- " tenances and term were only to ariſe in caſe of no iſſue male at the " time of his death; for otherwiſe, the intereſt being to be paid from " the death of the mother, in caſe there ſhould be a failure of iſſue male " 40 or 50 years after, the intereſt or maintenance would be more than " the principal, fortune, or portion; and he was ſo ſtrongly of this opi- " nion, that this term was to ariſe upon a condition precedent, which " here was not performed, that he ſaid they might argue all the days of " their lives, they ſhould never make him change it. And accordingly, " judgment was there given, that the term ſhould not ariſe. But after- " wards, upon a writ of error brought in parliament, that judgment was " reverſed. 2 Journ. 702. 5th Feb. 1706.

" *A.* makes a ſettlement upon the marriage of his ſon with one *B.* to " the uſe of the ſon for life, remainder to truſtees to ſupport, *&c.* re- " mainder to the firſt and other ſons in the uſual form, and adds this " proviſo, *viz. Provided that, if the ſaid* B. *ſhall happen to ſurvive her* " *huſband, not having iſſue of their two bodies lawfully begotten, then ſhe, the* " *ſaid* B., *ſhould have power to ſell and diſpoſe of ſuch part of the lands as* " *ſhe ſhould think fit.* The huſband dies, leaving iſſue; ſome years after " that iſſue dies without iſſue; and then the wife ſells the lands in queſti- " on to the defendants, againſt whom the heir at law of the huſband " brought this bill to have a diſcovery of the deeds and writings; and in- " ſiſted that the wife had no power to ſell theſe lands, becauſe the con- " dition was not performed; for the huſband left iſſue, and ſo ſhe did " not ſurvive him, not having iſſue. But my Lord Chancellour ſaid, " that when an eſtate is made to one and the heirs of his body, and in " caſe he die without iſſue, to go over to another, that limitation over is " good, though he dies leaving iſſue, which iſſue afterwards dies wit- " out iſſue. And that is a ſtronger caſe than this; for if he leaves " iſſue, he cannot be properly ſaid to die without iſſue, though " that iſſue after fails; becauſe death is a ſingle act, and to be " performed but once; but here, ſurviving is a continuing act, and " ſhe ſurvives her huſband as much a year after, as ſhe did the firſt mo- " ment; and therefore, if the iſſue fails during her life, ſhe actually ſur- " vives without iſſue, or not having iſſue, becauſe the iſſue fails during " her ſurvivorſhip, which continues after the failure of iſſue. And this, " he ſaid, was the plain natural meaning of the parties, as well as agree- " able to the words, which were to give the wife a power to diſpoſe of ſo " much of the lands, in caſe the iſſue to be provided for by that ſettle- Holt v. Burleigh, Paſch. 18 May, 1720 [Pr. Ch. 193. S. C 2 Vern. 651. S. C.]

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" ment failed during her life; and accordingly dismissed the
" bill.

Fletcher's case. Trin. 12th July 1709. in Ch. [1 Eq Ca. Abr 163. S. C Fearne's Ex. Dev. 184. 6, C,]

" One *Fletcher*, being possessed of a term for years, by his will de-
" vises it to his wife for life, and after her death to *Rebecca Fletcher* for
" life, and after her death to *Thomas Fletcher* and his children; and if it
" shall happen the said *Thomas Fletcher* to die before the expiration of the
" said term, not having issue of his body then living, then to go over to
" the now plaintiff for the residue of the term. The defendant's title
" was by an assignment from *Rebecca Fletcher*, and a release from *Thomas*
" *Fletcher*, of all their estate, title, and interest respectively in and to the
" premises: the two life-estates were at an end: and *Thomas Fletcher* was
" dead without issue; and now the plaintiff brought this bill to have an
" assignment of the residue of the term, pursuant to the will. All that
" was insisted on for the defendant to difference this case from the Duke
" of *Norfolk*'s case of a term, and from *Pell* and *Brown*'s case of a fee,
" was, that this contingency of his dying without issue then living was
" not confined to his death, but that the word then living should relate
" to the words before the expiration of the term; and so this went fur-
" ther than any of the cases had ever yet been carried, for he might have
" issue for several generations, and yet, if that issue failed at any time be-
" fore the expiration of the term, then it was to go over; and this in a
" long term plainly tended to a perpetuity, and therefore ought not to be
" allowed; but that, by the devise to *Thomas* and his children, and the
" words if he die without issue, the whole term and interest was vested
" in him, and he might dispose thereof as he thought fit. And that he
" could not be restrained by the words *then living*, for they related only
" to the expiration of the term, *&c.*; so the remainder over to the plain-
" tiff was void. But it was decreed to be a good remainder to the plain-
" tiff, by way of executory devise; and that the words *then living* must
" relate to the time of his death, for otherwise there would be no differ-
" ence between this case and the common limitation of a term to one and
" the heirs of his body, and if he die without issue, to remain to another
" which is void; for there it must likewise be intended if he die without
" issue before the expiration of the term, because when the term is ex-
" pired, nothing remains to limit over: but, here, being limited over
" upon this contingency, *viz. If he die without issue then living*, viz.
" *the time of his death*, it is good, because the contingency must happen
" within the compass of one life, or not at all, and will be certain
" known at his death. And this case differs in nothing material from the
" Duke of *Norfolk*'s case.

Corbett v. Maidwell, 1 Trin. 1710. in Chancery [1 Eq. Ca. Abr. 327. L, C. 1 Salk. 159. S. C. 2 Vern, 640. 655 S. C. 3 Ch. Cas. 190. S. C. Although this case, and the cases

" In this case it was said by my Lord Chancellour to have been
" creed in this court, and several cases cited for it, that where an estate
" limited to a man for life, remainder to his wife for life, remainder
" trustees for a term of years, upon trust out of the rents and profits,
" by mortgage or sale to raise portions for daughters of that marriage
" be paid at their age of 18 years, or day of marriage, which shall
" first happen, that these portions were absolutely due and vested
" eighteen or marriage, though in the life of the father and mother;
" that the term for raising them should be sold in the lifetime of the
" ther and mother, and this court would warrant the title. So, if
" trust of the term were limited upon a condition precedent, as if it
" declared, that in case he should die without issue male on the body
" his said wife, leaving daughters, that then the trustees should,

" the rents, *&c.* raiſe and pay portions to ſuch daughters at eighteen or " marriage, *&c.* that in caſe the mother died without iſſue male, leaving " daughters, who attained eighteen or were married in the father's life- " time, that ſuch term in remainder ſhould be ſold preſently, and the " portions raiſed. So, where even the term itſelf was to ariſe upon " ſuch condition precedent, or, after a limitation to the firſt and other " ſons or before, it were limited, that in caſe he ſhould die without iſſue " male on the body of his wife, leaving daughters, then to truſtees for a " term of years, in truſt to raiſe portions for daughters, payable at " eighteen or marriage, yet after the death of the wife without iſſue male, " ſuch term ſhall be ſold to raiſe the portions in the father's lifetime. " The reaſons of which reſolutions, he ſaid, were, becauſe the death of " the wife, which was all that was contingent in that caſe, had happen- " ed; that it was now become impoſſible he ſhould die leaving iſſue male " by her, and then it was no more than if it had been limited when he " ſhall die, or after his death. And the reaſon of the court's coming " into this at firſt was, to promote ſuitable matches, and that women " might have their portions when they were likely to do them moſt ſer- " vice; though he ſaid, if it had been *res integra*, he ſhould not have de- " creed it ſo.

on which it was founded have been conſtantly received as the law of the court, yet judges in later times have expreſſed their opinion of the inconvenience attending theſe determinations, and have anxiouſly ſought for circumſtances to diſtinguiſh the modern caſes from them.

Butler v. Duncombe, 1 P. Wms. 448. Sandys v. Sandys, *Id.* 707. Reresby v. Newland, 2 P. Wms. 93. Ravenhill v. Danſey, *Id.* 179. Brome v. Berkley, *Id.* 484. Evelyn v. Evelyn, *Id.* 659. Hebblethwaite v. Cartwright, Ca temp. Talb. 31. Stanley v. Stanley, 1 Atk. 549. Hall v. Carter, 2 Atk. 354. Stevens v. Dethick, 3 Atk. 39. Lyon v. Duke of Chandois, *Id.* 416. Goodall v. Rivers, Moſ. 395. Churchman v. Harvey, Ambl. 335. Smith v. Evans, *Id.* 633. Conway v. Conway, 3 Br. Ch. Rep. 267.

(L) Of Croſs Remainders, or thoſe ariſing by Implication and Conſtruction of law.

" THE laſt thing to be treated of under this head is concerning re- " mainders ariſing by implication or conſtruction of law, and there- " in of croſs remainders. But theſe being already ſettled under the head " of *Deviſes*, as being allowable only in laſt will and teſtaments, I ſhall " paſs them by."

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(*It hath been ſaid*) This doctrine, that there cannot be croſs remainders created between more than two perſons, ſeems exploded. The rule now ſettled is, that where they are to be raiſed between *two*, the preſumption ſhall be in favour of them; but where between *more than two*, it ſhall be againſt them. But it being only a preſumption, it may in either caſe be rebutted by circumſtances of plain, manifeſt intention. The words "*in default of iſſue*," and a deviſe over of all the deſtators eſtates, have been holden to raiſe croſs remainders. Phipard v. Mansfield, Cowp. 800. Cumber v. Hill, *infra*. Atherton v. Pye, 4 Term Rep. 710. Wright v. Holford, Cowp. 31. 8. C. by the name of Wright v. Englefield, Ambl. 468. and by the name of Wright v. Lord Cadogan, 6 Br. P. C. 156. Holmes v. Meynell *ſupra*. Marryatt v. Townly, 1 Vez. 102. The diſpoſition of the courts to preſume againſt croſs remainders, aroſe from their diſlike to the ſplitting of eſtates. 1 Vez. 164. 5.

(*It is clearly agreed,*) (*a*) This doctrine is not correctly ſtated, nor is it ſupported by the authorities to which it appeals. Croſs remainders, it is true, cannot ariſe in a deed by implication, Goodright v. Lewingſton, 1 Ventr. 224. Doe v. Dorvell, 5 Term Rep. 521. but they may be raiſed in a deed, where they are limited in expreſs, though perhaps rather informal, terms. Doe v. Wainewright, 5 Term Rep. 427. Indeed, in executory articles. Lord Camden went farther; for in the caſe of articles upon a marriage to lay out the wife's fortune, to the uſe of all the children of the marriage as tenants in common and of their reſpective heirs, and for default of ſuch children and their iſſue, to the uſe of the ſurvivor of the huſband and his wife; his Lordſhip held, that

that there were croſs remainders. Twiſden v. Birt, Nolan's edit. of Strange, vol. 2. 970. note (3), S. C. Ambl. 663. by the name of Twiſden v. Locke.

(*Richard Holden*) [Davenport v. Oldys, 1 Atk. 579. Cowp. 799. Marryatt v. Townly, 1 Vez. 102.]

Leach v. Jackſon, *coram* Lord Apſley, Tr. 11 G. 3. in Chancery. Nolan's edit. of Strange's Reports, vol. 2. 970, note (3).

[*R. H.* deviſed to his ſix nieces to be equally divided between them, ſhare and ſhare alike, as tenants in common, *&c.* and of the ſeveral and reſpective heirs of the body and bodies of all ſuch and every his ſaid nieces; and in caſe one or more of his ſaid ſix nieces ſhould happen to die without iſſue of her or their bodies, then he gave *&c.* the ſhare or ſhares of her or them ſo dying without iſſue to the ſurvivor or ſurvivors of them his ſaid ſix nieces, ſhare and ſhare alike, as tenants in common, *&c.* and to the ſeveral and reſpective heirs of the body and bodies of ſuch ſurvivor or ſurvivors of them; and if all his ſaid nieces ſhould die without iſſue, then he gave, *&c.* all the ſame manors, *&c.* unto his own right heirs for ever. It was admitted, that the original ſhare went to the ſurvivors by way of croſs remainders, but it was inſiſted that the ſhares which the two laſt dying nieces took by way of accruer did not ſurvive.

(*M*) "Of veſted Remainders, and of the particular "Eſtate to ſupport them in their Creation; how "long it muſt continue; and when by Determination, Grant, or Refuſal thereof, the Remainder is diſcontinued, barred, or deſtroyed, "and when not.

"AS to a veſted remainder, we are to conſider, 1*ſt*, The nature of a "remainder veſted, that there muſt be a particular eſtate to ſupport it in its creation; wherein to conſider, 1*ſt*, What eſtate is ſufficient for that purpoſe, when it muſt begin, and how long it muſt continue. 2*dly*, When by determination, grant, or refuſal thereof, the remainder is diſcontinued, barred, or deſtroyed, and when not; and therein of the remedies for him in the remainder or reverſion by entry, action, or reſceit. 3*dly*, Where the remainder or reverſion ſhall be ſubject to the acts or charges of the particular tenant, and where and how the charges of him in the remainder or reverſion ſhall take place.

"It has already appeared what eſtate is ſufficient to ſupport contingent remainders, and what not. As to remainders which veſt preſently, though there muſt be a particular eſtate to diſtinguiſh them to be remainders, yet, as to ſupporting them, there needs none; becauſe they veſt preſently and certainly as remainders in the perſon to whom they are limited. And I find only one eſtate whereon it is held a remainder can depend; and that is an eſtate at will; for if ſuch eſtate be made with remainder over, the remainder is void. The reaſon ſeems, becauſe by the limitation over the will is inſtantly determined, and then the remainder cannot be good for want of a particular eſtate whereon to depend; and in poſſeſſion it cannot be good, becauſe it is limited as a remainder.

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" A remainder may be limited upon a gift in frank-marriage either to the donees themſelves, or to a ſtranger. But the diverſity taken in the books is, that if the remainder be limited over in fee, then is the frank-marriage deſtroyed, and the donees have no eſtate-tail but only for life; becauſe by the limitation over of the fee, the tenure of the donor, which is inſeparable to frank-marriage, is deſtroyed, and then the words of the gift carry but an eſtate for life. But, if the remainder were limited over in tail only, or for any leſs eſtate, yet the frank-marriage continues; becauſe the tenure by reaſon of the reverſion left in the donor continues. Co. Litt. 21. b. Godb. 19. 20.

" If one make a leaſe to *A.* for life, remainder to him for years; or to *B.* for his own life, remainder to him for the life of *B.*; theſe are good remainders, and both eſtates are veſted in *A.*: for though he can have no benefit of the remainder to his own perſon, yet he may give, grant, deviſe, or aſſign either eſtate, and a greater eſtate may ſupport a leſs, as in thoſe caſes, but not *è converſo*; therefore, if one makes a leaſe to *A.* for years, remainder to him for life, the leaſe for years is drowned. Co. Lit. 54. b. Dyer, 310 a. Cro. Eliz. 491. 3 Leon. 22.

" Another rule is, that the remainder muſt be limited and given out at the ſame time that the particular eſtate is created; for otherwiſe the reverſion ſettles immediately in the leſſor or feoffor, and draws to it the rents and ſervices, and then the remainder limited after comes too late. Therefore, if one makes a leaſe for life, and after confirms his eſtate for life, remainder after his death to another, this remainder is void; becauſe the confirmation gave no new eſtate to the firſt leſſee, or any ways enlarged his old eſtate, but he continued tenant only for his own life, as he was before, and then the remainder cannot be good, becauſe it was limited after the particular eſtate had taken effect, whereby a reverſion was veſted and ſettled in the leſſor; and as a grant of the reverſion it is not good, becauſe not ſo intended. And ſome of the books add another reaſon that it cannot be good as a grant of the reverſion, becauſe he was not party to the deed, and unleſs it be by way of remainder, none can take, but thoſe who are parties to the deed. But *Littleton* ſeems to reject this reaſon, where he holds, that in ſuch caſe, if the tenant for life accepts the deed of confirmation, the remainder is thereby in him, to whom it is limited; becauſe ſuch acceptance is an agreement and attornment in law of the tenant for life; though without the deed he in remainder cannot maintain an action of waſte, or have any other benefit againſt the tenant for life. But this reaſon ſeems rather to prove, that the deed operates as a grant of the reverſion to which attornment is requiſite; for to a remainder there needs none, becauſe it takes effect by the ſame deed, and at the ſame time with the particular eſtate; and therefore his advice is for him that is to have the remainder, to get another part of the indenture to himſelf. Doct. & Student, lib. 2. c. 20. 1 Bro. 253. pl. 45. Plow. 25. b. 2 Roll. Abr. 415. pl. 8. Lit. Sect. 573. Co. Lit. 317. Plow. 160. b. Dyer, 126.

" If the leſſor diſſeiſe his tenant for life, and after make a new leaſe to him for life, remainder over, this remainder is void; becauſe the tenant for life is remitted to his firſt eſtate for life, which was long before the remainder was appointed, and then, as a remainder, it cannot be good, becauſe there was no particular eſtate created at the ſame time with it. So, if the heir endow his mother, remainder over, the remainder is void, though livery be made; becauſe the dower hath relation to the death of the huſband which was before the appoint- Plow. 25. b. Godb. 355.

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" ment of the remainder. But, if the leſſor diſſeiſe his leſſee for life, and
" make a leaſe to a ſtranger for the life of the firſt leſſee, remainder over,
" and then the firſt leſſee enter and be remitted; yet the remainder con-
" tinues good; becauſe it was well veſted before the entry and remit-
" ter.

Doct. & Stud. lib. b. c. 20. 1 Bro. 253. pl. 45. 2 Roll. Abr. 415. pl. 8.

" If a leaſe be made to *A.* for life of *B.*, and after the leſſor confirm
" the land to *A.* for his own life, remainder over, this is a good remain-
" der; becauſe, by the confirmation, the eſtate of *A.* was enlarged and
" made abſolute for his own life, which before was determinable upon
" the death of *B.*; and by ſuch confirmation a new eſtate being created, a
" remainder may be limited upon it, as it might at making the leaſe. So,
" if confirmation be to the tenant for life in tail, with remainder over,
" this is good for the ſame reaſon; becauſe the eſtate for life is enlarged
" to an eſtate in tail, upon which a remainder may be limited, as it might
" upon the firſt making of ſuch eſtate.

Cro. Car. 478. Dyer, 126. Lit. ſect. 525. Co. Lit. 299. 1 Lev. 38. Plow. 31. b. 1 Sid. 83. 361.

" So, if a woman be tenant for life, and the leſſor confirm the eſtate
" of the huſband and wife for their two lives; this confirmation enures
" to the huſband by way of remainder for life, or, at leaſt, by way of
" increaſe and enlargement of the eſtate of the huſband, and the eſtate
" for life of the wife continues diſtinct. But ſome call this a reverſion in
" the huſband, and not a remainder, becauſe the eſtate of the wife is
" not enlarged thereby; and this remainder did not paſs till after the re-
" verſion veſted and ſettled in the leſſor.

1 Saund. 149. 1 Sid. 360. 2 Keb. 341. Wade v. Batch.

" *A.* copyholder for life, remainder to *B.* in fee: *B.* ſurrenders this
" copyhold to the uſe of *A.* for life, remainder after his deceaſe to the
" uſe of *B.* and *C.* his wife for their lives, and the life of the longer liver
" of them, remainder to the uſe of the right heirs of *B*, It was argued,
" that this ſurrender to the uſe of *A* for life was void; becauſe he had
" an eſtate for life before, and then the remainders limited thereon are
" void alſo; and then the ſurrender enures to the uſe of *B.* and his heirs,
" as it was before, and *C.* took nothing by it. And though a leaſe to *A.*
" for life, remainder to *B* for the life of *A.* of lands at common law be
" good, becauſe *A.* may forfeit his eſtate for life, whereof *B.* ſhall take
" advantage and hold during the life of *A.*; yet it is otherwiſe in caſe of
" copyholds; for there the lord of the manor ſhall take advantage of the
" forfeiture, and hold during the life of the particular tenant, and not be
" in reverſion or remainder. And ſo here, the firſt eſtate being void, to
" give *A.* any benefit, the remainder muſt be void too. On the other
" ſide it was argued, that if the eſtate limited to *A.* was void, yet the limit-
" ation to *B.* and his wife was good by way of preſent eſtate and ſurren-
" der of the remainder, as a grant of the reverſion *cum poſt mortem* of the
" tenant for life *acciderit* hath been conſtrued a good grant *in preſenti* of
" the reverſion; and the words *cum poſt mortem* refer to the having the

Cro. Eliz. 323. Dyer, 367.

" land in poſſeſſion. So, here, *B.* and *C.* ſhall have the land for their
" lives in poſſeſſion after the death of *A.*, as by a mediate ſettlement, and
" not by way of remainder. And ſo was the opinion of the whole court
" as *Saunders* reports it; and that it was not good by way of remainder.
" But *Siderfin* reports it to be held by three juſtices good by way of re-
" mainder: and the reaſon there given for it is, becauſe, ſay they, the
" continuance of the particular eſtate *in eſſe* is not always neceſſary, as,
" a rent be granted to the tenant of the land for life, remainder over, this
" is good. So, an eſtate limited to an infant, remainder over, and the
" infant at full age diſagrees to the eſtate for life. So, they thought, if

" copyhold

" copyholder in fee ſurrenders to the uſe of the lord for life, remainder over, this is good. So, if tenant for life, and he in the reverſion grant their eſtate to the tenant himſelf for life, remainder over, this is good. But *quære*, if theſe caſes warrant ſuch conſtruction; for in the caſe of the rent, though between the parties it merges preſently in the land as ſoon as granted, yet, as to all ſtrangers, it hath continuance, and the grantee himſelf hath a continuing benefit by way of e oneration of his eſtate therefrom. As to the caſe of the infant, though he refuſes at full age, yet that ſhall not divert the remainder, which was once well veſted by good title, but he in remainder ſhall enter preſently, as in his remainder upon ſuch refuſal; becauſe there was a good eſtate to ſupport it in its creation. As to the caſe of the ſurrender to the lord, he hath benefit by actual poſſeſſion of the land during the eſtate thereby ſurrendered, and may grant it out again for his own life, though, whilſt it is in his own poſſeſſion, he cannot properly be called a copyholder thereof, becauſe he cannot be ſaid to hold of himſelf. And as to the laſt caſe, if it were barely by way of grant, it cannot be good, becauſe the freehold cannot paſs without livery; and if livery were made by parol, it then amounts to a ſurrender of his eſtate for life; and a new eſtate for life is created by the ſame livery, upon which a remainder may be limited, as it might have been at firſt. But, if it were by deed and livery, it ſhould ſeem it cannot be good; becauſe then every one paſſing only his own eſtate, the tenant for life cannot give an eſtate to himſelf; but by his joining in the deed and acceptance thereof, this may, as appears before, amount to an attornment, and then the grant, as to the other, will paſs the reverſion. But in the principal caſe, the ſurrender by him in remainder cannot paſs the reverſion, becauſe he has it not as a reverſion, but as a remainder. And for the ſame reaſon the acceptance of the particular tenant cannot amount to an attornment, (if it were neceſſary, which, in caſe of a copyhold being an eſtate at will only ſeems not requiſite,) becauſe no reverſion is granted or ſurrendered; and then his eſtate continuing in all reſpects the ſame as it was before the remainder, as a remainder it cannot be good, though by way of preſent grant, to take effect in poſſeſſion after the death of *A.* it may.

2 Roll. Abr. 415. pl. 2. 3. Dyer, 340. b. Pl. 41. held this remainder of the rent not good becauſe the particular eſtates ſuſpended are as ſoon as granted. But Co. Lit. 298. a. *contra*, that it is good, and veſts in an inſtant, and the ſuſpenſion in judgment of law grows after. So, thoſe books hold the remainder of a ſeignory granted in ſuch manner void for the ſame reaſon; and becauſe no *formedon in remainder* lies without alleging the eſplees in the particular tenant. *Ideo quære.* 2 Co. 50. Mo. 342. Sir Hugh Chomley's caſe.

" *A.* tenant in tail, remainder *B* to . in tail: *B.* by indenture enrolled for 20*l.* bargains and ſells the lands, and all his eſtate, right, title, *&c.* to C. during the life of *A*, remainder to the queen, her heirs and ſucceſſors. This remainder was held void; 1*ſt*, becauſe there was no particular eſtate; for the grant to *C.* was abſolutely void, becauſe it can never take effect in poſſeſſion, nor can *C.* have any benefit by it, *A.* having an eſtate tail therein, which is ſubject to no forfeiture to let in the remainder, and his entry into religion, which is a foreign poſſibility, and againſt law likewiſe, ſhall never be preſumed. 2*dly*, *B.* having granted *totum ſtatum ſuum* to *C.*, left nothing in him to limit over, and therefore the remainder is void, either becauſe *C.* took nothing, and then a remainder cannot be without a particular eſtate, or, if *C.* took any thing, he took the whole, and nothing remained to limit over to the queen; and, by conſequence, ſuch remainder is void. And as a grant of the reverſion it cannot operate, becauſe *B.* had no reverſion, but a remainder only.

" Huſband makes a feoffment in fee to the uſe of himſelf for life, remainder after the death of his wife to *B.*, and dies; then the wife dies; " and

Sir T. Jo. 124. Key v. Gamble.

" and if this remainder to *B.* was good, was the queſtion. The court
" ſeemed to be of opinion that it was not; becauſe, during the life of the
" wife, it did not veſt: and admitting the wife had an eſtate for life by a
" former conveyance, as the caſe in fact was, yet that could not ſupport a
" remainder which was created at the ſame time with it. On the other
" ſide it was argued, that here was no contingency but a remainder veſted,
" and a difference was taken between a remainder at common law and by
" the ſtatute of uſes. This is the caſe *verbatim* as it is reported; but no
" judgment was given. But it ſeems the remainder muſt be contingent,
" and upon the wife's ſurviving her huſband became void; becauſe by his
" death the particular eſtate was determined, and yet the remainder
" could not then take effect; and the eſtate of the wife by a former con-
" veyance could be of no regard, if it had had continuance, as it had not,
" being by the feoffment, diveſted and put to a right.

Co. Litt. 298. a. " My Lord *Coke* lays down for a rule, that when the particular eſtate
" and remainder depend both upon one title, there, the defeating of the
" particular eſtate is a defeating of the remainder alſo; but, when the par-
" ticular eſtate is defeatable only, and the remainder by good title, there
" though the particular eſtate be defeated, yet the remainder continues
" good: as, if *A.* be leſſee for life, and the leſſor diſſeiſe him, and make
" a leaſe to *B.* for the life of *A.*, remainder to *C.* in fee; though *A.* enter
" and defeat the eſtate for life, yet the remainder to *C.* being once
" well veſted ſhall not be defeated; for it would be unreaſonable, that
" the leſſor ſhould have the land again, and contrary to his own livery.
" And in this caſe the remainder depends upon the ſame life it did
" firſt, though that eſtate for life be in another perſon. And he there
" put alſo the caſe of the infant beforementioned, diſagreeing at full
" age.

Co. Litt. 298. a. " If one grant a rent to *A.* for the life of *B.*, remainder to the heirs of
" the body of *B.*, this is a good remainder; becauſe it takes effect at the
" inſtant of the determination of the particular eſtate, as all remainders
" ought, or during the particular eſtate.

Co. Litt. 298. a. " If one makes a leaſe to *A.* for the life of *B.*, remainder to *C.* in
" fee; *A.* dies; now till an occupant enters there is no particular eſtate,
" and yet the remainder to *C.* continues good, becauſe it veſted in
" *C.* preſently by the firſt limitation; and the want of a tenant to the
" firſt eſtate ſhall not vitiate the eſtate to the ſecond, which was well
" veſted.

Mo. 664. Yelv. 9. Salter v. Buttler. " If rent be granted to *A.* for life of *B.*, remainder over; if *A.* die
" he in remainder ſhall have the rent preſently; becauſe the eſtate for
" in the rent determined by the death of *A.*, and there can be no oc-
" pant of a rent. But *Yelverton* holds, that in the caſe of tertenants that
" ſhall have lands during the life of *B.* diſcharged of the rent, and this
" ſufficient to ſupport the remainder.

Perk. ſect. 55. 567. 568. 569. 1 Bro. 235. pl. 5. Plowd, 35. a. 2 Roll. Abr. 415. pl. 4. 5, 6, 7. 417. pl. 9. 1 Roll. " If one grant a rent to the right heirs of *J. S.* who is then living,
" mainder over, this whole grant is void; for *J. S.* cannot have
" during his life, and ſo there is no perſon to take the particular eſtate,
" and without that there can be no remainder; and therefore that is
" wiſe void. So if a leaſe be made to *J. S.* for life, where there is
" ſuch perſon, remainder over, the whole is void for the ſame reaſon.
" if a leaſe be made to a monk, or other perſon, who has no capacity
" law to take, for life or years, remainder over, both are void. By
" all theſe caſes, if ſuch eſtate were deviſed by will, he in remain-
" ſh

" ſhould take preſently. So, if the firſt deviſee refuſe, or die in the life-
" time of the deviſor, the remainder ſhall veſt in poſſeſſion preſently. The
" reaſon of which difference is, becauſe in a will the intent of the deviſor
" is principally to be regarded, and if the particular eſtate fails, the deviſe
" over ſhall be conſtrued as a new original deviſe to ſupport the intent of
" the teſtator, and let in the *hæres factus* according to the eſtate thereby
" given him. But if one by his will deviſe, that his feoffees ſhall make an
" eſtate to *A.* for life, remainder to *B.* in fee, if *A.* refuſe, the feoffees
" ought to make an eſtate to another for the life of *A.* with remainder to
" *B.* in fee. And ſo, if one deviſe, that his executors ſhall make ſuch eſ-
" tate, and *A.* refuſe, yet *B.* ſhall not have the remainder preſently, be-
" cauſe here he hath referred the eſtates to be made by the rules of the
" common law, and therefore they ought to be purſued. But *quære* in
" theſe caſes if the eſtates ought not to be made to *A.* purſuant to the
" will, which, though he refuſe, will, *nolens volens*, carry the eſtate to
" him with remainders over, and then, if he after refuſe to take ſuch eſ-
" tate the remainder will veſt in poſſeſſion preſently. But it is likewiſe
" held, that if a deviſe be to *A.* for five years, remainder to *B.* in fee,
" and *A.* die in the lifetime of the deviſor, that this ſhall deſcend to the
" heirs of the deviſor in the mean time, till the five years are paſt,
" and then *B.* ſhall have it, as by a new original deviſe. But *quære* in
" all caſes of wills, ſince the intent of the party is to be the principal guide,
" if it appears that the remainder is not to take effect till ſuch a de-
" terminate future time, why ſhould it not in the mean time deſcend
" to the heir at law, and ſo of the uſe, and when the time is expired
" take effect in the deviſee in remainder as a new original executory de-
" viſe?

Rep. 138. Swinb. 125. Mo. 519. 1 Leon. 195. 156. 198. 2 Bulſt. 292 Raym. 162. Dyer, 122. pl. 20. 127. 310. pl. 79. Plow. 244. 414. a. Godolph. 356. (6). 357. (13). 358. (19). (25). 462. Cro. Eliz. 423. Fuller v. Fuller.

" If one gives lands to *A.* in tail, remainder to himſelf for life, or years,
" remainder to *B.* in fee; this remainder to himſelf is void; becauſe
" none can give lands to himſelf; and yet the remainder to *B.* is good,
" becauſe there is a particular eſtate to ſupport it. So, if the firſt remain-
" der were to a monk or other incapable perſon, remainder over, this laſt
" remainder is good, and ſhall take effect in poſſeſſion, upon the deter-
" mination of the particular eſtate, without any regard to the meſne re-
" mainder, which was void. But *quære*, if there be not a diverſity be-
" tween ſuch remainder limited to himſelf by fine; for ſome of the books
" ſeem to hold it good by eſtoppel in ſuch caſe; but how that can be I do
" not know; for eſtoppels are generally to conclude the party to his pre-
" judice, when he does a thing, or grants an eſtate he had no right to;
" yet, having ſo granted it, he ſhall not afterwards be admitted to invali-
" date and make it void, by ſaying he had no power to make it.

1 Bro. 253 pl. 35. Perk. ſect. 566. 705. Godolph. 359. (20) 1 Leon. 197, 198. 1 Bro. tit. Eſtates. pl. 23. 66. Dyer, 309. (69). pl. 32. pl. 14. 2 Mod. 210. 1 Leon. 195, 196. 199, 200.

" Another diverſity is between a feoffment to uſes, and a covenant to
" ſtand ſeiſed to uſes; for if one makes a feoffment in fee to the uſe of *A.*
" for life, remainder to the right heirs of *J. S.*, who is living, here, the
" remainder paſſes out of the feoffor preſently, and is carried into abeyance
" till the death of *J. S.*; becauſe by the feoffment he departed with the
" whole eſtate, and left nothing in him. But, in caſe of a covenant to
" ſtand ſeiſed to ſuch uſes, nothing paſſes out of the covenantor, but what
" muſt then veſt in the covenantees.

1 Co. 101. a. 154. b Mo. 195. 520. Plowd. 307. 2 Sid. 66. 157 2 Lev 77. 2 Mod. 209. Ld. Paget's caſe.

" So, if a feoffment be to the uſe of *A.* for life, remainder to *B.* for life,
" remainder to *C.* in fee; if *A.* refuſe, *B.* ſhall take his remainder in poſ-
" ſeſſion preſently: but upon a covenant to ſtand ſeiſed, if *A.* refuſe, *B.*
" ſhall not take preſently, but the covenantor himſelf ſhall retain it during the

" life of *A.* So, if the firſt eſtate were void, as a covenant in con-
" ſideration of long acquaintance to ſtand ſeiſed to the uſe of *A.* for
" life, and after his death, in conſideration of conſanguinity, to
" the uſe of *B.* in tail or fee; here the firſt eſtate is void for want of a
" ſufficient conſideration to raiſe the uſe to *A.* Yet *B.* ſhall have no
" uſe till the death of *A.*; but the covenantor ſhall retain the land
" during the life of *A.* The reaſon of which diverſity is, that in caſe
" of the feoffment he diveſted himſelf of the whole eſtate, and there-
" fore againſt his own ſolemn livery can have nothing further therein;
" and the feoffees being only inſtruments, through whom the eſtate
" were to paſs over to others, were to have nothing to their own uſe.
" And ſince *A.* refuſed, *B.* muſt take in poſſeſſion preſently, becauſe
" no other can have it. But, in caſe of the covenant to ſtand ſeiſed,
" the uſes being executory and to ariſe out of the poſſeſſion of the co-
" venantor, if one refuſe, or the uſe limited to him be void, yet the
" cannot carry the poſſeſſion to the other ſooner than was intended,
" becauſe it is the conſideration that draws out the uſe, and that by
" the terms of the covenantor himſelf begins not to operate as a con-
" ſideration till after the death of *A.*; and the conſideration for each
Ld. Paget's caſe, *ub. ſup.* " eſtate was ſeveral and independent. So, in the principal caſe; there
" *A.* covenanted by indenture with *B.* and *C.* that in conſideration that
" with the rents and profits ſhould pay his debts, and ſuch other ſums
" of money as he by his will ſhould appoint, he and his heirs ſhould
" ſtand ſeiſed to the uſe of *B.* and *C.* for 24 years; and after the end
" or expiration of ſaid term, then to the uſe of *D.* his ſon in tail, &c.
" Then *A.* is attainted of treaſon, and it was adjudged, 1*ſt*, that the
" limitation to *B.* and *C.* was void for want of conſideration; becauſe
" they were ſtrangers to the payment of his debts, and were to pay
" them out of the rents and profits of the land limited to them, which
" was no conſideration on their part, and therefore could raiſe no uſe
" to them, as it would, if they had been made executors, or were
Mo. 195. *contra*; but *quære*—If the difference upon the word *term* was not in the book unobſerved. " to have paid the debts out of their own eſtates. 2*dly*, It was
" judged, that the limitation over, being after the end or expiration
" of the term of 24 years, and this term (which excludes the intereſt of
" the land) being void, the uſe ſhall ariſe to *D.* in remainder preſently.
" But, if it had been limited after the end or expiration of the 24 years
" there, though the term had been void, yet the remainder ſhall
" not have taken place till the 24 years ran out by effluxion of time,
" becauſe each eſtate was executory, and to ariſe out of the eſtate of
" the covenantor upon diſtinct conſiderations.

9 Co. 107. Margaret Podger's caſe. 1 Saund. 151. 2 Brownl. 154. " If copyhold land be ſurrendered to the uſe of *A.* for life, remain-
" der to the uſe of *B.* for life; if *A.* commit a forfeiture, or refuſe,
" *B.* ſhall not enter till his death, but the lord ſhall enter, and hold
" during the life of *A.* So, in ſuch caſe, of a ſurrender to the uſe of
" *B.* ſhall not enter till *A.*'s death, becauſe his eſtate is by the cuſtom
" and is not to begin till after the death of *A.*, and no incident of the
" common law which veſts it ſooner belongs to ſuch eſtates without
" cial cuſtom; and then the lord, from whom all theſe copyhold eſtates
" ginally moved, ſhall take advantage of ſuch forfeiture, refuſal or
" ſurrender, as a benefit not originally departed with, when he granted
" out the lands. So, where *A.*, *B.*, and *C.*, copyholders for life, ſucceſſively; *A.* takes a conveyance from the lord of the freehold
" inheritance; this does not diveſt the remainders to *B.* and *C.*

" yet they cannot enter till the death of *A.*; becauſe the cuſtom was " ſo, though the eſtate for life of *A.*, as copyhold, was enfranchiſed " and gone.

" If *A.* limits an eſtate to the uſe of himſelf for life, remainder to " his executors for twenty years, remainder to *B.* in tail; *A.* is at- " tainted of treaſon, ſo that he can make no executors by which the " remainder to them is become void; the remainder to *B.* ſhall take " effect in poſſeſſion preſently, without ſtaying until the years run out " by effluxion of time. So, if the remainder had been to the admi- " niſtrators of *A.*, which had been merely void for the time interven- " ing after the death of *A.* till adminiſtration granted; in ſuch caſe, " the remainder to *B.* ſhould veſt in poſſeſſion preſently upon the at- " tainder of *A.*; becauſe the intermediate remainder being void, the " laſt remainder did then depend immediately upon the particular eſ- " tate, and upon determination thereof takes effect in poſſeſſion.

1 Leon. 196-7. 2 Leon. 5. 3 Leon. 20. Moor, 100. Dyer, 309. Cranmer's caſe.

" Huſband, ſeiſed of lands in right of his wife, makes a feoffment " in fee to the uſe of himſelf and his wife for their lives, remainder to " the uſe of *C.* in tail, or in fee, and dies: the wife refuſes the eſ- " tate limited to her by the feoffment, and brings a *cui in vitâ*, not " againſt the heir of her huſband, but againſt *C.* in the remainder; " which proves, that upon ſuch refuſal the remainders being by way of " eſtate executed by feoffment veſted preſently in *C.*

Plowd. 114. Amy Townſend's caſe. 1 Leon 199.

" We come next to conſider by what means remainders or reverſions " may be diſcontinued, barred, and deſtroyed, and by what not; " and therein of the remedies for him in the reverſion or remainder by " entry, action, or receit. And here it will be neceſſary to diſtinguiſh " between the acts of the tenant in poſſeſſion ſolely, and the acts of the " tenant in poſſeſſion jointly, or with the concurrence of him in the " remainder, or the reverſion; the acts of the tenant in poſſeſſion " ſolely, or ſuch as are done or ſuffered either by the tenant for life or " years, or by the tenant in tail. And of theſe, ſome only diveſt or " diſplace the remainder or reverſion, but make no bar or diſcontinu- " ance: ſome both diveſt and diſplace the remainder or reverſion, and " alſo cauſe a bar or diſcontinuance: and ſome neither diveſt nor diſ- " place the remainder or reverſion, and by conſequence make no bar or " diſcontinuance.

" As to the firſt—if tenant for life or years of lands, houſes, or " other things which lie in livery, make a leaſe for life, a gift in tail, " or a feoffment in fee, levy a fine, or ſuffer a common recovery there- " of; theſe acts diveſt and diſplace the remainder or reverſion, but " make no bar or diſcontinuance; for he in the remainder or reverſion " may enter preſently for the forfeiture. But in caſe of the fine, if it " be with proclamations, he in the remainder or reverſion muſt enter " within five years after the fine levied, elſe he is barred during the " life of the tenant for life; but after his death, he has other five " years to make his entry, within which if he does not enter or claim " he is then barred for ever; becauſe his remainder or reverſion be- " ing diſplaced and turned to a right, the operation of the ſtat. 4 *Hen.* " 7. upon the fine bars ſuch right, if no entry or claim be made with- " in five years; and here being two ſeveral rights, one to enter pre- " ſently for the forfeiture committed in levying the fine, and the other " after the death of the tenant for life, when the title of him in re-

Co. Lit. 252. a. Lit. ſect. 611. Co. Lit. 327. b. Cro. Car. 157. 368. Plowd 373. b Cro. Eliz 2[illegible]. 1 Leon. 28 214. 2 Inſt. 516. Cro. Eliz. 254. Saunders v. Tucker. 7 Eliz. Jones's caſe Mo. pl. 192-3 Co. 78. 2 Brownl. 157. MS.

and 1 Keb. 249. 543. Fryer v. Kenn. 1 Chan. Cases, 279. 1 Leon. 40.

" remainder or reverſion falls into poſſeſſion, the words of the ſtatute " have been expounded to give five years for the reſpective recovery " of theſe ſeveral rights. But, in caſe of the feoffment or common " recovery, if there be no fine, he in remainder or reverſion may en- " ter at any time either during the life of the tenant for life by reaſon " of the forfeiture, or at any time after his death in right of his re- " mainder or reverſion.

3 Co. 77. Farmer's caſe.

" Leſſee, for years of ſome lands, and of others at will, and of " others by copy of court roll, having alſo lands of inheritance in the " ſame town, leaſes all to *A.* for life; and then levies a fine to *A.* " of ſo many acres as included all the lands. Five years paſſed, he " himſelf all the while continuing in poſſeſſion, and paying the rent to " the leſſor. *A.* dies; the leaſe for years expires: it was held by " all the judges of *England*, except two, that the original leſſor was " not barred: *1ſt*, Becauſe without making ſuch leaſe for life, the " leſſee for years, at will, or by copy of court roll, could not have " levied ſuch fine to bar his leſſor by the intent of the ſtat. of 4 *Hen.* 7. " *2dly*, Though ſuch leaſe was a diſſeiſin and turned the reverſion of " the leſſor to a right, yet being made by fraud and covin, that ſta-

Sir T. Raym. 219. 1 Vent. 241. 2 Vent. 334. 2 Lev. 52. 3 Keb. 37. 110. Whalley v. Tancred.

" tute never intended to eſtabliſh ſuch fines. And it has now been " adjudged, that if leſſee for years makes a feoffment, and levies a " fine, and five years paſs, the leſſor ſhall have the other five years " after the term expired to enter or make his claim, as well as where " leſſee for life makes a feoffment, and levies a fine; for in that caſe " he may have a writ of entry *in conſimili caſu* preſently, as here he may " have aſſiſe, and therefore this differs from the caſe put in *Margaret* " *Podger*'s caſe, that if leſſee for years be ouſted, and he in reverſion " diſſeiſed, and the diſſeiſor levy a fine with proclamations, and five " years paſs, the leſſor is for ever barred, becauſe his right firſt began " upon the diſſeiſin, and diſſeiſor comes in without the conſent of the " leſſee for years; and therefore if he can defend his poſſeſſion five " years, he ſhall hold out the leſſor for ever, who by not purſuing " his right within that time hath let in the fine which works the bar " by force of the ſtatute: but in this caſe all is tranſacted by the meane " and with the privity of the leſſee, who is truſted with the poſſeſſion. " And though in *Farmer*'s caſe there were many notorious circum- " ſtances of fraud, yet it does not follow but that the law is the ſame " where no ſuch evidence of fraud appears. And it would be of dan- " gerous conſequence to men's inheritances if it ſhould be otherwiſe. " But, where tenant for life is diſſeiſed, and the diſſeiſor levies a fine " there, the right of him in the remainder or reverſion does not begin " till the death of the leſſee, as it does, where the leſſee for life him- " ſelf levies a fine, or the leſſee for years makes a feoffment and levies " a fine; in which caſes, if he in the reverſion or remainder ſhould " be compellable to enter within the firſt five years, then, if the leſſee " for life or years ſhould have charged or incumbered the land, they " would hold it charged during the continuance of the particular eſtate " in right. And the reaſon of the forfeiture in theſe caſes being a " breach of truſt committed by the tenants in poſſeſſion, it is reaſona- " ble he in reverſion or remainder ſhould have the ſame benefit when " it is committed by a tenant for years, or where by a tenant for life " poſſeſſion. *Quære*, if the law be the ſame on fine levied by copyhol- " er for life or years; for if one ouſts the copyholder, this is a " ſe

" ſeiſin to the lord, and both he and the copyholder on fine with pro-
" clamations, and five years, ſhall be barred for their ſeveral inte- Leon. 99.
" reſts.

" If tenant for life and a ſtranger levy a fine *come ceo*, &c. to him 2 Lev. 202.
" in the remainder for life, who accepts it; this is a forfeiture of both Sir T. Jo. 65.
" their eſtates; the one by giving, and the other by accepting, ſuch 3 Keb. 687.
" fine, which paſſed a greater eſtate than both of them had; and there- 733. Smith
" fore the remainder-man in fee may enter; becauſe both are eſtopped v. Abell.
" by the fine. It was urged, indeed, that this was only the ſurren-
" der of the firſt tenant for life, and could be no eſtoppel, becauſe
" an intereſt paſſed; but the fine purports the contrary, in giving a
" fee, and therefore eſtops the parties to ſay againſt it.

" If there be *A.* leſſee for life, remainder to *B.* in tail, remainder 1 Roll. Abr.
" to *A.* in fee; *B.* and *A.* make a feoffment in fee to *C.*, this diveſts 854. pl. 5.
" the remainder to *B.* and his own remainder likewiſe; but *B.* may 6. Hiblin v.
" enter for the forfeiture, becauſe his remainder hinders the cloſing Slack, 857.
" of *A.*'s two eſtates, and then his eſtate for life, which was diſtinct, pl. 3.
" is, by the feoffment, forfeited and gone. But in this caſe, if *A.*
" had made a leaſe to *C.*, who afterwards makes a feoffment in fee to
" *D.*, and then *A.* had releaſed all his right to *B.*, this had been no
" forfeiture to entitle *B.* to an entry; becauſe *A.* did nothing to take
" out the remainder from *B.*, but the wrong and diſſeiſin was done im-
" mediately to *A.* himſelf, and his releaſe paſſed only his own right
" without affecting *B.*'s remainder.

" If leſſee for life makes a feoffment in fee, he in the remainder 1 Roll. Abr
" or reverſion, be it for life, or in fee, may enter for the forfeiture; 858. pl. 5.
" and if he in the firſt remainder does not enter, he in the ſecond or to 12. 15.
" third remainder may enter to the uſe of the others, and by reaſon 9 Co. 106.
" of his own intereſt; and ſo may the iſſue or heirs of any of thoſe in 2 Inſt. 118
" remainder after their deaths; for the feoffment diveſts their ſeveral
" remainders, and gives them title of entry in their turns.

" *A.* copyholder for life, remainder to *B.* for life, *A.* accepts a bar- 9 Co. 104.
" gain and ſale of the freehold from the lord to him and his heirs, and Margaret
" then levies a fine with proclamations with five years; then *A.* dies. Podger's
" It was adjudged, that *B.* may lawfully enter, for the acceptance caſe
" only of the freehold from the lord did not diveſt the remainder to *B.*, 2 Brownl.
" for *A.* was only paſſive in it, and accepted that which was lawful 134. 153.
" for him to take, and for the lord to grant; and then the remainder Meſme caſe,
" of *B.* not being turned to a right, the fine could not attach upon it. *per noſme*
" And though, as between the lord and *A.*, the copyhold was deter- Bagnall v.
" mined and entranchiſed by the acceſſion of the freehold; yet, as Tucker.
" to *B.*, it ſtill continued copyhold, and then the fine levied of the
" freehold by *A.* could not bind the copyhold of *B.*, unleſs it had been
" turned to a right, any more than a fine levied of land ſhall be a bar
" of the rent iſſuing out of it; and *B.*'s remainder by the cuſtom not
" being to take effect till after the death of *A.*, he cannot enter ſooner,
" to take advantage of the forfeiture. But, if ſuch fine had been levied
" after the death of *A.* and then five years had paſſed, this had bar-
" red the remainder of *B.* becauſe then his title came in poſſeſſion.

" *A.* tenant for life, remainder to *B.*, remainder to *C.* in fee; *B.* 1 Leon. 40.
" being in poſſeſſion levies a fine *come ceo*, &c. to a ſtranger; *A.* dies. Braybrook's
" It was agreed by the whole court, that by that fine the remainder caſe.
" in fee is not touched, or diſcontinued: but becauſe *B.* had done as
" much

" much as in him lay for the diſpoſing of the fee-ſimple by the fine,
" and had taken that upon him, the ſame amounts to a forfeiture.
" *Quære* of this caſe, how *B.* could be in poſſeſſion unleſs by diſſeiſin
" of *A.*, and then that diſplaces all the remainders, and turns them
" to a right, which right, as to his remainder, being but for life, is
Co. Litt. 251. b. " forfeited by the fine, as it would be by a feoffment in ſuch caſe,
" though the fine or feoffment cannot touch or diſplace the remain-
" der in fee, that being diveſted and diſplaced before. But, if the
" fine were levied by *B.* being in poſſeſſion of a remainder, as a re-
" mainder only, then indeed it does not diveſt or diſplace the remain-
" der in fee, and yet amounts to a forfeiture; as a fine levied by ten-
" ant for life of rent, common, *&c.* or other things which lie in grant,
" would be. Wherein the fine differs from a grant by deed, though
" it be enrolled; for ſuch deed of things which lie in grant neither
Co. Litt. 251. b. " diſplaces the remainder, nor amounts to a forfeiture of the partic-
" lar eſtate. *Quære* the reaſon of the diverſity.

Co. Litt. 252. a. " A right of a particular eſtate may be forfeited; and he who hath b
" a right of a remainder or reverſion may take advantage thereof: as,
Co 2, 55. " leſſee for years be ouſted, or leſſee for life be diſſeiſed, and levy a fi
1 Leon. 264. " to a diſſeiſor, or a ſtranger; or, if the leſſee for years bring an aſſiz
" or the leſſee for life a writ of right, accept a fine *come ceo*, &c. o
" ſtranger; theſe are forfeitures of their ſeveral rights, for which he w
" hath but a right of remainder or reverſion may enter preſently upon t
" diſſeiſor.

Co. Litt. 280. 281. a. 362. 2 Inſt. 345. Co. 88. 10 Co. 44. 45. 2 Leon. 64. 4 Leon. 129. Booth, 151. 60. 70. Brook, tit. Forfeit, 8. 1 Co. 15. 39. Ed. 3. 16. 24. Ed. 3. 685. Aſſ. 2. 22. Aſſ. 31. Co. Litt. 251, 252. a.

" At the common law, if lands were given to one for life, remain
" to another in fee, and a ſtranger brought a feigned action or *pra*
" againſt the tenant for life, who ſuffered judgment to go againſt him
" default or confeſſion, without praying in aid of him in the remaind
" this diveſted the remainder, and turned it to a right. And yet he
" the remainder had no remedy to recover it, unleſs he were once ſeiſ
" as by entry upon the tenant for life before ſuch recovery; in wh
" caſe, after his death, he might maintain a writ of right againſt the
" coveror upo ſuch ſeiſin. And whether any formedon in remainder
" in ſuch caſe, the books are not agreed. But if ſuch feigned *pra*
" were brought againſt tenant for life, and he let judgment go by defa
" or confeſſion, whithout praying in aid of him in the reverſion, this
" a forfeiture of his eſtate for life. And yet he in the reverſion ha
" other remedy but by a writ of right. The reaſon ſeems to be, the
" dit which the law gave to ſuch recoveries being had in courts of reco
" and becauſe, for ought appeared to the contrary, the demand
" might have good title to the land; and therefore the law would
" ſuffer ſuch recoveries to be impeached, but in an action of an hi
" nature, as the writ of right was. There were likewiſe other ac
" record by the tenant for life or years, which amounted to a forfe
" of their eſtates; as, if tenant for life in a feigned *præcipe* bro
" againſt him pleaded in chief, vouched, or prayed in aid of a ſtra
" or in a writ of right. So, if in a writ of entry *in caſu proviſo*
" ſtranger, ſuppoſing the reverſion to be in him, the tenant for life
" feſs the action; or in waſte againſt him by a ſtranger plead *null* e
" ſo, if leſſee for years being ouſted bring aſſize or loſe in a *præcipe*
" bring error for error in the proceſs; theſe and ſuch like are agreed
" forfeitures of their eſtates. But, whether he in the reverſion or rema
" might enter, or were driven to his writ of right, or what other re

" he had, does not ſeem clear from the books: but the caſes where the " tenant for life loſt in a feigned *præcipe* by default or reddition, that is, " confeſſion, being the moſt frequent, and the proſecuting the writ of " right by thoſe in remainder or reverſion being both tedious and expen- " ſive, the firſt ſtatute that provided remedy in thoſe caſes was the ſtatute " of *W.* 2. *c.* 3., which gives power to him in the reverſion to come in be- " fore judgment, and pray to be received to defend his right; or, if he " did not come in, and judgment was given by default or reddition, then " the ſtatute gave him the writ of entry *ad communem legem* againſt ſuch re- " coveror after the death of the tenant for life, wherein he might ſet forth " his title; and if the tenant could ſhew no better title than only the re- " covery, that ſhould not avail him. So, where the recovery againſt " the tenant for life was by *nihil dicit*, this being an equal miſchief was " taken to be within the ſame ſtatute. And ſo was he in the remainder " as well as he in the reverſion. But where the recovery was upon feint " or feigned pleading of the tenant for life, this, not being within the " ſtatute, was remedied by 13 *R.* 2. *c.* 17. which gives reſceit likewiſe in " that caſe. But, to elude the force of this ſtatute, the tenant for life " would contrive to have the *præcipe* and recovery againſt him carried on " ſo ſecretly, that he in the reverſion or remainder ſhould have no no- " tice of it time enough to pray to be received, and then, if the recovery " were againſt him upon feint or falſe pleading, this not being within " the former ſtatute of *W.* 2. or remedied by this of *R.* 2. otherwiſe than " by giving reſceit, which by ſuch ſecret recovery was preſented, he in " the reverſion or remainder hath no other remedy than what he had at " common law before either of the ſtatutes; therefore, to obviate this " miſchief, another ſtatute was made, 32 *H.* 8. *c.* 31., which makes " void all recoveries had by aſſent of the parties againſt tenant for term " of life, unleſs it were by good title or the aſſent of him in the remainder " or reverſion. But the tenants for life found a way to get out of this " ſtatute likewiſe, by making a feoffment in fee with warranty, and be- " fore he in the remainder or reverſion could have notice to enter for " the forfeiture, would cauſe a *præcipe* to be brought againſt the feoffee, " and come in themſelves by way of voucher; and ſo the recovery, not " being againſt the tenant for life, as the ſtatute ſpeaks, was out of the " ſtatute, and remained at common law. So, if ſuch tenant for life was 1 Bend. 132. pl. 194. Co. 15.
" not diſſeiſed, and a *præcipe* brought againſt the diſſeiſor by covin, and " he vouched the tenant for life, and ſo a recovery was had; this like- " wiſe was out of the ſtatute; for which reaſons this ſtatute, being de- " fective, was repealed, and another ſtatute, made, 14 *Eliz.* *c.* 8., " which makes void all recoveries by agreement and covin had either " againſt the tenant for life himſelf, or where he comes in by way of " voucher only, unleſs he in the reverſion or remainder aſſent of record, Co. Litt. 362. a.
" viz. upon voucher, aid prier, or reſceit. But if recovery be had 1 Co. 15.
" againſt tenant for life without conſent or covin, though without title, " this diveſts the remainder or reverſion, ſo that they cannot enter with- " in any of the ſtatutes, but remain yet at common law. And all theſe " ſtatutes extend to all ſorts of tenants for life.

" *A.* tenant for life, remainder to *B.* in tail, remainder to *C.* in fee; 1 Co. 14. Mo. pl. 423. 2 Leon. 60. 4 Leon. 123. Co. Litt. 362. a.
" *A.* by indenture inrolled in Chancery bargains and ſells the lands to " *D.* and his heirs, and then *D.* ſuffers a common recovery with vouch- " er of *A.* before the ſtatute 14 *Eliz.*, and execution was had thereupon. " Yet it was adjudged a forfeiture, for which he in the remainder might

" enter

10 Co. 44. 45. 2 Co. 74. 5 Co. 40. Sir William Pelham's caſe.

" enter preſently without aid of any of the ſtatutes; for a common re-
" covery is but a common aſſurance or conveyance, and, if no uſe be
" declared, ſhall be to the uſe of tenant for life. And by the proceed-
" ings in it *conſtat curiæ*, that the recoverer hath no title. And the ſuing
" of execution, which is but in purſuance and contemplation of the firſt
" act, cannot be any bar to the entry of him in the remainder or rever-
" ſion. Note; where tenant for life bargains and ſells lands to *A.* and
" his heirs, and after levies a fine *come ceo*, &c. to *A.*; this was held a
" forfeiture of the bargainee, not of the bargainor, who at the time of
" the fine, which alone made the forfeiture, had nothing to for-
" feit.

11 Leon. 264.

Cro. Eliz. 757. Hold v. Liſter.

" *A* tenant for life, remainder to *B* for life, *B.* reciting, that he
" had an eſtate in fee, levies a fine *come ceo*, &c. to a ſtranger, who
" brings *quid juris clamat* againſt *A.*, and *A.* makes default, and there-
" upon judgment was, that he ſhould attorn, which he accordingly did.
" And the court held, that his eſtate for life was not forfeited becauſe
" the attornment was by compulſion of the court upon his default of ap-
" pearance, and not voluntarily. And there two juſtices held, that the
" eſtate of *A.* was not forfeited by the fine, becauſe this made no diſ-
" continuance, and nothing paſſed by it, but what he might lawfully
" grant. But two other juſtices held the contrary, and that it is not the
" diſcontinuance only that makes the forfeiture, but where he doth any
" thing in a court of record whereby his will appears to diſinherit him in
" the remainder or reverſion; as, praying in aid of a ſtranger, &c. And
" this ſeems the better opinion. For attornment *in pais* to the grant of a

9 Co. Litt. 252. a. 2 Leon. 64. 66. 4 Leon. 129. 132.

" ſtranger works no forfeiture; but attornment of record does, where in
" *quid juris clamat* the tenant for life comes in, and ſubmits in court to
" attorn. But the attornment in the principal caſe being by judgment of
" the court upon the default makes the difference.

Mo. pl. 108.

" In *quid juris clamat* the tenant ſays, that he holds in tail of the gift
" of one *A.*; the plaintiff ſays, that *A.* *ne dona pas*; and upon iſſue
" was found for the plaintiff. And *Brown* held, that the plaintiff might
" enter preſently, becauſe by ſuch claim the tenant for life had forfeited
" his eſtate; but whether the plaintiff ſhould upon the verdict have judg-
" ment to recover the land, was the doubt.

Walſton Dixe's caſe Moor, 211. pl. 352.

" In an aſſize of freſh force by *A.* againſt *B.* and *C.*, it was found
" that one *D.* was ſeiſed of the lands in queſtion, and by indenture made
" a leaſe for three years to *B.* at ſuch a rent; and after by indenture in-
" rolled, bargained, and ſold the reverſion to the plaintiff *A.* and his heirs
" who after, for rent arrear, brought debt in *C. B.* againſt *B.*, and he
" pleaded, that after the ſaid leaſe, and before the grant to *A.*, *A.* by
" deed inrolled according to the cuſtom, bargained and ſold to him
" upon which they were at iſſue. And if this was a forfeiture of *B.*'s
" leaſe was the queſtion, on which the jury doubted, and referred it to
" the court: and it was adjudged to be a forfeiture.

" It would be too large a field here to enter into all the caſes and di-
" verſities wherein the particular tenant ought to pray in aid of or vouch
" him in the reverſion or remainder, and where he in the reverſion or
" remainder may pray to be received, and where not; and what acts
" the particular tenant ſhall amount to a forfeiture, whereof and whe-
" he in the remainder or reverſion ſhall take advantage, and in what
" manner, &c. theſe being large enough to make diſtinct heads of them-
" ſelves.

" I ſhall

" I ſhall proceed therefore to the ſecond diverſity, to ſhew what acts of " the tenant in poſſeſſion make a diſcontinuance or bar of the remainder or " reverſion, and what not.

" If tenant in tail in poſſeſſion of lands, houſes, or other things, which " lie in livery, make a feoffment in fee, a gift in tail, or a leaſe for an- " other man's life, or levy a fine thereof; theſe acts diveſt and diſplace " the remainder or reverſion, and amount to a diſcontinuance; for avoid- " ing whereof, after the death of the tenant in tail without iſſue, thoſe in " reverſion or remainder are put to their formedon, and cannot enter; be- " cauſe then the alienee might loſe the benefit of the warranty annexed " to ſuch alienation. Co. Litt. 327. a. 3 Co. 85.

" So, if a man ſeiſed of lands in tail, in fee, or for life, in right of " his wife, made a feoffment in fee, a gift in tail, or a leaſe for another " man's life; this diveſted the wife's eſtate, ſo that after her huſband's " death ſhe could not enter, but was driven to her *cui in vita*; for the " ſafeguard of the warranty that might be annexed to ſuch alienation of " the huſband made a diſcontinuance of the wife's eſtate-tail, and of the " reverſion or remainders depending thereon, for avoiding whereof after " her huſband's death ſhe was driven to her *cui in vita*, and after her " death without iſſue, thoſe in remainder or reverſion to their ſeveral " formedons. Co. Litt. 326. 2 Inſt. 342. 343. 681 8 Co. 71.

" So, if in a *præcipe* brought againſt the huſband and wife of the " wife's lands, the huſband loſt by default, reddition, or *nihil dicit*, if he " were ſeiſed for life, or in tail, in her right, ſhe was driven to her *cui in* " *vita* after his death; but, if in fee, then ſhe had no other remedy, but " a writ of right after his death. Which laſt caſe was remedied by the " ſtatute of *W.* 2 *c.* 3. which gives her a power to come in and pray to " be received before judgment, or to bring her *cui in vita* after his death. " But for an effectual remedy both for the wife and thoſe in remainder or " reverſion againſt all alienations of the huſband ſolely or jointly with " his wife, except it were by fine or common recovery, wherein both " joined, and as well of lands given to them jointly during the coverture, " as of lands whereof the wife was ſolely ſeiſed; and alſo for remedy " againſt all recoveries by default, reddition, *nihil dicit*, or feint pleader " of the huſband, the ſtatute of 32 *H.* 8. *c.* 28. gives the wife, and " thoſe in remainder or reverſion, power to enter in their ſeveral turns; " and ſo it does to their ſeveral iſſues or heirs, notwithſtanding any fine, " feoffment, or other act, made, done, or ſuffered by the huſband only. " And yet, if the huſband and wife join in a feoffment of the wife's " lands, this being in effect the feoffment of the huſband only is within " the relief of the eſtate, ſo, if the lands were given to the huſband and " wife and their heirs during the coverture, all acts of the huſband to de- " feat this eſtate are equally provided againſt by the equity of this act, " as if the wife had the ſole ſeiſure thereof. But, if the huſband levies " a fine with proclamations of his wife's lands, and dies, the wife or her " iſſue muſt enter within five years after his death, and thoſe in remain- " der or reverſion within five years after the death of the wife without " iſſue, elſe they will be barred by another ſtatute, *viz.* 4 *H.* 7. for ſuch " fine makes a diſcontinuance of the wife's eſtate, and of thoſe in re- " mainder or reverſion at common law. And though 32 *H.* 8. aids the " diſcontinuance by giving them an entry, yet it does not take away the " bar which is wrought by their laches upon the other ſtatute. Alſo

" the

" the iſſue cannot enter during the huſband's life, either by the common
" law or this ſtatute.

" If tenant in tail in poſſeſſion ſuffers a common recovery, this not
" only diveſts and diſplaces the eſtate-tail, and all remainders and reverſi-
" ons depending thereon, but alſo by reaſon of the ſuppoſed recompence
" bars them for ever; as is confirmed by every day's practice. But then
" he who ſuffers ſuch recovery ought to be perfect tenant in tail, and alſo
" ſeiſed by force of the tail.

" For, where huſband and wife were ſeiſed of lands to them and the
3 Co. 6. " heirs of their two bodies, or to them and the heirs of the body of the
Moor, 210. " huſband with remainder over, and a ſtranger brought a *præcipe* againſt
Owen v. " the huſband only who vouched over, and thereupon a common recovery
Morgan. " was had; the wife died; and then the huſband died without iſſue;
3 Co. 6. " it was adjudged, that this recovery ſhould not bind the remainder;
Cupple- " for between the huſband and wife are no moieties, nor has the huſband
dike's caſe " power to ſever the jointure, or to diſpoſe of any part of the land with-
" out his wife, ſo that the *præcipe*, being brought againſt him only, the
" recompence cannot enure; becauſe the wife had a joint eſtate with him
" at the time of the recovery, and did not join; and to a moiety it can-
" not enure, becauſe here are no moieties between the huſband and wife
" and therefore the recompence, recovered by the huſband only, cannot
" enure to the remainder, which depends upon a joint and undivided eſ-
" tate made to the huſband and wife. And then the recovery, which
" binds only in regard of the recompence in value, cannot in this caſe
" bind either the iſſue, if there were any, or the remainder, ſince neither
" of them can take advantage, or ſue execution of the recompence in
" value. And though the huſband ſurvived, this will not mend the caſe,
" becauſe the law is to judge of it as it was at the time of the recovery,
" and not as it falls out by an after accident. But, if the eſtate had been
" to the huſband and wife, and the heirs of the body of the huſband, and
" he had levied a fine, or made a feoffment in fee, and then come in
" as vouchee in a common recovery, this had barred both the iſſue in
" tail and him in the remainder; becauſe, by the feoffment or fine
" the whole eſtate was diſcontinued, and the feoffee or conuſee ſole and
" perfect tenant to the *præcipe*; and then, when the huſband came in
" only as vouchee, he came in in privity and repreſentation of all the
" eſtates he ever had, and was to make his defence by them, which
" he does not, but calls upon another to defend him, and that other un-
" dertakes it accordingly, and by his miſbehaviour ſuffers the demand
" to get judgment, he is bound to make a recompence equal to what the
" other loſt; and ſuch recompence, being to be in lieu thereof, is to
" in the ſame manner as the eſtate he was bound to defend ſhould be
" done, and, by conſequence, to the iſſue, and thoſe in remainder or re-
" verſion; and then they having, in ſuppoſition of law, a recompence
" equivalent to what they loſt, have the effect of the firſt ſuppoſed war-
" ranty, and cannot impeach the recovery, or complain of any harm
" done them. But, if the huſband and wife had been jointly ſeiſed of
" them and the heirs of their two bodies, with remainder over, and the
" huſband had made ſuch feoffment, or levied ſuch fine, and then come
" in as a vouchee; it ſeems doubtful, if the iſſue in tail, or the re-
" der, ſhould be barred; becauſe the wife, having a joint eſtate and in-
" heritance with the huſband, was no party to the voucher, and there-
" fore the recompence could not enure to the inheritance of the

" And to a moiety it could not, becauſe there are no moieties between " them. *Quære ergo.*

" The tenant in tail at the time of the recovery, if the *præcipe* be " brought againſt himſelf, ought to be then ſeiſed by force of the eſtate- " tail in poſſeſſion, otherwiſe the recovery will be no bar either to his " iſſue or thoſe in remainder or reverſion; becauſe the recompence in " value, which cauſes the bar, will go in lieu of the eſtate he then had, " which was recovered, and not in lieu of the eſtate-tail which then he " had not, nor, by conſequence, could loſe. Therefore, if tenant in tail " be diſſeiſed, and the diſſeiſor die ſeiſed, and his heir be in by deſcent, " and then the tenant in tail enter upon the heir and diſſeiſe him, and, " upon a *præcipe* brought againſt him, ſuffer a common recovery; or, if " the tenant in tail take back an eſtate in tail, or in fee, from the diſ- " ſeiſor himſelf; or diſcontinue the eſtate-tail, and enter upon the diſ- " continuee, and then ſuffer ſuch common recovery on a *præcipe* againſt " himſelf; theſe recoveries bar neither the iſſue in tail nor remainders; " becauſe the recompence in value goes to the eſtate which he had at the " time of ſuffering ſuch recovery, which not being the eſtate-tail, cannot " be a bar to the eſtate-tail, or the remainders or reverſion depending " thereon. But, if the *præcipe* had been brought againſt the diſcontinuee, " diſſeiſor, *&c.* and the tenant in tail had come in by way of " voucher, and vouched over the common vouchee, and ſo a re- " covery had been had, this would bar the eſtate-tail and remainders or " reverſions depending thereon: becauſe he, coming in only as vouchee, " comes in in privity and repreſentation of the eſtate-tail, and for defence " thereof, and cannot come in for any other reſpect; and therefore the " recompence in value which he recovers againſt the common vouchee " goes to that eſtate-tail, and the remainders or reverſions depending " thereon, and ſo makes good the recovery againſt the tenant, none ha- " ving any loſs but the laſt vouchee, and that occaſioned by his own de- " fault or contempt. Plow. 8. Manzell's caſe. Co. 3. 5. b. 58. Mo. 256. 8 Co. 77, 8.

" Tenant in tail covenants to ſtand ſeiſed to the uſe of himſelf for life, " and after, to other uſes, which were totally void; becauſe by ſuch co- " venant only he could diſpoſe of no more than for his own life: and after " a *præcipe* being brought againſt him, and a common recovery had with " ſingle voucher; it was held, this recovery did not bar the remainder " or reverſion, becauſe by ſuch covenants *quoad* himſelf, the tenant in tail " was not ſeiſed by force of the tail, and then the recompence could not " ecure to the eſtate-tail and remainders. *Sed quære*, for *Moore* reports " the ſame caſe otherwiſe, becauſe, he ſays, he was tenant in tail as he " was before notwithſtanding ſuch covenant. Yelv. 51. Moor, pl. 940. Freſhwater v. Roſs. Moor, pl. 105. 2 Co. 52. Cro. Eliz. 279. 471. 895.

" Tenant in tail makes a leaſe for twenty-one years, and after makes a " feoffment in fee with letter of attorney to enter and make livery; " the attorney enters and ouſts the leſſee, and makes livery accordingly: " and this was held a diſcontinuance of the eſtate tail and remainders; " for the leaſe being but for years, he was ſeiſed by force of the tail; and " though livery by him or his attorney was a wrong to the termor by " putting him out of poſſeſſion, yet ſuch livery gave away nothing from " the termor, who may re-enter when he will, but paſſed only the free- " hold which the tenant in tail had or may give away by livery. But, " if tenant for life be with remainders in tail, and he in the remainder in " tail enter upon the leſſee for life, and diſſeiſe him, and then make a " feoffment in fee; or, if tenant in tail make a leaſe for life, and after Mo. pl. 236. Co. Litt. 347. a. b. 333. Sir T. Raym. 37.

diſſeiſe

" diſſeiſe the leſſee for life, and make a feoffment in fee, and the leſſee die,
" and then the tenant in tail die without iſſue; he in the reverſion or
" remainder may well enter, becauſe the tenant in tail at the time
" of the feoffment was not ſeiſed of the freehold and inheritance of the
Co. Litt. 332. b. ſect. 619. " eſtate-tail, but of another eſtate gained by diſſeſin. But, in the firſt
" caſe, if the tenant in tail after ſuch leaſe for years had only granted
" the reverſion in fee, and the leaſe had expired; though the grantee
" had entered in the life of the tenant in tail; yet this had made no
" diſcontinuance, becauſe neither the leaſe for years, nor the grant of
" the reverſion, diveſted any eſtate, but paſſed only what the grantor
" might lawfully grant, *viz.* an eſtate for his own life.

Co. Litt. 333. ſect. 620, 621. 622. 339. ſect. 638. " If tenant in tail make a leaſe for the life of the leſſee, and after grant
" the reverſion in fee, and the tenant for life attorn; or, if he by in-
" denture enrolled bargain and ſell the reverſion, and then the tenant for
" life die, and the grantee enter in the life of the tenant in tail; this is a
" diſcontinuance equivalent to a feoffment, and puts the iſſue and thoſe
" in remainder or reverſion to their ſeveral formedons. And ſo it would
" be, if the tenant for life ſurrendered to the grantee, or the gran-
" tee recovered in waſte, or entered for a forfeiture in the life of
" the tenant in tail; the grantor by the attornment and entry comes in to
" continuance of the new reverſion, which was gained on making the
" leaſe for life. But, if the tenant in tail had died in the lifetime of the
" leſſee, and then the leſſee had died, and the grantee entered; yet the
" iſſue or thoſe in remainder or reverſion might well enter upon him; be-
" cauſe there was no diſcontinuance executed in the life of the leſſee
" longer than for the life of the leſſee, and by his death, that being de-
" termined, the grantee, who *primâ facie* took only during the continu-
" ance thereof, has no right after the death of the tenant in tail to enter
" to enlarge the diſcontinuance. And though ſuch grant of the rever-
" ſion were with warranty, yet it would be all one; for the eſtate itſelf
" to which the warranty was annexed being determined, the warranty
" cannot have continuance or enlarge the eſtate. So, if after the death
" of the tenant in tail his iſſue had granted the reverſion, though with
" warranty, and the tenant for life had attorned, and died, and then the
" grantees entered; yet the iſſue of that iſſue, or thoſe in remainder or
" reverſion, might well enter upon him; becauſe the diſcontinuance was
" in effect but for life; and the iſſue who granted the reverſion not ſeiſed
" by force of the eſtate-tail.

Co. Litt. 333. b. " If tenant in tail make a leaſe for life, remainder over in fee, and die
" in the life of the leſſee for life; yet this is an abſolute diſcontinuance
" and takes away the entry of the iſſue or thoſe in remainder or rever-
" on becauſe the eſtate for life and remainders make but one eſtate
" and all paſs by the ſame livery. So, if tenant in tail make a leaſe for
" life, and after releaſe to the leſſee and his heirs; this is an abſolute
" diſcontinuance, becauſe the whole fee is executed in the life of the
" nant in tail.

Co. Litt. 265. a. b. 333. b. 339. a. b. ſect. 637. 601. 640. 641. " It is a rule in our books, that the eſtate-tail cannot be diſcontinued
" but where he who makes the alienation was once ſeiſed by force of
" tail, unleſs it be by reaſon of a warranty: as, if the grandfather
" nant in tail be diſſeiſed by the father, who makes a feoffment in fee
" and dies, and then the grandfather dies, the ſon may enter upon
" feoffee and by conſequence ſo may they in remainder or reverſion in the
" turns. For here can be no diſcontinuance of the eſtate-tail or rema-

" ders; becauſe the father who made the feoffment was not ſeiſed by " force of the tail, but of the eſtate gained by the diſſeiſin. But, if the " feoffment had been with warranty, this had wrought the effect of a " diſcontinuance, and taken away the ſon's entry for preſervation of the " warranty, and to prevent circuity of action. So, if tenant in tail be " diſſeiſed, and he or his iſſue after his death releaſe to the diſſeiſor with " warranty: this in effect amounts to a diſcontinuance, and takes away " the entry of thoſe who have right; which without the warranty, it " would not have done; and the iſſue, being never ſeiſed by force of " the tail without ſuch warranty, could not by any means have diſcon- " tinued the tail.

" Another rule is, that to make a diſcontinuance, the alienee muſt Co. Litt. " be in by force of the alienation of the tenant in tail himſelf, and not of 333 b. " any other. Therefore, if tenant in tail makes a leaſe for life, and after " grants the reverſion to *A.*, and the leſſee attorns, and then *A* grants " this reverſion to *B.*, and the leſſee attorns, and dies in the life of the " tenant in tail; though *B.* enters, yet this is no diſcontinuance, becauſe " *B.* is not in of the grant of the tenant in tail, but of *A.* his grantee. " *Quære rationem.*

" *A.* tenant in tail, remainder to *B.* in tail, reverſion to *A.* in fee 10 Co. 95. *A.* by indenture enrolled bargains and ſells the lands to *C.* and his heirs, Edward v. and after levies a fine thereof to *C.* and his heirs. *C.* enfeoffs *D.*, and Seymours, then *A.* dies without iſſue, and *B.* enters It was adjudged, that by 1 Rulſt. 62 the bargain and ſale to *C.* he had only an eſtate deſcendible to him and Meſme aſe, his heirs during the life of *A.*, and alſo the reverſion in fee expectant *per meſne* upon the eſtate-tail of *B.* 2*dly*, That the fine levied after made no diſ- Heywood continuance, not ſo much as a diveſting or diſplacing of the remainder v. Smith. to *B.*, but only enured to corroborate the eſtate of *C.*, and by force of the ſtatutes 4 *H.* 7. and 32 *H.* 8. made it to have continuance ſo long as *A.* ſhould have iſſue of his body: and that it operated only as a re- leaſe or confirmation upon the eſtate, which paſſed before by the bar- gain and ſale, and was guided by it. But, if the fine had been levied before the bargain and ſale, or before the enrolment of it, this had made a diſcontinuance of the eſtate-tail and remainders. 3*dly*, It was adjudged, that the feoffment of the conuſee made no diſcontinuance of the remainders to *B.*, ſo as to take away his entry; for none can diſ- continue the reverſion or remainders, but he only, who hath the eſtate- tail; and therefore if tenant in tail grant *totum ſtatum ſuum* to one who makes a feoffment in fee, this will not take away the entry of him in the reverſion or remainder: and here, the remainder to *B.* was not ſo much as diveſted or diſplaced, for the conuſee had but a fee de- terminable upon the death of *A.* without iſſue, and alſo the reverſion in fee: and therefore when he who had a fee, though it were deter- minable, gave a fee, this did no wrong to the heirs of *A.*, nor by conſequence to *B.* in remainder; as a feoffment by tenant for life or tail does, who, having no fee themſelves, cannot give a fee to others without plucking it out of the reverſion or remainders: and therefore in one caſe it is a forfeiture of the eſtate for life; and in the other a diſcontinuance of the eſtate-tail and remainders. But here it is no wrong nor diſcontinuance to either, and therefore the entry of *B.* in remainder lawful.

A. tenant in tail, remainder to *B.* in tail: *A.* makes a leaſe for three Cro. Eliz. years, warranted by 32 *H.* 8., and dies without iſſue: the warranty 62. Kent " deſcends v. Cope. 8 Co. 31.

Co. Litt. 333.. Vaugn. 383. accord. Cro. Car. 156, Salvin v. Clerk. Dyer, 48-9. contr.; but there in the margin, is cited 1 Ed. 6. to be resolved by all the justices, that such leaſe ſhall not bind him in remainder. Hil 40. Eliz.

" deſcends upon *B.* who was his heir. It was held, that by the death " of *A.* without iſſue, the leaſe for three lives was determined, and was " no diſcontinuace, nor could bind him in the remainder; becauſe the " eſtate out of which it was derived was at an end, and then the leaſe to " which the warranty was annexed being determined, the warranty was " determined alſo, and cannot bar him in the remainders. And *Vaughan* " ſays, that the caſe of *Salvin* v. *Clerk*, in which it is reported, that ſuch " leaſe is a diſcontinuance, and that therefore a ſubſequent fine with war- " ranty by the tenant in tail, which on his death without iſſue deſcended " to him in the remainder whoſe eſtate was diſcontinued, was a bar of " the remainders; *Vaughan* ſays, that this caſe is all falſe and miſre- " ported; for the leaſe being warranted by 32 *H.* 8. was no diſcontinu- " ance or tort; and then there was no new reverſion gained to which the " warranty could be annexed; but being annexed to the eſtate-tail, de- " termined with it, as did the leaſe, and ſo could not touch him in the " remainder.

in C. B. Reeve v. Cox, adjudged accordingly, and 4 Mar. accord. *per cur.*

Cro Car. 156. Salvin. v. Clerk.

" Another point in *Salvin* v. *Clerk*'s caſe was this: *A.* tenant in tail " remainder to *B.* in fee: *A.* makes a leaſe for three lives, warrante " by 32 *H.* 8. and after levies a fine with proclamations, and dies witho " iſſue. Five years after his death elapſe, and then the leaſe for thr " lives expires. *B.* and his heirs are barred; becauſe the right to ha " formedon in remainder, admitting ſuch leaſe a diſcontinuance, or " enter, if it were not, accrued immediately on the death of *A.* witho " iſſue; and he had no other right after the determination of the le " for three lives, than he had before; for by the death of *A.* witho " iſſue, that leaſe, or the right of his continuance, was at an end. A " this differs from the caſe of a fine levied by tenant for life; for the " he in the remainder or reverſion hath two titles, one to enter preſe " ly for the forfeiture, the other to enter within five years after " death of the tenant for life, when the remainder or reverſion falls i " poſſeſſion: but here, he hath but one title, *viz.* after the death of " tenant in tail without iſſue, and therefore ought to have purſued it " entry or action within five years after ſuch death without iſſue.

Godb. 9. pl. 12.

" *A.* tenant in tail, remainder to *B.* in fee. *A.* makes a leaſe " three lives, warranted by 32 *H.* 8., and dies without iſſue; and be " any entry, *B.* grants his remainder by fine. And if the conuſee m " enter and avoid the leaſe, was the queſtion. *Dyer* and *Mead* hel " might; becauſe by the death of tenant in tail without iſſue, the l " was not avoidable only, but abſolutely void, the eſtate out of whi " was derived being determined: and the leaſe being warranted b " ſtatute made no diſcontinuance; for if it had, then ſuch grant o " remainder before avoidance of the leaſe had eſtabliſhed and made " avoidable.

Co. Litt. 339. 1 Rol. Abr. 629.

" Another rule is, that none can diſcontinue an eſtate-tail witho " alſo diſcontinues the reverſion or remainder, for the diſcontin " working a wrong, and paſſing a larger eſtate than the perſon " makes it has by law power to paſs, ſuch eſtate muſt be made up " the reverſion or remainder. If therefore the reverſion or remain " in ſuch perſon, that the tenant in tail cannot draw it out; or, " who takes the eſtate has already the reverſion or remainder, " there is no occaſion to draw it out for making good the eſtate gi

" by the tenant, there, the alienation of the tenant in tail makes no dis-
" continuance; becauſe for want of the reverſion or remainder he deals
" only with his own eſtate, and that being in tail, he can give no more
" thereof than for his own life only, and by conſequence after his death
" his iſſue may well enter.

" Therefore, if there be tenant in tail, remainder or reverſion to the
" king, and the tenant in tail make a feoffment in fee, a gift in tail, or
" a leaſe for life, this is no diſcontinuance; but after his death his iſſue
" may enter; for the remainder or reverſion being in the king, the ſub-
" ject cannot by any act of his without title draw it forth, and then what-
" ever eſtate he departs with muſt be wholly derived out of his own poſ-
" ſeſſion, which being in tail only, he can diſpoſe no more thereof than
" for his own life only; and by conſequence after his death his iſſue may
" well enter. But, if ſuch tenant in tail had ſuffered a common recove-
" ry, this in reſpect of the ſuppoſed recompence had barred the eſtate-
" tail, and all remainders depending thereon, except the remainders or
" reverſions to the king, which by ſuch feigned recovery and recompence
" could not be touched. So if ſuch tenant in tail had levied a fine
" with proclamations after 4 *H.* 7. this had bound the iſſue by virtue o
" that ſtatute, but made no diſcontinuance either of the eſtates-tail, or
" the reverſion or remainder depending thereon; becauſe the reverſion
" or remainder in the king prevented ſuch diſcontinuance for the reaſons
" before given: and then thoſe in the intermediate reverſion or remain-
" der might enter after the death of the tenant in tail without iſſue, as if
" no ſuch fine had been levied. But now by 34 *H.* 8. *c.* 20. it is provided,
" that where the king gives or otherwiſe provides lands to one in tail, no
" feigned recovery by aſſent of parties had againſt ſuch tenant in tail of
" any lands, tenements, *&c.* whereof the reverſion or remainder at the
" time of ſuch recovery is in the crown, ſhall bind or conclude the heirs
" in tail; but that after the death of ſuch tenant in tail, the heirs in tail
" may enter, the ſaid recovery or any other thing done or ſuffered by or
" againſt ſuch tenant in tail to the contrary notwithſtanding. Upon
" which laſt words this ſtatute has been likewiſe extended to take off the
" force and effect of the fine levied by ſuch tenant in tail of the gift or
" proviſion of the king, ſo as that the ſame ſhall not bind the iſſue;
" though *Hobart* ſays, this was an oblique and indirect ſtrain upon the
" ſtatutes. For the ſtatute 32 *H.* 8. *c.* 36. which ſays, that that ſtatute
" ſhall not extend to fines levied by tenant in tail, the reverſion being in
" the crown, but that they ſhould be of like force as if the ſtatute had not
" been made; this did not at all mend the caſe of the iſſue in tail, and
" therefore that ſlip was helped by the judges upon the words of the fol-
" lowing ſtatute of 34 *H.* 8.; upon conſtruction of which ſtatute it was alſo
" held, that all intermediate reverſions or remainders to common perſons
" depending on ſuch eſtate tail of the gift or proviſion of the king, where-
" of the reverſion or remainder was then in the king, were preſerved like-
" wiſe againſt ſuch feigned recovery by the tenant in tail in poſſeſſion;
" for their remainder or reverſion being barrable at common law, in re-
" gard the eſtate-tail whereon they depended was barred, now that ſta-
" tute having made proviſion againſt barring ſuch eſtate-tail in poſſeſſion,
" by conſequence, preſerves alſo the remainders or reverſions depending
" thereon.

" But this ſtat. 34 *H.* 8. extends only to eſtates-tail of the gift or pro-
" viſion of the king; therefore, if a common perſon by deed enrolled gives
" lands

Co Litt. 372. b. 335. Dyer, 32. a. Plow. 555. a. Poph. 63. Brook. tit. Aſſurance, 6 tit. Fines levy, 121. tit. Diſcontinuance of Poſſeſſion, 2 tit. Recovery. 31. b. tit. Tail, 41, Bendlow, 223. Plow. 254. Co. 878. Hob. 333. 2 Co. 19. Mo. pl. 259. Jackſon v. Darcy. 3 Leon. 57. & 4 Leon. 40. Meſme caſe. Co. Litt. 372, 373.

2 Co, 15. Mo. 195. Wiſeman's caſe.

2 Co, 52. Mo. 345. b. Sir Hughy Cholmle's caſe. Co. Litt. 372. Yelv 149. Poole v. Needham, 2 Co 41. 10 Co. 38. 1 Leon. 85. Cro. Car. 430.

" lands to *A.* in tail, remainder to *B.* in tail, remainder to the king in fee; or, if one who hath a remainder in fee, except upon an eſtate-tail of the gift of a common perſon by deed enrolled, grants ſuch remainder or reverſion to one for life, or in tail, remainder to the king in fee, and the tenant in tail in poſſeſſion after ſuffers a common recovery; this bars all but the remainders to the king, as it did at common law. So, if he levies a fine with proclamations, this binds the iſſue as it did before; but, neither the king, nor thoſe who have an intermediate reverſion or remainder; becauſe it makes no diſcontinuance, as has been ſhewn.

Mo. pl. 665. Cro. Eliz. 595. Stratfield v. Dover. Co. Litt 373. *contr.* 1 Sid. 166. 1 Keb. 620 Loyd v. Pollard.

" The King gave lands to one in tail, ſaving the reverſion to himſelf: the donee is diſſeiſed, and the diſſeiſor levies a fine with proclamations, and five years paſs. *Walmſley* held, this bound only the iſſue, in whoſe time the fine and non-claim was, and that his iſſue were at liberty to enter after his death by the ſtatute 34 *H.* 8. And though my Lord *Coke* cites this caſe to be reſolved contrary, yet this is held in other books not to be law; for that would open an eaſy way to get out of the ſtatute; and therefore, where ſuch donee in tail, the reverſion being in the king, bargained and ſold the lands to one and his heirs, and died, and the vendee levied a fine, and five years paſſed without claim by the iſſue: yet the court ſeemed to be of opinion, that ſuch iſſue was not bound; and if it were, that yet clearly his iſſue would be at large and not bound by the fine.

Co Litt. 372. b. and the books there cited.

" Other diverſities there are upon the ſaid ſtatute, which, being not to the preſent purpoſe, I ſhall paſs over, referring you to the books where they may be ſeen.

Co. Lit. 335. a. ſect. 629. 9 Ed. 4. 24. Plow. 555. 1 Co. 140.

" Another caſe wherein there can be no diſcontinuance of the eſtate tail, unleſs the reverſion or remainder be alſo diſcontinued, is this: tenant in tail enfeoffs him in the intermediate reverſion or remainder, there is no diſcontinuance, but that after his death the iſſue in tail may enter; becauſe the livery being made to him who had the intermediate reverſion or remainder, cannot be ſuppoſed to give him what he has already, or to draw out an eſtate from him only to give it him again *eo inſtanti*; therefore, ſuch livery being made of the poſſeſſion can paſs only ſo much thereof as the tenant in poſſeſſion had power to depart with; and that being for his own life only leaves his iſſue at liberty to enter after his death. But, if *A.* were tenant in tail, remainder to *B.* in tail, remainder or reverſion to *C.* in fee, and *A.* make a feoffment, gift in tail, or leaſe for life to *C*, this diſcontinues the eſtate-tail and the remainders depending thereon; becauſe there is room for the tortious operation of the livery upon the firſt eſtates, before it comes to the laſt remainder or reverſion in fee; and whether that be diſcontinued or not, yet the force of the livery, reaching beyond the eſtate-tail in poſſeſſion, muſt be a diſcontinuance thereof, and of the next remainder depending thereon, ſince it can have no other effect.

Dyer, 8. pl. 15.

" If tenant in tail make a leaſe for his own life, remainder to the donor in fee, this is no diſcontinuance; becauſe the leaſe for his own life being lawful, the limitation over to the donor, who had the fee before, could make no diſcontinuance. For that would be to make the limitation to him by way of remainder work ſtronger than an immediate feoffment to them: and then he having, in the leaſe for his own life, given away all that he had, the limitation over is void. But, if

" leaſe had been for another man's life, with remainder to the donor in " fee, this had been a diſcontinuance; becauſe ſuch leaſe, being more " than he could lawfully make, plucked out of the reverſion of the donor " to ſerve and apply ſuch leaſe; and then the limitation, which he after- " wards makes to the donor, being derived out of ſuch new fee gained by " the firſt livery, carries on the diſcontinuance as againſt the iſſue in " tail.

" If tenant in tail enfeoff the donor and a ſtranger, this is a diſconti- " nuance of the whole land; becauſe they take as joint-tenants whereof " each is ſeiſed *per my et per tout.* Co. Lit. 335. a. Dyer, 12.

" Another way whereby thoſe in reverſion or remainder might at com- " mon law have remedy upon a recovery, with or without title had againſt " tenant for life, in dower, or by the curteſy, if ſuch tenant, being em- " pleaded, would not vouch or pray in aid of thoſe in remainder or rever- " ſion, or they had no notice time enough to come in to pray to be re- " ceived, was by bringing a writ of error to reverſe the judgment given " againſt ſuch tenant for life, if there were error in it, not otherwiſe. " But this they could not have till after the death of ſuch tenant for " life, unleſs they came in by way of voucher, aid prier, or reſceit; for " then being parties to the record might have had ſuch writ of error pre- " ſently. And when the ſtatute of *W.* 2. divided the fee conditional " into a fee-tail whereupon a reverſion or remainder might depend, the " judges extended the remedy which the common law gave by writ of " error to thoſe in remainder or reverſion expectant on ſuch eſtate-tail " after the death of the tenant in tail without iſſue; but the judgment " againſt the tenant for life diveſting the reverſion or remainder, ſo that " he could not after grant or transfer it over to any perſon; and it being " doubtful whether he could puniſh waſte after ſuch recovery had; there- " fore the ſtatute of 9 *R.* 2, *c.* 3. gave him in the reverſion or remainder " expectant on ſuch eſtate for life a writ of error or attaint in the life of " the tenant for life. And if the judgment be reverſed, the tenant for " life is to be reſtored to the poſſeſſion and meſne profits, unleſs the plain- " tiff in error can prove that he was of covin, and aſſent that the deman- " dant ſhould recover; for then reſtitution is to be made of the poſſeſſion " and meſne profits to the plaintiff in error. And this proves that the par- " liament held ſuch covin or recovery a forfeiture of the eſtate for life, " otherwiſe it would have been hard to have given the poſſeſſion and " meſne profits to him in the remainder or reverſion during the life of the " tenant for life. But though it was a forfeiture, yet, as it appears be- " fore, if it were not erroneous, no ſufficient remedy was provided for " him in the reverſion or remainder to take advantage thereof, till 32 *H.* " 8. and 14 *Eliz.* And if it were erroneous, yet till this ſtatute he " could not reverſe it, till after the death of the tenant for life. But this " ſtatute making no mention of recoveries againſt tenant in tail, they re- " main ſtill as they were after the making of the ſtatute *de donis*; and " thoſe in reverſion or remainder expectant thereon can have no writ of " error of an erroneous judgment given againſt the tenant in tail, till after " his death without iſſue; nor can they be received upon the ſtatute of " *W.* 2. c. 3. which gives the reſceit, becauſe the eſtate-tail is looked " upon as an inheritance which by poſſibility may endure for ever: and " therefore during the continuance of it thoſe in reverſion or remainder " are little regarded. Co. 3. 3. 4. F. R. 21 E. 99 d. Palm. 226. 229. 230. 245. 253. 254. 3 Co. 61. 2 Inſt. 345. 10 Co. 44 a. 1 Co. 84. 1 Roll. Rep. 301. &c.

" I ſhall put but one caſe to ſhew what is a ſufficient error for thoſe in
" remainder or reverſion expectant upon an eſtate-tail to take advantage
" of by writ of error, and how ſuch writ of error may be barred or pre-
" vented by the tenant in tail.

Palm. 224. Darcy v. Jackſon. 1 Roll. Rep. 301. S. C. by the name of Holland v. Soe, 2 Roll. Rep. 85. S. C. *quoad* 1/4 part only

" *A.* having iſſue three daughters, *B.*, *C.*, and *D.*, makes a feoffment
" to the uſe of himſelf for life, remainder to *B.* in tail, remainder to him-
" ſelf in tail general, remainder to himſelf in fee; and dies. *B* entera
" and takes huſband, and they both levy a fine with warranty againſt *B*
" and her heirs, *B.* being then within age; and after a common recover
" is ſuffered with voucher of *B.* and her huſband, who appeared by a
" torney, and vouched over the common vouchee; and ſo a common r
" covery is had, and the uſe declared to the huſband and his heirs, *B* b
" ing ſtill under age: then *B.* dies without iſſue, and five years paſſ
" after her death; and now a writ of error was brought by *C.* and
" againſt one who claimed under the huſband to reverſe this recovery, a
" be let in by their formedon in remainder to avoid the diſcontinuan
" wrought by the fine for two parts of the land; and, after argument,
" was held by all the court.

1ſt point.

1*ſt*, That the appearance of an infant by attorney was error, and
" if the attorney had appeared without warrant; for an infant cannot
Palm. 225. 228. 244. 250, 251.
" him authority *ad perdendum et lucrandum* for him as the warrant of
" torney purports; but an infant might always appear by guardian aſſig
" either by the court or by writ out of Chancery; and ſuch guar
" hath his warrant from the court, not from the infant, and ought t
" one of an eſtate; for if he miſbehaves himſelf, an action of deceit
" againſt him. And though *B.* here had a huſband, yet he cannot
" an attorney for his wife in a matter which concerns her inheritance,
" then he might defeat her of her inheritance, eſpecially in a commo
" covery, which is now but a common aſſurance, and their coming
" vouchees makes it the ſtronger, for the vouchee loſes all the right t
" land, and gives recompence to the tenant.

2d point. 226. 229, 230. 245. 246. 253, 254.

" 2*dly*, It was held by all but *Haughton*, Juſt. that though b
" fine the remainder was diſcontinued and put to a right, and th
" roneous recovery was ſuffered after, yet thoſe who had ſuch
" only at the time of the recovery ſhall have a writ of error to r
" it; for as by ſuch recovery, if good, their right ſhall be bou
" reaſon of the recompence; ſo, if erroneous, they ſhall have e
" reverſe it. And if it were otherwiſe, no common recovery
" ever be reverſed, for they always make a feoffment in fee, or
" fine firſt, in order to have double voucher; and thoſe in rem
" or reverſion have privity in right, though not in fact, by re
" the diſcontinuance; and as thoſe who have but a right of a r
" der or reverſion ſhall take advantage of the forfeiture of a rig
" particular eſtate, ſo ſhall thoſe who have but a right of a re
" or reverſion have error or attaint upon erroneous recovery had
" one, who had but a right of an entail, 5 *Ed.* 3. 43. 6. 4.
" the voucher of the tenant in tail he comes in in privity of the
" tail, and revives the remainders to give them the recompence
" lue, without which they would not be barred. And thou
" the plaintiffs cannot be reſtored to the land by the reverſal of
" covery, yet they will be reſtored to all they have loſt by
" their right to have formedon in remainder to avoid the di
216. 1 Co. 67. 7 Jac. " ance wrought by the fine. They agreed, if the remainder

" been *in esse* at the time of the recovery, but in abeyance only as to Zouch v.
" the right heirs of *J. S*, there, though *J. S.*, died after, yet his Bamfield.
" heir should not have error of a recovery suffered by tenant in
" tail; 7 *Jac. Zouch* v. *Bamfield.* So, of a remainder to the eldest
" son of *A.*, who hath an estate for life; if *A.* suffers an erroneous
" recovery, a son born after shall not reverse it; otherwise, when
" the remainder was *in esse* at the time of the recovery, as here, though
" turned to a right. But *Haughton*, Just. held, that the plaintiff hav- 237. 251.
" ing only right of a remainder in fact, should not have a writ of er-
" ror, unless their remainders had been turned to a right by disseisin of
" the tenant in tail, or such like tort; and that the privity of the re-
" mainders by the tenant in tail coming in as vouchee, was only re-
" stored to be barred and have recompence over, but not to be *de facto*
" restored to their estates.

" 3*dly*, It was held by all the court, that the infant appearing in 3d point
" this case by attorney was such an error as those in remainder may take
" advantage of, though strangers in blood; for this writ of error is 226. 231,
" not to reverse the recovery for the infancy of the feme covert, but 207. 238,
" because it was suffered by attorney without warrant, the infant hav- 246. 251,
" ing no power to make any warrant, and therefore it was not voidable 254.
" only but absolutely void: for the making of the warrant of attorney
" is an act of the party *in pais*, without examination of the justice,
" though the appearance by attorney after be recorded by the court.
" And upon shewing this in a writ of error, the defendant must plead, 3 Co. 30.b
" that she was of full age at the time of making the warrant, and the 43 Eliz.
" other must take issue upon it, and so it shall be tried *per pais*, not by Hobby v.
" inspection. And cases were cited, that those in remainder may Daniel.
" have error for the infancy of the tenant in possession. But they 25 Eliz.
" agreed, that for avoiding a feoffment made by the infant there ought B. R.
" to be privity of blood, and that privity in estate was not sufficient: Roll. 407
" but here, by the voucher of the tenant in tail the remainders were Carney's case.
" so received for the sake of the recompence in value, that they were 8 Co. 43.
" *quasi* parties to the record.

" 4*thly*, It was held by all the court, that notwithstanding the ob- 4th point.
" jection that the warranty upon the fine could not bind this title to the
" writ of error upon the recovery, being matter subsequent and suffer-
" ed after the warranty, that yet this warranty descending on the plain- 227. 231,
" tiffs in remainder was collateral for two parts, and for these two 235. 238.
" barred them of their writ of error. For though the recovery was 248. 252.
" suffered after the warranty, yet their title to the remainders was
" prior to the warranty, and it is in virtue of that title they seek to re-
" verse the recovery. And by the descent of the warranty their title
" to the remainder was divested and turned to a right. But, if the re-
" mainder be barred, so is their title to a writ of error to be restored
" to that remainder; for the remainder being barred, which is the
" principal, the writ of error, which is but accessary and depending
" thereon, is barred likewise. And a case was cited, 7 & 8 *Jac.*, where
" father tenant for life, remainder to his son in fee, the father levied a
" fine with warranty to a stranger to the use of himself for life, remain-
" der to his son for life, remainder over in fee, and died. It was
" resolved, that because the son had not entered in the life of his fa-
" ther, but suffered the warranty to descend upon him, that now this
" had crushed his right to the remainder in fee, and he must be con-

tented

" tented with the eſtate for life. And though in the principal caſe,
" upon the recovery againſt the conuſee, he had judgment to recover
" in value againſt *B.*, and therefore (as objected) the warranty was
" executed and ſatisfied by the recompence in value, and that no re-
" voucher can be; yet it was held, 1*ſt*. that it does not appear that
" any actual recompence was had; 2*dly*, the voucher upon the reco-
" very was no execution of the warranty, becauſe the recovery was part
" of the ſame aſſurance, and made in affirmance of it; and therefore
" the warranty upon the fine continues ſtill unſatisfied; 3*dly*, admit-
" ting it were ſatisfied, ſo that he could not revouch, yet he may rebut
" by force of it; and here it is pleaded by way of rebutter. Alſo it
" was held, that though by this writ of error the land is not directly
" demanded, yet it is obliquely and by implication. And a return
" of all one's right in the land will be a bar of a writ of error,
" and the warranty here may be pleaded for avoiding circuity of ac-
" tion.

5th point. " 5*thly*, It was held by all, that the fine with proclamations and
" five years non-claim after the death of *B.* without iſſue had been a
227. 232. " bar of this writ of error, if it had been relied on; but there, defen-
235. 240. " dant after he had pleaded the fine with proclamations concludes with
243. 247. " *petit*, &c. if againſt the fine containing ſuch warranty plaintiff ought
" to have a writ of error, and ſo hath relied upon the warranty, not
" upon the fine with proclamations; and he having election to rely ei-
" ther upon the one or the other, by relying upon the one hath waived
" the other, and therefore it ſhall be intended only a fine at common
" law without proclamations, which only diſcontinues, but does not
" bar any right. *Nota*—In this caſe it was after held by *Doddridge*,
" and *Leigh*, Chief Juſtice, that for ſo much of the eſtate as was li-
" mited in uſe to the feme, the warranty was extinguiſhed and gone,
" and ſo plaintiff had judgment for all the point of the warranty, being
" the only point wherein the court was againſt him. And if the war-
" ranty were out of the way he muſt have judgment for all. But *quære*
" here, for the uſe is to the huſband and his heirs, and the warranty
" was againſt the feme and her heirs, and therefore this ſeems a mi-
" take of putting the caſe.

" As to ſuch acts of the tenant in poſſeſſion as work no diveſting or
" diſplacing of the remainders or reverſions, and, by conſequence, no
" bar or diſcontinuance, this has already appeared in part, and I
" ſhall only put two or three caſes more for further illuſtration thereof.

" If there be tenant for life, remainder to the king for life, remain-
1 Co. 76. b. " der to another in fee, and the tenant for life make a feoffment in fee;
Co. Litt. " this works no diveſting or diſplacing of the remainder to the king, but
251. a. " by conſequence, of the remainder depending thereon, but paſſeth only
Poph. 30. " his own eſtate for life. And yet this amounts to a forfeiture which
" of the king may take advantage; becauſe by making livery there-
" fee he hath done as much as in him lay to defeat and diſinherit the
" king of his remainders, which is always a ſufficient cauſe for a
" forfeiture of a particular eſtate. So, if the king make a leaſe
" for years, and the leſſee make a feoffment in fee, this is a for-
" feiture of the term; and yet the reverſion is not drawn out of the
" king.

" If tenant for life, the reverſion or remainder to the king be pleaded in a *præcipe*, and a recovery be had againſt him by aſſent, without title, this does not diveſt the remainder or reverſion of the king; becauſe being by aſſent, and without title, is but in the nature of a conveyance, which cannot take away the king's inheritance. But, if ſuch recovery were upon good title and without covin, this would diveſt the king's remainders or reverſion, becauſe the judgment is matter of record, and no wrong is done to the king; as, if a diſſeiſor recovers againſt the tenant for life, and enters, by this he defeats the king's remainder. 1 Co. 16. 2 Co. 53.

" If tenant for life of rent or ſervices on a *præcipe* brought againſt him pleads to the right, or confeſſes the action, &c.; or grants them in fee; this is no forfeiture to him in the remainder or reverſion; becauſe they cannot by any act of the particular tenant be drawn out of him in the remainder or reverſion, or be conveyed for any longer time than ſuch particular tenant hath intereſt therein. Wherein there is a diverſity between land, houſes, and other things which lie in livery, as appears before, and rents, commons, advowſons, remainders, or other things, which lie in grant only. For if tenant in tail of ſuch things as lie in grant, by deed or fine grant them to one and his heirs, yet this is no diſcontinuance; but the iſſue in tail, or thoſe in remainder or reverſion, may diſtrain for the rent, uſe the common, preſent to the church, or enter into the land; or they may, if they will, admit themſelves out of poſſeſſion, and bring their formedon. But then, a lineal warranty with aſſets, or a collateral warranty without aſſets, will be a bar to them, and therefore it is more dangerous to bring ſuch action. 15 Ed. 4. 9. Co. Litt. 251. 2 Leon. 61. 4 Leon. 126. Ca. 385. Co. Litt. 327. 332. a. ſect. 608. 615. 616. 617. Pop. 62.

" Another diverſity is, between ſuch things as lie in grant and are *in eſſe*, and ſuch things as lie in grant and are newly created; as, if tenant in tail of land grant thereout a rent, common, &c. to one and his heirs, yet this is abſolutely determined by the death of the tenant in tail upon the conſtruction of the ſtatute *de donis*. 3 Co. 85. Co. Litt. 377.

" If one let lands to *A.* for life, and *A.* let the ſame lands to *B.* for years, and after grant the reverſion; yet the grantee hath an eſtate but for term of life of the grantor; and there is no diveſting of the firſt reverſion, nor cauſe of forfeiture: becauſe by ſuch grant nothing paſſed but the eſtate which the grantor had. So, if *A.* had in this caſe releaſed or confirmed the land to *B.* and his heirs, yet he would have only an eſtate for the life of *A.*, and no forfeiture or diveſting of the firſt reverſion. Co. Litt. 350. ſect. 609. 610.

" I come now to conſider the acts of the tenant in poſſeſſion jointly or with the concurrence of him in the remainders or reverſion, whereof ſome diveſt and diſplace the remainder or reverſion, and cauſe a forfeiture and diſcontinuance, and ſome not.

" *A.* tenant for life, remainder to *B.* in tail, remainder to *C.* in tail, or in fee. *A.* and *B.* join in a fee *come ceo*, &c. to *D.* in fee, who grants and renders a rent-charge to *A.* for life: *B.* dies without iſſue; then *C* enters; and *A.* diſtrains and avows for the rent. It was adjudged lawful; for this fine made no diſcontinuance either of the firſt or ſecond remainder, but each of them give only what he might lawfully give, *viz.* *A.* his eſtate for life, and *B.* a fee determinable upon his death without iſſue; and the remainder to *C.* was not diveſted or diſcontinued 1 Co. 76. Bredon's caſe. Hob. 227. 278. 6 Co. 15. a. Treport's caſe. Co. Litt. 302. b. 2 Roll. Abr 875. pl. 7, 8.

" diſcontinued by the fine; and by conſequence no forfeiture of the eſ-
" tate for life was wrought, by reaſon he in the remainder in tail join-
" ed therein. And there it was held, that, if need were, to prevent a
" forfeiture, it ſhould be conſtrued firſt the grant of *B.* of his remain-
" der, and then the grant of *A.* of his eſtate for life. It was likewiſe
" held in the ſame caſe, that if *A.* and *B.* had joined in a feoffment by
" deed, this would be no diſcontinuance or diveſting of the remainders
" or reverſion, but that each ſhould be ſaid to paſs only what they might
" lawfully depart with: and that if *B.* died without iſſue, yet the feoff-
Sid. 83, " fee ſhould hold during the life of *A.* But ſome books hold this caſe
MS. " of the feoffment to be different from the fine, and though the fine
" makes no diſcontinuance, yet the feoffment, they think, does. And
" it was held in the principal caſe, that if the feoffment were by parol,
" it would operate as the ſurrender of *A.*, and the feoffment only of
" *B.*, which would diſcontinue the eſtate-tail and remainder. For in
" ſuch caſe it cannot enure otherwiſe; becauſe unleſs the remainder
" comes into poſſeſſion by the acceſſion of the eſtate for life, it would
" not paſs at all; for a remainder, as ſuch, cannot paſs by parol with-
" out deed and therefore to make *B*'s joining of any effect, it muſt
" be taken to be the ſurrender of *A.*, and the feoffment of *B.* But
" caſe was there cited, 41 *Ed.* 3. 21 & 41 *Aſſ. pl.* 2. where *A.* was
" tenant for life, remainder to *B.* in tail, and *A.* made a feoffment in
" fee to *B.* and his wife, who ſurvived *B.*, this was held a forfeiture of
" *A.*'s eſtate for life, and that *D.* in remainder might enter: becauſe
" between baron and feme there are no moieties, and the wife ſurviving
" is in of the whole by *A.* the feoffor, whoſe feoffment diveſted all
Co. Litt, " diſplaced the remainder to *D.*, and, by conſequence, made a forfei-
251. a. 502. " ture of *A.*'s eſtate for life. So, where tenant for life, and he in the re-
Hob. 277. " mainder for life, join in a feoffment, though by deed, yet this is
Dyer, 339 a. " forfeiture of both their eſtates, for which he in the next remain-
1 Leon 262. " may enter preſently; becauſe both of them joined in the tortious act
1 Roll Abr. " which diveſted the remainders.
855. pl. 8.

" If *A.* be tenant for life, remainder to *B.* in tail, remainder to
1 Co. 140. " in fee; *A.* make a feoffment in fee to *C.*; this diveſts and diſplaces
Pop. 84. " the remainder of *B.*, and is a forfeiture for which he may enter. So,
1 Roll Abr. " *A.* were tenant for life, remainder to *B.* in tail, remainder to *C.* in
857 pl. 1, 2. " tail, remainder to *D.* in fee, and *A.* make a feoffment in fee to
4. " who dies without iſſue, *C.* may enter for the forfeiture; for the
" ry diveſted his remainder, and *B.* could not diſpenſe with the
" feiture as to his own eſtate. So, if *A.* be tenant for life, remainder
" to *B.* in tail, and *B.* releaſe to *A.* in fee, and after *A.* make a
" ment in fee, and then *B.* die; yet his iſſue may enter for the for-
" ure: for the releaſe did not mend at all the eſtate of *A.*; and the
" it prevented *B.* himſelf from taking advantage of the forfeiture, yet
" could not bind his iſſue, or thoſe in remainder.

1 Leon, 36. " Huſband tenant for life, remainder to his wife for life, re-
1 Sid 83. " der to the heirs male of their two bodies, remainder to *A.* in
Raym. 36. " The huſband and wife levy a fine with warranty, and die with-
1 Keb. 76. " ſue:—the warranty deſcends upon *A.*: yet it was adjudged,
&c. " neither the fine nor the deſcent of the warranty upon *A.* bar
Stephens v. " diſcontinued his remainder, becauſe the eſtates of the huſband
Pittridge. " wife for their ſeveral lives continued diſtinct, and were not
" in the remainder to them in tail; and then not being ſeiſed by

of the tail, their fine could make no diſcontinuance of the eſtate-tail or the remainder, and, by conſequence, the warranty could not attach upon *A.*, whoſe eſtate was not diveſted or turned to a right. But in all theſe caſes the fine with proclamations binds the iſſue by force of the *ſtat.* 4 *H.* 7. & 32 *H.* 8.

"*A.* tenant for life, and *B.* in remainder in tail levy a fine; *B.* dies without iſſue, and if the conuſee ſhould hold during the life of *A.* was the queſtion. The court thought this caſe the ſame with *Bredon*'s caſe. But *Hale* ſaid, the reaſons given in *Bredon*'s caſe make againſt the reſolution; for where it is ſaid, the remainder in tail paſſed firſt to avoid a forfeiture, he ſaid, if it did, the freehold muſt then paſs to it by way of ſurrender, and ſo drown; but they ſhall rather be conſtrued to paſs *inſimul et uno flatu:* and he reſembled the principal caſe to a feoffment by the huſband and wife of the wife's lands whereof the huſband is entitled to be tenant by the curteſy; the heir of the wife ſhall not avoid the feoffment during the life of the huſband. But the caſe was ended by agreement.

"Huſband and wife, ſeiſed of lands to them and the heirs of the huſband, make a leaſe thereof to the defendant, who covenants with them and each of them, and with the heirs and aſſigns of the huſband to do ſuch a thing upon the land. The huſband and wife convey the reverſion to the plaintiff in fee, who brings covenant, and concludes *unde actio accrevit* to him as aſſignee of the huſband, without averring the wife to be dead. And though it was urged, that he ought to have brought covenant as aſſignee to both, having his eſtate as well from the wife, who had an eſtate for life, as from the huſband who had the fee, unleſs he had alleged the wife to be dead; yet it was held well, being brought by the aſſignee of him who had the inheritance and ſo no prejudice to any; and that the eſtate for life being transferred with the fee was thereby drowned and confounded, and ſo the action well brought as aſſignee of the huſband. Cro. Car. 285. Major v. Talbot.

"*A.* tenant for life, remainder to *B.* in tail, remainder to *C.* in fee. *A.* and *B.* intermarry, and after levy a fine *come ceo*, &c. with remainder to *A* for life, remainder to *B.* the huſband and his heirs: then the huſband and wife ſuffer a common recovery with ſingle voucher to the uſe of the huſband and his heirs, and die without iſſue. *C.* enters within five years. And it was adjudged clearly, 1*ſt*, That the fine levied by *A.* and *B.* made no diſcontinuance, and they would not ſuffer it to be argued for the reaſons in *Bredon*'s caſe; for none can diſcontinue an eſtate-tail, but he who is ſeiſed thereof in poſſeſſion, or at leaſt of the freehold thereof. 2*dly*, It was adjudged, that the recovery was no bar or diſcontinuance of the eſtate-tail or remainders, becauſe he who ſuffered it was not ſeiſed of the eſtate-tail at the time of the recovery; for by the fine an eſtate in fee determinable on *B.*'s death without iſſue paſſed, though there was no diſcontinuance: and by the render a new eſtate is given to the huſband, to which the recompence in value upon the recovery enures, and not to the eſtate-tail, nor, by conſequence, to the remainders depending thereon. And this recovery was not within 32 *H.* 8. becauſe he in the remainder in tail joined with the tenant for life. But it was agreed, that the fine would have bound the iſſue, if there had been any, by virtue of the ſtatutes. Cro. Eliz. 827. Moor, pl. 870. Peck v. Channell.

A. tenant

1 Roll. Abr. 585. pl 9. Owen, 146. Styles, 192. Garratr v. Blizzard. 2 Mod. 114. *infra.*

" *A.* tenant for life, remainder to *B.* for life, remainder to *C.* in tail, " remainder to *B.* in fee. *B.* levies a fine *come ceo*, &c. to *D.*: this is " a forfeiture of his remainder for life; ſo that after the death of *A.*, *C.* " may enter; for by this fine *B.* is eſtopped to ſay that he did not paſs " a fee in poſſeſſion without any fraction of eſtate. And therefore this " differs from *Bredon*'s caſe, where the eſtate for life and remainders " were immediate one to the other, which here they are not.

Hob. 277. 1 Roll. Abr. 854. Earl of Clanrikcard's caſe.

" Feme tenant in tail general, remainder to the huſband and his heirs " during the life of *A.*, remainder to *A.* in fee. The huſband and wife " levy a fine *come ceo*, &c. to *D.* and *E.*, to the uſe of the wife and her " heirs; the huſband dies; the wife dies without iſſue; *A.* brings for- " medon againſt the heir of the wife, upon pretence that the fine levied " by her being tenant in tail in poſſeſſion, was a diſcontinuance, and that " the eſtate in remainder of the huſband for the life of *A.* was merged " and extinguiſhed in the fee granted by the fine to *D.* and *E.*, ſo that " upon the death of the wife without iſſue, the remainder to *N.* was to " come into poſſeſſion. But it was held, that the eſtate-tail of the wife, " and the remainder of the huſband for the life of *A.* were conveyed as " two diſtinct eſtates in being to the conuſees, and that the eſtate for " life was not extinguiſhed or involved in the eſtate-tail given by the " fine; for then it muſt be either by ſurrender, forfeiture, or confirma- " tion. By ſurrender it cannot be, becauſe it is ſubſequent to the eſ- " tate-tail; by forfeiture it cannot be, becauſe the tenant for life gave " not the fee alone, but gave only ſo much thereof as he had and joined " with the tenant in tail, who had power to give a fee during the eſtate " tail without wrong to any. And if need were, as in *Bredon*'s caſe, to " avoid a diſcontinuance, they conſtrued the remainders in tail to paſs " firſt; ſo here, to avoid a forfeiture, her eſtate for life may be ſaid to " paſs firſt, though in the conuſee they both made but one entire eſtate. " And if the fine were reverſed for the infancy of the wife, yet the con- " ſee ſhould hold the huſband's remainder for the life of *A.* So, if the " fine were upon condition, both eſtates on breach thereof ſhould be re- " ſtored in the ſame plight as at firſt. But admitting it ſhould be taken " as a diſcontinuance of the wife, being tenant in tail in poſſeſſion, and " as the confirmation of the huſband in remainder, yet *A.* can no more " enter during the continuance of the eſtate, than if the huſband had not " joined in the fine, but had kept his right, or had releaſed it to the " diſcontinuee. For in ſuch caſe, every one muſt ſue in their turn to " avoid the diſcontinuance: firſt, the iſſue, then, he in the firſt remain- " der, and after *A.* Though the iſſue will not, or there be no iſſue, yet " the iſſue be bound, and the huſband cannot by reaſon of his release, " yet it is all one to *A.*, for his right does not begin till after the two " foregoing eſtates ended. But in *Bredon*'s caſe, if the tenant for life " had ſurrendered to him in the remainder in tail, and then he had con- " vied a fine, and died without iſſue, he in the next remainder ſhould " have had a formedon preſently, though the tenant for life were living, " becauſe by the ſurrender the eſtate for life was abſolutely determined, " but by his joining, as he did there, or, if he had releaſed or confirmed " the land to the conuſee, in ſuch caſe, he ſhould have been ſaid to have " only his own ſingle eſtate for life, and he in the ſecond remainder " ſhould not enter till that determined. And therefore in the principal " caſe it was held, that no formedon lay during the life of *A.*

A. te

" *A.* tenant for life, remainder to *B.* in tail, remainder to *A.* in fee. *A.* and *B.* make a leaſe for three lives by indenture to *C.*, then *A.* dies, and *B.* grants the reverſion to *D.* in fee, to the uſe of his laſt will, and by his will deviſes the reverſion for years, and dies leaving iſſue. The three lives die: the deviſee for years enters, and the iſſue of *B.* ouſts him. And it was argued, that this leaſe for three lives was a diſcontinuance, becauſe, as it was ſaid, it was more than they could both make, and ſo it was a tort; and the reverſion gained by tort, though in whom the reverſion was might be a doubt. But it was adjudged no diſcontinuance, and that the entry of the iſſue was lawful; for the leaſe being by indenture was the leaſe of *A.*, and the confirmation of *B*; but, if it had been without deed, then it had been the ſurrender of *A.* and the leaſe of *B.* only, becauſe otherwiſe nothing could paſs from him, his remainder, as ſuch, not being transferable but by deed. Cro Eliz. 56. 1 Leon. 243. Trevilian v. Lane.

" *A.* tenant for life, remainder to *B.* in tail. *A* makes a feoffment to the uſe of himſelf for life, remainder to *B.*; then *A.* and *B.* enfeoff *D. Gaudy* and *Shute* held clearly, that this was a diſcontinuance; for when *B.* enters to make the feoffment, he is remitted by reaſon of the forfeiture committed before by *A.*, and then by ſuch remitter he gains the poſſeſſion, and it is only his feoffment, and ſo it is a diſcontinuance; for both cannot have the poſſeſſion. *Clench cont.* Becauſe the intent of *B.*'s entry was only to join in the feoffment with *A.*, and to paſs both their eſtates together, and not to take advantage of the forfeiture; and therefore it was no diſcontinuance. But the caſe was adjourned, and no judgment appears to be given. 1 Leon 127. Cro. Eliz. 135. Toft v. Tonkins.

" *A.* tenant for life, remainder to *B.* in tail. *A.* levies a fine to the uſe of himſelf; then he and *B.* join in a feoffment by letter of attorney. And it was held a diſcontinuance, becauſe it was the feoffment of *B.*, and the confirmation of *A.* only. Dyer, 324, pl. 35.

" *A.* tenant for life, remainder to *B.* in tail, remainder to *C.* in tail, or fee; a *præcipe* is brought againſt *A.* and *B.*, who both vouch the common vouchee, and thereupon a common recovery is had; yet this ſhall not bind the eſtate-tail or remainders, becauſe *B.* in remainder is not tenant to the *præcipe*, but *A.* the tenant for life only, and therefore the recompence in value cannot go to *B.* in remainder only, he being never ſeiſed by force of the tail; but ſhall go to them jointly according to the writ, which was againſt them jointly, and ſuppoſed them joint-tenants; and by conſequence can be no bar to the eſtate-tail or remainder, whereof they were not jointly ſeiſed, but in remainder one after another. Dyer, 252. 3 Co. 6. Kniveton's caſe Cro. Eliz 670. Leach v. Cole.

" But in that caſe if *A.* only had been empleaded, and had vouched *B.* in remainder in tail, and he the common voucher, and ſo a common recovery were had; this had barred the eſtate-tail, and all remainders or reverſions depending thereon; becauſe there *A.* was ſole tenant to the *præcipe*, and by voucher of him in the next remainder in tail he does his duty. And if he in the next remainder in tail cannot defend the poſſeſſion, or call in one who will, he muſt be contented with the recompence in value, which the court adjudges the laſt vouchee to render to him according to the eſtate he hath loſt; and ſuch recompence is to go over to thoſe in the future remainders, whoſe eſtates are likewiſe by the judgment taken out of them to make good the eſtate recovered. 10 Co. 43. 3 Co. 60. Cro. Eliz. 562. 570. Mo. pl. 953. Jenning's caſe. 10 Co. 39. b. Co. Litt. 362. a.

A. tenant

Cro. Car. 387. 405. Baker v. Hacking.

" *A.* tenant in tail, and *B.* in reverſion in fee, join in a leaſe for life " by deed, which is not warranted by 32 *H.* 8. then *B.* deviſes his re- " verſion, and dies, and after *A.* dies without iſſue: and the queſtion " was, if this leaſe was a diſcontinuance of the eſtate-tail and the rever- " ſion; for then the deviſe of *B.* is void, he having no reverſion, but " only a right of a reverſion, which is not deviſable. And three " juſtices held this leaſe a diſcontinuance, and, by conſequence, the de- " viſe to be void: for the livery is made only by the tenant in tail; for " he only hath the immediate freehold, and his leaſe diſcontinues the " eſtate-tail and reverſion, and gains him a new fee during the leaſe. " And they held likewiſe, that it was a diſcontinuance preſently or not " at all: for the after-accident of the death of the tenant in tail without iſſue " could not make it a diſcontinuance of the reverſion, if it were not ſo " upon making the livery. But *Croke*, J. held it no diſcontinuance, 1*ſt*, " becauſe it ſhould be taken to be the leaſe of the tenant in tail during " his life, and the confirmation of him in the reverſion; and after the " death of the tenant in tail without iſſue, then it ſhould be taken to be " the leaſe of him in the reverſion only; 2*dly*, becauſe their joining in " ſuch leaſe ſhews they had no intent to make any diſcontinuance to " diveſt or diſplace the reverſion. But by other three juſtices it was " adjudged to be a diſcontinuance, and the deviſe void.

2 Lev. 154. 2 Jon. 65. 2 Mod 139. 3 Keb. 321. 580. 632. 681. &c. Piggott v. Lord Saliſbury.

" *A.* leſſee for years, remainder to *B.* wife of *C.* for life, remainder " to *D.* in tail, remainder to *C.* huſband of *B.* for life, remainder to *B.* " in fee; the huſband and wife, by fine *ſur conceſſit*, grant *tenementa præ-* " *dicta et totum et quicquid habent in tenementis prædictis* to *E.* and his heirs " for the life of the huſband and wife, and the longer liver of them, with " warranty againſt them, and the ſurvivor of them: *A.* attorns; after- " wards *F.* father of *D.*, and the huſband and wife, levy a fine *come ceo*, " &c., with warranty ſeverally againſt *F.* and his heirs, which de- " cended on *D.*: and if the fine *ſur conceſſit* by the huſband and wife " ſhould enure to paſs an eſtate in poſſeſſion for their lives, and the life " of the longer liver of them, then it was agreed by all that the remain- " der to *D.* was diſplaced, and then the warranty attaching upon him " bound him: but, if it had paſſed only their ſeveral eſtates by fractions, " *viz.* the eſtate of the wife in poſſeſſion, and the eſtate of the huſband " as a remainder, then there was no ſuch diveſting of *B*'s remainder, and " would let in the warranty upon him. But the better opinion ſeemed " that by the grant of *tenementa prædicta* for the life of the huſband and " wife, and the longer liver of them, an eſtate in poſſeſſion paſſeth for " that time; and that the words *totum et quicquid habent*, &c. cannot be " taken by way of reſtriction to qualify it, ſo as to paſs only their ſeve- " ral eſtates by fractions, that being a diſtinct independent clauſe, but " added by way of accumulation to include and take in whatever in- " the firſt words might be thought inſufficient to carry; and then the " remainder to *D.* was diſplaced, and the warranty of his father " taching upon him, bound his right. For they all agreed, that the " firſt fine, though executory only at firſt, was well executed by the " attornment of the leſſee for years; and though this fine *ſur conceſſit* is " the moſt innocent of all others, and but as a grant of *totum ſtatum ſuum*, " there be proper words of reſtriction, yet with ſuch words it paſſes " a fee as well as the fine *come ceo*, &c, which, if levied by tenant for " life or years, is always a forfeiture of their eſtate, be the reſtriction " what it will. And here they ought to have only granted *totum ſtatum*

ſorum et quicquid habent in tenementis prædictis, without ſaying for what eſtate, or, if any eſtate were named, it ought to have been only for the joint lives of the huſband and wife, or for the life of the wife, and after the death of *D.* without iſſue, then for the life of the huſband: but as it is here, it paſſes an entire eſtate in poſſeſſion for a longer time than they had power to give it, and ſo diſplaces the remainder to *D.*, and lets in the warranty. And yet it was agreed by all, that the intent of the huſband and wife was only to paſs their ſeveral eſtates, becauſe otherwiſe *D.*, by his entry for the forfeiture, might not only have defeated the eſtate of *E.* the purchaſer, but might alſo (being in poſſeſſion) by a common recovery have barred the remainder in fee to the wife; to prevent which, as they thought, they contrived ſuch fine. *E.* having agreed to the purchaſe of the whole eſtate, and *D.* being only to join in the ſale when he came of age. Note—*Garratt* v. *Blizzard* (*ſupra*) was cited and relied on; but the parties after agreed and no judgment was given.

"*A.* by leaſe and releaſe on a marriage intended with *B.*, conveys lands to the uſe of himſelf for 99 years, if he ſhould ſo long live, remainder to truſtees during his life to ſupport contingent remainders, remainder to *B.* for life for her jointure, remainder to the firſt, ſecond and other ſons in tail male ſucceſſively, remainder to the heirs male of the body of *A.* on the body of *B.* to be begotten, remainder to the right heirs of *B.*; the marriage takes effect; and before the birth of any ſon, *A.* and *B* mortgage the ſaid lands for 500 years to the plaintiff for ſecuring 1000*l.*, and then levy a fine *come ceo*, &c. to the plaintiff, in the firſt place for corroborating the term, and after to the uſe of the right heirs of *A.*; the truſtees enter for a forfeiture; then a ſon is born, after *A.* dies, and the truſtees continue poſſeſſion in right of the ſon; the plaintiffs enter, and *B.* is yet living. And if the plaintiffs ſhould hold during the life of *B*, was the queſtion; for there was no endeavour to prove the contingent remainders deſtroyed, there being a ſufficient eſtate in the truſtees to preſerve them till they came in eſſe. For the plaintiffs it was argued, that they ſhould hold during the life of *B.*, for if the remainder in fee had been in a ſtranger, and *A.* and *B.* and that ſtranger had levied ſuch fine, this had been a forfeiture of *A.*'s eſtate, by reaſon of the intermediate remainder to the truſtees, who did not join; but it could be no forfeiture of *B.*'s eſtate for life, becauſe he in the remainder joined; and therefore they only paſſed what they lawfully might paſs, *viz.* their ſeveral eſtates. (1 *Co.* 76. 6 *Co.* 15.) And though both are conjoined in the conuſees, yet there being no forfeiture ſurrender, or extinguiſhment of *B.*'s eſtate for life, the eſtate of the conuſee ſhall open to let in the contingent remainders when they happen, as if no alienation had been made, there being a ſufficient eſtate to ſupport them. And if there was no forfeiture of the eſtate for life of *B.* upon levying the fine, the birth of the ſons after cannot make it ſo, that being matter *ex poſt facto*, and 1 *Co.* 76. *Engliſh*'s caſe was cited, where tenant for life and an infant in remainder joined in a fine, which was after reverſed for the infancy; yet the conuſee held during the life of the tenant for life. 2*dly*, Admitting the eſtate for life of *B.* could not revive and ſeparate from the inheritance to let in the contingent remainders when they happen, being conjoined in the conuſee; yet, after the death of *B.*, they may take place without any ſuch interpoſition; as if *A.* be tenant for life, the remainder

2 Jo. 98.
3 Keb 822.
2 MSS. 50.
Lane v. Vane.

" remainder to *B.* in fee, and *A.* be diſſeiſed, and releaſe to the diſſeiſor,
" he ſhall have the whole fee during the life of *A.*, and *B.* cannot de-
Co. Litt. 276. " feat it or take out his remainder till *A.*'s death. So, if *A.* be tenant
Hob. 276. " for life, remainder to his firſt and other ſons in tail, and before the
1 Roll. Abr. 5. " the birth of any ſon *A.* be diſſeiſed, and then after a ſon be born, and
" *A.* releaſe to the diſſeiſor, he, by this, ſhall have a fee till *A*'s death,
" and then the ſon may defeat it by entry; becauſe the right of *A.* ſup-
" ported it till it came *in eſſe*, and then his releaſe after cannot deſtroy it.
" So here, the eſtate for life of *B.* is virtually *in eſſe*, though being con-
" joined with the remainder in fee in the conuſee it ſhould not ſurvive.
" But in this caſe the remainder in fee being in the wife, ſhe has no
" eſtate for life to forfeit or ſurrender, but has the whole fee in her, ſub-
" ject to divide and let in the contingent remainders when they happen,
" and ſhe has then no new eſtate but the ſame ſhe had before, then join-
" ed, now divided, and therefore the conuſee ſhall hold during her life.
" On the other ſide it was argued for the defendant, that, till the con-
" tingent remainders came *in eſſe*, the wife had the whole fee executed
" in her, and no eſtate for life: for that was not to ariſe till the birth of
" the ſons: and therefore, by her joining in the fine, could not be grant-
" ed or transferred over as any certain or fixed intereſt, but being in
" contingency, was extinguiſhed and deſtroyed by the fine before it took
" effect; and therefore the eſtate of the ſon ſhall be now in poſſeſſion
" diſcharged of it. And a caſe was cited to be reſolved in Chancery by
" the Chancellour, *Hales* Ch. J. *Wyld*, *Ellis* and *Wyndham*, *Februar.*
" 1672, where *A.* conveyed lands to the uſe of himſelf for life, and
" after his death and the death of *B.*, then to the uſe of *C.*, this limita-
" tion to the uſe of *C.* was reſolved to be contingent, by reaſon that
" had no eſtate, and he might ſurvive. And there it was agreed, that
" if *C.* had levied a fine or made a feoffment, the eſtate to *C.* could not
" ver veſt. But this caſe differs from *Bredon* and *Treport*'s caſes: for
" in thoſe caſes there was an eſtate for life *in eſſe*; but here there was
" none, but in contingency. But the principal caſe was adjourned, and
" no judgment appears to be given.

Cro. Eliz. 253. 1 Leon. 243. Jeffery v. Cuite.

" *A.* tenant for life of certain lands,. remainder to his ſon *B.* in tail,
" *A.* and *B.* join in a leaſe by indenture to *C.* for life, remainder to
" *D.* for life, rendering 10*l. per annum* rent. *A.* dies; *B.* accepts
" the rent from *C.* and dies, having iſſue, who alſo accepts the rent
" from *C.*, and then enters, and makes a feoffment, and levies a fine
" to *J. S.*; then *C.* re-enters, and dies, and *D.* enters as in his re-
" mainder. And the queſtion was, If *J. S.* the purchaſer of the
" remainder might avoid this leaſe in remainder to *D.*, or if the
" acceptance of the rent from *C*, the firſt tenant for life, hath
" made good the remainder to *D.*, ſo that he coming in under
" the iſſue of *B.*, who ſo accepted the remainder, ſhould be bound by
" it? And it was adjudged, that the leaſe in remainder to *D.* was
" good, and not avoidable by *J. S.* the purchaſer; for the power to
" avoid this leaſe was only given to the iſſue in tail in reſpect of the
" eſtate-tail, and when that by the fine is bound and gone, the pur-
" chaſer, who is a ſtranger to the eſtate-tail, and not in in privity
" thereof, cannot have the privileges annexed thereto, nor, by con-
" ſequence, can avoid the leaſe, which the iſſue in tail, as ſuch, only
" had a power to do.

" Copy

" Copyhold was granted to one for life, remainder to an infant in fee; they both join in a ſurrender to one who was admitted tenant for life, and after the infant dies, and his heir enters. It was adjudged, that he might well enter without being put to his writ of *dum fuit infra ætatem*; for ſuch ſurrender was but a conveyance by matter *in pais*, which cannot bind an infant, but that he or his heirs may enter, or bring treſpaſs before admittance. Cro Eliz. 50 Knight v. Fortipan.

" *A.* tenant for life of certain lands, remainder to *B.* in tail male, remainder to *A.* in tail, remainder to *B.* in tail general, remainder to *A.* in fee. *A.* and *B.* join in a deed, whereby *A.* grants, and *B.* confirms to *C.* and his heirs a rent-charge of 10*l. per annum* out of the ſaid lands, *B.* being then within age; then *A.* and *B.* levy a fine of the ſame lands to the uſe of *A.* and his heirs, who enfeoffs the plaintiff, and dies, and *B.* hath iſſue yet living. And if the plaintiff was chargeable with this rent, was the queſtion. It was argued, that if a rent be granted by tenant for life, and confirmed by him in the remainder in fee, being within age, that this iſſues out of the eſtate for life only, and is merely a void grant as to the remainder; ſo that if the tenant for life purchaſes the reverſion or remainder, and dies, this ſhall not bind the inheritance. And though he had made a feoffment over, yet a feoffee after his death ſhould avoid it. But here, becauſe *A.* was not only tenant for life, but had alſo a remainder in tail, and after that a remainder in fee, the rent is iſſuing out of all his eſtates; and though it were void as againſt *B.*, who was the next in remainder in tail, and confirmed it, by reaſon of his infancy, yet now that eſtate-tail of *B.* being bound by the fine, and the whole eſtate limited to the uſe of *A.* and his heirs, the court inclined that the rent had ſtill a continuance, and ſhould bind the plaintiff; for the privilege which the tenant in tail could have had of avoiding the rent by reaſon of his infancy ſhall not help the plaintiff, who comes in under all the eſtates of *A.*, which of themſelves would have been ſufficient to go through the whole grant of the remainder, were it not for the remainder in tail to *B.*, and that remainder is now by the fine barred and gone. Cro Car. 103 Holt. v Samback.

" A caſe in effect was this: *A.* tenant for life, remainder to *B.* in tail, reverſion to *A.* in fee. *A.* grants a rent out of the lands, to begin after his death; then he and *B.* join in a fine to the uſe of *A.* for life, remainder to *B.* in tail, or in fee; then *A.* dies; yet the rent ſhall not charge the remainder of *B.*, for each paſſed their ſeveral eſtates only, *viz.* *A.* his eſtate for life, and reverſion in fee, and *B.* his remainder in tail; and there was no eſtoppel, becauſe a ſeveral intereſt paſſed from each of them; and then the remainder of *B.* is no more chargeable with this rent after the fine than it was before, he granting only his own remainder diſtinct from what *A.* granted; and by conſequence, none of the charges of *A.* can affect ſuch remainder after the fine any more than they would have done before. But *quære*, upon *B.*'s death without iſſue, if the rent ſhall not then take effect, being well chargeable at firſt upon the reverſion of *A.*?" Mo. pl. 274.

(I) In what Caſes a Remainder or Reverſion ſhall b ſubject to the Acts or Charges of the particula Tenant.

"I Am now to conſider in what caſes the remainder or reverſion ſha
"be ſubject to the acts or charges of the particular tenant, and
"what not, (which has been partly treated of before,) and when, a
"how, the charges of him in the remainder or reverſion ſhall takeplace.

(K) To what Purpoſes the Remainder is accounte but as one with the particular Eſtate, as whe they are regarded as ſeveral Eſtates.

Page 331
(*Admittance of the*) 3 Keb. 263. 329. Gilb. Ten. 194. Watkin's edit.
Page 332
(*And yet where*) See Gilb. Ten. 246. 250. 305. Watkin's edit. 2 Ld. Raym. 999
Wms. 10. note. F.

AS the rule in Shelley's *caſe is intimately connected with the doctrine in the ceding Treatiſe, and as a controverſy reſpecting the extent of the applicati that rule has unhappily long divided the opinions of ſome of the greateſt L yers of* Weſtminſter-hall; *the Editor feels it a duty he owes to the Publ direct the attention of the reader to a tract lately publiſhed by* Hargrave *in the* firſt Volume *of his* Collection of Law Tract *titled,* "Obſervations concerning the Rule in *Shelley's* Caſe, ch "with a View to the Application of that Rule in Laſt Wills." *controverſy is there fully ſtated; the errors of each of the contending p are pointed out diſtinctly, but with delicacy; and the author's idea true principle of the rule, its ſpirit and uſe, is diſcloſed with perſp and maintained with admirable force and cogency of reaſoning.—It added, that this idea of the rule has been fortified by the opinion of* Thurlowe *in the caſe of* Jones *v.* Morgan (1 Br. Ch. Rep. 220) *by what is ſaid by Mr.* Fearne *in the later editions of his profound on the learning of Contingent Remainders. It is to be hoped therefo the credit of the Profeſſion, and for the ſake of thoſe whoſe titles w come the ſubject of it, that the controverſy will henceforth be cloſed.*

*** *The long note upon the caſe of* Sympſon *v.* Southern, *in page* 468, *of this volume, was communicated to the Editor by the i Author of The Law of Deſcents, and is extracted from a Treatiſe holds, with the publication of which the Profeſſion will be ſhortly gr*

RI

RENT.

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ALL property, by our law, is preſumed to have been originally in the crown; and the king portioned it out in large diſtricts to the great men that had deſerved well of him in the wars, and were able to adviſe him in time of peace. This was the nature of their tenure; and theſe were all the ſervices the king expected in return for ſuch conceſſions. But theſe large diſtricts or countries, would have been but of little uſe, either to the lords, or to the publick, if they had continued in their own hands: In ſuch a caſe, they muſt, in the midſt of their large territories, have wanted almoſt the neceſſaries of life; and the publick that ſtrength and ſecurity, which land well peopled and cultivated produces and yields. Hence it became neceſſary to ſubdivide thoſe territories; and the diviſion muſt neceſſarily have been made among two ſorts of men, to anſwer the ſeveral neceſſities of the lord and the publick;—the *military men*, to attend the lord in the field, and venture their lives for their country;—and the *ſocmen*, to plough the demeſnes which the lord kept in his own hands for the ſupport of his own table, or to make an annual return of corn and other proviſions for that uſe and purpoſe: and hence, by the way, the lands which the ſocmen held were called *farms*, from the *Saxon* word *ferm*, which ſignifies proviſions. Gilb. on Rents, 1, 2, &c.

Theſe corporal ſervices, as money multiplied and trade increaſed, were changed into money by the conſent of the tenants, and the deſire of the lords; and, as the military tenure began to decline, they admitted of compoſitions from the feudal tenant for not attending his lord in the field, and thoſe compoſitions were aſcertained by parliament after the war was over, which was called *eſcuage*: This change of the ſervices ſeems to have been for the eaſe and advantage of the lords, becauſe they were no longer obliged to carry their own proviſions to the camp, when they had money from their tenants, which in every place would ſufficiently provide them with all the neceſſaries of life.

The remedy for the recovery of rent is by way of *diſtreſs*, which ſeems to have come over to us from the civil law: for anciently, in the feudal law, the not paying attendance on the lords' courts, or not doing the feudal ſervice, was puniſhed with the forfeiture of the eſtate. So is *Virgilius*, in the title *Cauſæ ex quibus Feudum amittitur; viz.* "Si vaſſalus a domino non ſervitat, fidelitatemque ei non præſtet; ſi vaſſalus, a domino ejus vocatus, non venerit; ſi pactum feudi non ſervetur:" But theſe *feudal forfeitures* were afterwards turned into *diſtreſſes*, according to the pignorary method of the civil law; that is, the land that is ſet out to the tenant is *hypothecated*, or as a pledge in his hands, to anſwer the rent agreed to be paid to the landlord; and the whole profits ariſing from the land are liable to the lord's ſeizure, for the payment and ſatisfaction of it.

Beſides this, the lord had another ſecurity by the feudal law for the faithful performance of his ſervices: and that was, the ſolemn engagement made by the tenant upon his firſt entering into the feud, by the doing *homage*, and taking the oath of *fealty*: by which the tenant ſolemnly ſware and undertook, to bear faith to him for the lands which he held, and lawfully to do the cuſtoms and ſervices which he ought to do at the terms aſſigned him: hence came that connexion between the lord and tenant

nant, in the feudal law, that dependence and attendance of the tenant in all the circumſtances of life and articles of danger; and, in return of that ſervice and fidelity, the utmoſt protection the lord could give him: "De-" bet quidem tenens manus ſuas utraſque ponere inter manus utraſque do-" mini ſui; per quod ſignificatur, ex parte domini, *protectio*, *defenſio*, et " *warrantia*; et ex parte tenentis, *reverentia* et *ſubjectio*."

This oath of *fealty* or fidelity was, we ſee, taken by the tenant on account " of the lands holden from the lord; for ſo ſays the tenant, — " *that he* " *will be faithful to the Lord for the lands which he holds*;"—and there-fore this engagement muſt ſubſiſt while the tenure between the lord and tenant remains: and it was looked upon to be ſo ſacred an obligation and ſo neceſſary to be punctually obſerved, that originally, as we have obſerved, the breach of it was attended with no leſs a penalty than the for-feiture of the *feud* itſelf; and afterwards, when the rigour of that law came to be mitigated, with a ſeizure of every thing that was found on the land. Now the diſtreſs being ſubſtituted inſtead of the ſeizure of the *feud*, we may eaſily account, why the power of diſtraining always attend-ed the *fealty*, or, as the law-books term it, was inſeparably incident to it; becauſe the power of ſeizure could only belong to him in whoſe *domain* the tenant was, and to whom the lands muſt return when the feudal do-nation to the tenant was ſpent; for it had been unreaſonable and abſurd that the tenant ſhould forfeit his land for not paying a ſervice to a perſon to whom he never obliged himſelf by any oath or engagement: and hence it is, that if the lord upon the donation had reſerved to himſelf any ſervice or rent, and had afterwards granted the rent to a ſtranger, though the tenant had attorned, or conſented to the grant, yet the ſtranger could not diſtrain for the rent; for as the power of ſeizure, ſo the diſtreſs that was ſubſtituted in its place, belong only to him of whom the lands were held and in whom the right of *reverter* was when the feudal donation was ſpent; and therefore, the ſtranger who could pretend no ſuch right from the grant, could have no power of ſeizing the *feud* for the non-payment of rent, nor conſequently of diſtraining, becauſe then the land would be liable to two different ſeizures at different times.

So it was upon leſſer donations: as, if a leaſe had been made for life reſerving rent, and the leſſor grants the rent, the grantee has no remedy for the recovery of it, for the former reaſon: but, if the reverſion itſelf had been granted to a ſtranger, the whole ſervices incident to it had paſſed and the grantee, after attornment, might well diſtrain, becauſe the tenant muſt neceſſarily be of him to whom the lands muſt return when the feudal donation is ſpent; and the tenant muſt owe his fidelity to him whoſe tenant he is, becauſe it were contradictory, to make him bear faith for the ſame land to different perſons; therefore the obligation of his firſt oath of fidel-lity muſt ceaſe, ſince he no longer holds any land of him to whom he owed it. But theſe things will be conſidered more at large in treating of rents under the following diviſion:

(A) Of the ſeveral Kinds of Rents: And herein

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(*A rent-ſeck*) In what caſes a rent-ſeck may be diſtrained for, Keilw. 104. Co. Lit. 153 a 14th edit.

(C) Upon what Conveyance a Rent-Service may be reſerved.

A rent cannot be reſerved on a fine *ſur cognizance de droit come ceo*, or on any other fine which is executed: but if an eſtate for life only be conveyed by the fine, the cogniſor may reſerve a rent with a clauſe of diſtreſs. Bro. Abr. tit. Fines, p. 30. Roll. Abr. tit. Fine, O. p. 10.

(H) Of the Continuance of the Rent, and to whom to be paid; and herein, of the diſtinct Intereſts of the Heir and Executor of the Leſſor.

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(*If a leaſe be made reſerving rent at Michaelmas*) 2 Bl. Rep. 1077.

Where a tenant in tail granted a leaſe not warranted by the ſtatute, and died without iſſue a week before the day of payment of the half year's rent, and the leſſee afterwards paid all that half-year's rent to the remainder-man, Lord *Hardwicke* held the executors of the tenant in tail entitled to the rent to the day of his death; for as the leſſee had ſubmitted to pay it, but had paid it to one who had no right to it, the perſon to whom it was ſo paid ſhould be accountable, and conſidered as receiving it to the uſe of thoſe who were in equity entitled to it. Paget v. Gee, 1 Burn's Juſt. tit. Diſtreſs, § 17. Ambl. 198.

Where tenants from year to year under demiſes from a teſtamentary guardian of an infant tenant in tail who died without iſſue between the days of payment, had paid the whole of the rent to receivers, Lord *Thurlow* directed ſuch part of it as had accrued due in the lifetime of the tenant in tail to be paid to his perſonal repreſentative, for that the tenants holding from year to year, or from period to period, from a guardian without leaſe or covenant, could not be allowed to raiſe an implication in their own favour that they ſhould hold without paying rent to any body. Theſe two caſes were decided independently on the ſtatute of 11 Geo. 2. though Lord *Hardwicke* ſtrongly inclined to think that a tenant in tail was within it: a tenant in tail after poſſibility of iſſue extinct, and a tenant for years determinable upon lives, he thought, were clearly within it. Vernon v. Vernon, 2 Br. Ch. Rep. 659.

Where money to be laid out in the purchaſe of land is veſted in government ſecurities, and the intereſt and dividends are directed to go in the ſame time as the land would, in thatcaſe if the tenant for life die between the days of payment of the half-yearly dividends, his executors are not entitled to a proportional ſhare thereof to the time of his death, but the remainder-man takes the whole. Sherrard v. Sherrard. 3 Atk. 502. Wilſon v. Harman, 2 Vez. 672. Ambl. 279. Raſhleigh Walters, 3 Br. Ch. Rep. 99. Pearly v. Smith, 3 Atk. 260. In this laſt caſe, the money had originally ſecured by mortgage, but by order of the court had been transferred to government ſecurities.

Of the Recovery and Demand of the Rent: And herein,

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(*If that if*) If lands of a ſubject, whereon rent is reſerved, with a condition of re-entry to the king, he may, by reaſon of his prerogative, take advantage of the condition without demand, though the ſubject could not. 5 Co. 57 a. b.

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(*By the* 4 *Geo.* 2.) The meaning of the act is, that where there is no expreſs ſtipulation, in the leaſe for entry without demand, the leſſor may, notwithſtanding, enter without demand, provided ſix months' rent is in arrear, and there is not a ſufficient diſtreſs; otherwiſe, in ſuch caſes, a demand muſt be made. Doug. 469. Goodright *ex dim.* Hare v. Cator.——Acceptance of rent by the landlord after the leaſe has been forfeited, has been holden to be a waiver of the forfeiture in ejectments brought upon this act; for it is a penalty, and by accepting the rent, the penalty is waived. *Per* Aſton, J. Cowp. 247. A very little matter is ſufficient to keep the poſſeſſion; therefore where the defendant had left ſome beer in the cellar, and the landlord proceeded as on a vacant poſſeſſion, the judgment and execution were ſet aſide with coſts. Bull. N. Pri. 97. 4th edit. Savage v. Dent.

§ 3 If the leſſee, his aſſignee, or any other perſon, claiming any right, title, or intereſt at law or in equity to the leaſe, ſhall, within the time aforeſaid, file one or more bill or bills for relief, in any court of equity, he ſhall not have or continue any injunction, againſt the proceedings at law on ſuch ejectment, unleſs he ſhall within forty days next after a full and perfect anſwer ſhall be filed by the leſſor of the plaintiff in ſuch ejectment, bring into court, and lodge with the proper officer, ſuch ſum and ſums of money as the leſſor of the plaintiff ſhall in his anſwer ſwear to be due and in arrear, over and above all juſt allowances, and alſo the coſts taxed in the ſaid ſuit, there to remain till the hearing of the cauſe or to be paid out to the leſſor or landlord on good ſecurity, ſubject to the decree of the court; and in caſe the bill ſhall be filed within the time aforeſaid, and after execution executed, the leſſor of the plaintiff ſhall be accountable for no more than he ſhall really and *bonâ fide*, without fraud deceit, or wilful neglect, make of the demiſed premiſes from the time of his entering into the actual poſſeſſion thereof; and if that happen to be leſs than the rent reſerved on the leaſe, then the leſſee, before he ſhall be reſtored to his poſſeſſion. ſhall pay to the leſſor or landlord what the money he ſo made fell ſhort of the reſerved rent, for the time he held the lands.

Provided that if the tenant ſhall, at any time before the trial in ſuch ejectment, pay or tender to the leſſor or landlord, his executors or adminiſtrators, or his or their attorney in that cauſe, or pay into court where the cauſe is depending (*a*), all the rent and arrears, together with the coſts, all further proceedings on the ſaid ejectment ſhall ceaſe and be diſcontinued; and if the leſſee, his executors, adminiſtrators, or aſſigns, ſhall, upon ſuch bill filed as aforeſaid, be relieved in equity, and they ſhall hold the demiſed lands according to the leaſe thereof made, without any new leaſe to be thereof made to him or them.

(*a*) This had been permittedantecedently to the paſſing of this act, where the court were atisfied, that the ejectment was brought upon no other title, than a re-entry for the non-payment of rent. 2 Salk. 59 Str. 900. Andr. 341. It is now permitted too in other actions beſides ejectment, where the ject is the recovery of rent: as, in replevin, 1 H Bl. 24 in covenant, 1 Wilſ. 79 in debt rent, and aſſumpſit for uſe and occupation, Barnes, 19. Pr. Reg. C P. 257. 1 Curr. 57. upon payment of the rent and coſts, the court will ſtay the proceedings in ejectment, notwithſtanding judgment has been obtained. 8 Mod. 345. 2 Str. 900

(K) The ſeveral Remedies for the Recovery of Rents: And herein,

(*The remedy*) Rents of aſſiſe, and chief-rents which have been duly paid for the ſpace of years within the ſpace of twenty years before the firſt day of the ſeſſion of parliament when the tute paſſed; or ſhall hereafter be created, as in caſe of rent reſerved upon leaſe, 4 G. 2. c. 5. For a rent granted in fee ſince the ſtatute of *quia emptores*, and before the paſſing of the tute, there cannot be a diſtreſs but under this ſtatute, and therefore in an avowry for ſuch treſs, the caſe muſt be brought within it. Dougl. 604. Bradbury v. Wright.

It is ſettled, that goods diſtrained for rent and not ſold, are liable to ſeizure on an immediate extent for the king's own debt; for the mere diſtreſs does not change the property. Parker, 112 Rex v. Cotton. Whilſt goods are upon the premiſes the landlord may diſtrain them, notwithſtanding an actual aſſignment under a commiſſion of bankrupt 1 Atk. 103. *ex parte* Plummer. But if the goods are carried off the premiſes, or ſold, he loſes his lien upon them. 1 Atk. 104. *ex parte* Grove. 1 Co. Bankrupt Laws, 221. *ex parte* Devine. So he does, if the goods are replevied and the leſſee afterwards, and before any proceedings in replevin, becomes bankrupt, and the aſſignees ſell the goods. Bradyll v. Ball, 1 Br. Ch. Rep. 427. Where a trader, after committing an act of bankruptcy, takes a ſhop and agrees to pay half a year's rent in advance, where by the cuſtom of the country ſo much becomes due on the day on which the tenant enters, the landlord after an aſſignment under the commiſſion, and before the expiration of the half year, may diſtrain the goods on the premiſes for half a year's rent. Buckley aſſignee of Buckley v. Taylor, 2 Term Rep. 600.

§ 4. Provided, if ſuch goods and chattels exceed not the value of 20*l.* the landlord, his bailiff, ſervant, or agent, may exhibit (*a*) a complaint in writing againſt ſuch offender or offenders before two or more juſtices of the peace of the ſame county, riding or diviſion of ſuch county, reſiding near the place whence ſuch goods and chattels were removed, or near the place where the ſame were found, not being in the lands or tenements whence ſuch goods were removed, who may ſummon the parties concerned, examine the fact, and all proper witneſſes upon oath, and if any ſuch witneſs be one of the people called Quakers, upon affirmation required by law, and in a ſummary way determine whether ſuch perſon or perſons be guilty of the offence with which he, ſhe, or they are charged; and in like manner to inquire of the value of the goods and chattels by him, her, or them reſpectively ſo fraudulently carried off or concealed as aforeſaid; and upon full proof of the offence (*b*), by order under their hands and ſeals, the ſaid juſtices may and ſhall adjudge the offender or offenders to pay double the value of the ſaid goods and chattels to ſuch landlord, his bailiff, ſervant, or agent, at ſuch time as the ſaid juſtices ſhall appoint: And in caſe the offender or offenders, having notice of ſuch order, ſhall refuſe or neglect ſo to do, may and ſhall, by warrant under their hands and ſeals, levy the ſame by diſtreſs and ſale of the goods and chattels of the offender or offenders, and for want of ſuch diſtreſs may commit the offender or offenders to the houſe of correction, there to be kept to hard labour without bail or mainpriſe for the ſpace of ſix months, unleſs the money ſo ordered to be paid as aforeſaid ſhall be ſooner ſatisfied.

(*a*) The complaint need not be upon oath. The King v. Biſſex, Tr. 29 & 30 G. 2. K. B. 1 Burn's Juſt. title. Diſtreſs, 8.

(*b*) This is merely an order, not a conviction, and if good in ſubſtance, great ſtrictneſs in point of form is not requiſite The evidence thereforeneed not be ſet out. *Idem.* The court will intend that the juſtices had juriſdiction, where

order follows the words of the ſtatute. *Id* It is not neceſſary to ſtate in ſo many words, that rent was in arrear when the goods were carried off: it is enough if it appears from the order. Nor is it neceſſary to ſtate for what time due. *Id* It is enough to ſay that the goods were on about ſuch a time. *Id.* In a charge againſt a perſon for aſſiſting the leſſee in carrying away goods, it is only neceſſary to ſtate that offence; for the carrying away by the leſſee, and the aiding him in carrying them away, are by the ſtatute two diſtinct offences. *Id.* The ſtating the charge in the diſjunctive, as that the defendant aſſiſted in removing *or* concealing the goods, is ſufficient. R. v. Middleton, 1 Burr. 399.

§ 6. Appeal given to the quarter-ſeſſions; and appellant entering into recognizance with two ſureties in double the ſum ordered by the juſtices to be paid, the execution of ſuch order in the mean time to be ſuſpended.

§ 7. Landlords are empowered to break open houſes, &c. to take goods fraudulently ſecured therein, firſt calling to their aſſiſtance the conſtable, &c. of the hundred, borough, pariſh, diſtrict, or place where the ſame are ſuſpected to be concealed; and in the caſe of a dwelling

(*a*) *Before this ſtatute* It was holden, that when in the houſe, the

a dwelling houſe (*a*), oath being alſo firſt made before ſome juſtice of the peace of a reaſonable ground of ſuſpicion that ſuch goods are therein.

landlord might break open an inner door. Comb. 17.

By § 9. The diſtreſs of corn, &c. is to ceaſe, if the rent in arrear, and the coſts of making the diſtreſs, be paid before it is cut.

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(*But if the*) The diſtinction when the profits taken by the leſſee after entry are, and when they are not to be in ſatisfaction of the rent, is not admitted in equity; for the courts of equity will always make the leſſor account to the leſſee for the profits of the eſtate during the time of his being in poſſeſſion of it, and decree him after he is ſatisfied the rent in arrear, and the coſts, charges, and expences attending his entry and detention of the lands, to give up the poſſeſſion to the leſſee, and deliver and pay him the ſurplus of the profits of the eſtate, and the money ariſing thereby. Co. Litt. 203. a. n. 3.

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(*But if the rent*) To entitle himſelf to the penalty, Hobart thought that there muſt be a demand of the rent on the day after it became due, that is, in the caſe here put, on the eleventh day.

(*But if the plaintiff*) But *per* Holt, C. J. if a leſſor avows for rent and a *nomine pœnæ*, and the rent was not demanded, ſo that the *nomine pœnæ* was not due, a general judgment for both ſhall be entirely reverſed. Ld. Raym. 256.

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(*If tenant pur auter*) See the caſes on this branch of the ſtatute of Anne, tit. Diſtreſs (A).

And by a) A receiver under the court of Chancery is an agent lawfully authoriſed within this act to give notice. The court of K. B. conſidered the notice itſelf to be a ſufficient demand. But the court of C. P. ſeemed to think the demand of poſſeſſion to be diſtinct from the notice, and they held that a demand made on the laſt day of the term was premature, inaſmuch as the term did not in ſtrictneſs of law expire till midnight, but in the ſame caſe determined that the notice ought to be given before the expiration of the term. Wilkinſon v. Collett, 5 Burr. 1694. Cooting v. Derby, 2 Bl. Rep. 1075. But the law ſeems to be as laid down by the court of B. —If a landlord give his tenant notice to quit at the expiration of his leaſe, he is entitled to double rent, if the tenant holds over: and a ſecond notice given to the tenant after the expiration of the firſt notice "to quit on a ſubſequent day, *or* to pay double rent," is no waiver of ſuch firſt notice, or of the double rent which has accrued under it. Meſſenger v. Armſtrong. 1 Term Rep. 53. One tenant in common may bring this action for his moiety without his companion, 2 Rep. 1077

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(*And by the ſaid laſt*) *Nil habuit in tenementis* cannot be pleaded to an action for uſe and occupation, Lewis v. Wallace, Hil. 25 G. 2. K. B Bull. Ni Pri 159. 4th edit 2 Wilſ. 208. Nor can the defendant in ſuch an action bring evidence to impeach the plaintiff's title. Cooke v. Loxdale, 5 Term Rep. K. B. 4.

(L) Rent when and how diſcharged; and here of the Eviction of the Tenant.

Gilb. on Rents, 145.

A Rent-ſervice is ſomething given by way of retribution to the lord for the land demiſed by him to the tenant; and, conſequently the leſſor's title to the rent is founded upon this; that the land demiſed is enjoyed by the tenant during the term included in the contract. For the tenant can make no return for a thing he has not: if therefore the tenant be deprived of the thing letten, the obligation to pay the rent ceaſes, becauſe ſuch obligation has its force only from the conſideration, which was the enjoyment of the thing demiſed. Hence then we may draw theſe concluſions or inferences.

s, if a) It must be so pleaded: a plea of mere entry by the lessor, or destruction by him of part of the premises, without alleging an actual expulsion, is not sufficient; for these are simply trespasses. Hob 326. Reynolds v. Buckle, Cowp. 242. Hunt v. Cope. 2 Jon. 148. Roper v. Loyd.

Where rent was so granted, as that upon some contingency happening, there was no one who could take by the grant, in such case the rent was said to be *determined*, for it could not properly be said to be extinguished or suspended, these terms being only applicable when there is an union in the same person, either absolute or temporary, of the rent and the land out of which it issues. A determination of it happened, when rent was granted to one *pur auter vie*, and the tenant *pur auter vie* died in the lifetime of *cestuy que vie*, here, as there could be no general occupancy of a rent, and no special occupant was marked out, it determined upon the death of the grantee. So, where a rent was granted to one, his executors, administrators, and assigns, and the grantee died in the lifetime of the tenant *pur auter vie*, it was holden that it did not go to the executor, being a freehold which he was incapable of taking, and therefore where there was no assignment, determined by the death of the grantee. So where rent was granted to one and his heirs *pur auter vie*, and the grantee died in the lifetime of *cestuy que vie*, leaving an heir, in such case the rent is not determined, but goes to the heir as a special occupant (*a*). This question, however, with respect to the determination of rents by occupancy is now universally prevented by two statutes, *viz.* the 29 *Car.* 2. c. 3. §. 2. which makes estates *pur auter vie* devisable, and if not devised, chargeable in the hands of the heir as assets, if he takes them as special occupant; and if he does not, directs that they shall go to the grantee's executors and administrators, and be assets in their hands; and the 14 *G.* 2. c. 20. §. 4. which in the case of intestacy makes the surplus of such estates distributable.

Holder v. Smallbrooke, Vaugh. 199. 3 P. Wms. 264 (D). Salk. 189. 2 Roll. Abr. 150. Mo. 664. Cro. El. 901. Yelv. 9. Noy, 48. But see 3 Atk. 466. where Ld. Hardwicke thought that executors if named in the grant might have taken an estate *per auter vie*, though a freehold before the statute of 29 Car. 2. Co. Lit. 41. b. n. 3, 4, 5. 14th edit.

Ld C. J. Vaughan thought that there could be no occupancy, either general or special, of a rent, and therefore that the heir took in this case by descent as heir of a descendible freehold (see the notes in Co Litt. above referred to.

(*a*) Of Apportionment*, and herein of the Suspension and Extinguishment of the Rent; And therein.

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(And first,) Sav. 69. (*a*) Noy, 5. The terre-tenant must plead this, in order to exonerate the under.

(In some cases) Hobart *arguendo* observes, that the tenant is not compellable to attorn, and Ld C. B. Gilbert in his treatise on this subject, 165. seems of the same opinion. But see the page,

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(If part of the land be burnt) But this was on the express covenant, 2 Str. 763. S. C. Earl of Winchelsea v. Duke of Bolton, Com. Rep. 627. Belfour v. Weston, 1 Term Rep. 310. Doe v. Wetherham, *Id.* 705. Q. Whether, if an action were brought for the rent in such case, equity would not relieve? Brown v. Quilter, Ambl. 619. Where a landlord is bound to repair in certain cases, and the tenant in one of those cases from a sudden accident is obliged to make those repairs to prevent further mischief, if an action be brought against the tenant for the rent, a court of equity will not interpose, because the tenant may set off in the action the money advanced for the repairs, as money paid to the use of the landlord. Waters v. Weigall, Anstr.

(*But*,

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(*But if in debt*) Com Rep. 42. 2 Salk. 580. 5 Mod. 363. where it was holden, that *before* judgment an avowant may abate his avowry for part of the rent diſtrained for, but not *after* judgment.

Replevin and Avowry.

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(L) Of the Judgment in replevin.

(A) The Nature and Deſcription thereof.

(*Replevin*) Spelman in his Gloſſary, *voc.* "*Replegio*," deſcribes it thus—*Replegiare eſt r apud alium detentam, cautione legitimâ interpoſitâ, redimere. Et cautio hæc eſt ſtipulatio in formâ j exhibita, de ſtando juri, et ſiſtendo ſe foro. Dictum autem* replegiare *quaſi* revadiare, *hoc eſt, vadem pignus unum loco alterius ſuggerere, conſtituere.* In other words, a replevin is a judicial writ to t ſheriff, complaining of an unjuſt taking and detention of goods and chattels, commanding t ſheriff to deliver back the ſame to the owner, upon ſecurity given to make out the injuſtice of ſ taking, or to return the goods and chattels. Gilb. Replev. 85.

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(*That the avowant*) But a defendant in replevin is not entitled to move for judgment as in c of a nonſuit under the ſtat. 14. G. 2. c. 7. Jones v. Concannon, 3 Term Rep. 661. Shortbridg Hiern. 5 Term Rep. 400.

(*But, though an avowry*) But ſee *contr.* Lamſhead v. Leate, Sir W. Jones, 253. 1 Roll. A 220. S. C. and Calley v. Spearman, 2 H. Bl. 386. He cannot avow alone, but muſt alſo m cognizance as bailiff of his companion.

(C) Replevins, out of what Courts and by wh Authority they iſſue; and herein, of the Pow and Duty of the Sheriff.

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(*And therefore*) The different reports of the caſe of Hallet v. Birt do not agree as to the op of the court upon this point. Carthew's report is ſtated in the paſſage immediately prece The language of the court in 12 Mod. 120. is this—Suppoſe the hundred court might hol of replevin, which is hard to imagine, yet it muſt be as a court; and aſked how a thing c graſted on a preſcription, which had its original by act of parliament: and gave judgment fo plaintiff. Skin. 674. S. C. adjudged for the plaintiff; becauſe the defendant having ſhew property in a ſtranger, the plea amounts to the general iſſue; and though a hundred court hold plea in replevin, this ought to be in court, and not out of court. S. C. 5 Mod. 25 cordingly; and *per cur.*—It is true, all theſe courts do hold plea in replevins; but it is ill for the party ought to go to the ſheriff for the purpoſe, whoſe court is in nature of a court- Therefore this cuſtom was holden to be void, as againſt law and reaſon. And ſo the p had judgment, the plea being naught. 1 Ld. Raym. 219. S. C. ſaith, that after ſeveral ments at the bar it was reſolved, that ſince the ſheriff could not replevy by plaint at the co law, but by writ only, and that in his county court; the hundred court, which derives its rity from the county court, cannot do it by preſcription. And the ſtatute of Marlebridg not extend to the hundred court; therefore this replevin granted out of this court is ill. e ly being granted by the ſteward, who is not a judge of the court; and the uſage in ſuch c not alter the law; therefore judgment was given for the plaintiff.

(*So, when the*) *Vide* Bro. tit. Repl. pl. 51 *contr.* And a replevin lies againſt the king, if goods be in his hands. *Per* Hide, to the Lords. 3 Ruſh. 1361. But, if a diſtreſs is taken upon a ſee farm rent or other duty to the crown, it is conſidered as a contempt to replevy; and an attachment will iſſue upon it. Rex v. Oliver, Bunb. 14. And, if a man at this day, there being a ſeizure in order to condemnation, were to preſume to replevy the goods, it would be a contempt of the court of Exchequer, for which an attachment would be granted inſtantly. *Per* Eyre, C. B. Anſtr. 212.

(*It was ruled*) (*a*) But now in ſuch caſes it is conſidered as a contempt for a party to replevy; and an attachment will iſſue upon it. Rex v. Oliver, Bunb. 14. Anſtr. 212. S. C. cited by Eyre, C. B.—Replevin does not lie for goods diſtrained on a conviction (for deer-ſtealing). Rex v. Monkhouſe, 2 Stra. 1184.—And if the under-ſheriff grants it, an attachment ſhall go againſt him. *Ibid.*

If a ſuperior juriſdiction award an execution, it ſeems, that no replevin lies for the goods taken by the ſheriff by virtue of the execution; and if any perſon ſhould pretend to take out a replevin, and execute it, the court would commit him for a contempt of their juriſdiction, becauſe by every execution the goods are in the cuſtody of the law, and the law ought to guard them: and it would be troubling the execution awarded if the party on whom the money was to be levied ſhould fetch back the goods on a replevin. And therefore the courts conſtrue ſuch endeavours to be a contempt of their juriſdiction, and upon that account commit the offender. But, if any *inferior* juriſdiction iſſues an execution, a replevin will lie for the goods taken by that execution; becauſe the inferior juriſdiction being reſtrained within particular limits, the officer who took the goods, is obliged to ſhew that he took the goods within thoſe limits, and that the inferior court which iſſued the execution, did not exceed their authority in iſſuing it. Gilb. Replev. 154.

When juſtices exceed the ſpecial juriſdiction given to them by a particular ſtatute, the goods which have been diſtrained in conſequence of ſuch exceſs of juriſdiction may be replevied, even though the court of appeal has confirmed the warrant of diſtreſs. As, where a diſtreſs was taken for a poor's rate for lands not on the occupation of the plaintiff, the court held, notwithſtanding the ſeſſions on appeal had confirmed the rate, that the diſtreſs was repleviſable, becauſe the determining that a man may be aſſeſſed for what he does not occupy, was an exceſs of the juriſdiction given by the 43 *Eliz. c.* 2. and 17 *G.* 2. *c.* 38. Milward v. Caſſin, 2 Bl. Rep. 1330.

It hath been ſaid, that goods taken under a warrant of diſtreſs granted by commiſſioners of ſewers, cannot be replevied by the ſheriff, at leaſt, whilſt in the hands of the officer. But this opinion hath been doubted of by very high authority. And where goods ſo taken had been actually replevied, and the proceedings in replevin had been removed into the King's Bench, that court refuſed to quaſh the proceedings in a ſummary way, but left it to the defendant in replevin to put his objection on the record. Callis. 195. 7. 200. Pritchard v Stephens, 6 Term Rep. 522.

(D) Of the Pledges in Replevin, and the Proceedings againſt them.

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(*There are*) And not only the ſheriff, but the under-ſheriff, and the replevin clerk are reſponſible for the ſufficiency of the ſureties. Richards v. Acton, 2 Bl. Rep. 1120.

(*An*

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(*An action*) Bull. N. P. 60. 4th edit S. C. by the name of Prowſe v. Pattiſon. In ſuch action ſome evidence muſt be given of the inſufficiency of the pledges or ſureties, but very ſlight evidence is ſufficient to throw the proof upon the ſheriff; for the ſureties are known to him, and he is to take care that they are ſufficient. Sannders v. Darling and another. Bull. N. P. 60. 4th edit.—The extent of the ſheriff's liability in this action, where the replevin has been of a diſtreſs for rent, does not ſeem to be yet preciſely ſettled. In Gibſon v. Burnell, C. B. 30 G. 3. (cited in 2 H. Bl. 549. and 4 Term Rep. 434.) Gould. J. before whom the action was tried, held, that the plaintiff might recover the coſts of the replevin ſuit, as well as the rent in arrear. In Yea v. Lethbridge, 4 Term Rep. 433. the court of K. B. held, that the ſheriff was not anſwerable beyond the value of the diſtreſs. In Concanen v. Lethbridge, 2 H. Bl. 36. the court of C. B. determined, that he was liable for the whole damage which the party had ſuſtained by his neglect. But afterwards, in Evans v. Brander, 2 H. Bl. 547. the court of C. B. (three of the judges being then changed) ſaid the ſheriff ſhould be liable no further than the ſureties would have been if he had done his duty, and taken a bond under the ſtatute 11 G. 2. c. 19. and they had been ſufficient; that their reſponſibility was limited by that ſtatute to double the value of the goods diſtrained, which ſum ought to be the meaſure of damage againſt the ſheriff.—The party being entitled to an action againſt the ſheriff for omitting to take a replevin bond, the court of K. B. will not therefore grant an attachment againſt him. Rex v. Lewis, 2 Term Rep. 617. A defendant in replevin is entitled to an aſſignment of the bond, if the plaintiff in replevin do not appear in the county court, and proſecute according to the condition. And he may ſue the bond as aſſignee of the ſheriff in the ſuperior courts, though the replevin be not moved out of the county court. Dias v. Freeman, 5 Term Rep. 195.

(E) Of the Writs or Proceſſes in Replevin: And herein.

1. Of the original Writ of Replevin.

Gilb. Replev. 106. (*a*) 2 H. 7. 5. Fitz. Abr. tit. Replevin, pl. 16.

When the *pluries* iſſues, it hath been much diſputed, whether the ſheriff's *vicontiel* power be determined. And it is ſaid in one caſe (*a*) that ſince the writ is to replevy, *vel cauſam ſignifices*, the *vicontiel* power determines. But, if the ſheriff does not replevy, then he is to ſhew cauſe why he did not; and this is argued to be the ſenſe of the writ from the disjunctive words contained in it. But I take it, ſaith *Gilbert*, that the *vicontiel* power is determined by the *pluries*. 1. Becauſe the ſheriff has been twice guilty of neglecting his duty, and therefore is not to be truſted with judicial power. 2. He is anſwerable to the court how he has obeyed the writ; and therefore the court muſt have the writ, to ſee whether he has done his duty or not. And if the court be entitled to the writ to ſee whether the officer has done his duty, he cannot proceed on a falſe writ.

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(*If on the*) (*c*) *Withernam* is derived from the *Saxon* words *weder* (other) and *naam* (diſtreſs) ſignifying another diſtreſs, inſtead of the former, which was eloigned. *Vetitum namium* ſignifies forbidden diſtreſs; and therefore though a diſtreſs were originally lawful, yet, if it be detained againſt the replevin, it is *vetitum namium* and unlawful. Gilb. Replev. 109. 2 Inſt. 140. In the old Northern languages the word *withernam* is uſed as equivalent to repriſals. Stiernh. Jure Sueon. l. 1. c. 10.—(*d*) It is ſaid, that it is the uſage in the King's Bench, that they be delivered to the plaintiff: by which, it ſeems, that the form of the writ of *withernam* there is ferent from that in the regiſter. This is a point that has been ſeveral times controverted; ſome of the clerks made the diſtinction between the practice of the King's Bench and Common Pleas. But the true diſtinction is between the *original* and the *judicial* writ of *withernam*. In the former, the ſheriff is to take *et ea detinere donec eidem*, &c. which obliges the ſheriff to detain the cattle or goods in his own cuſtody. But in the judicial *withernam* the words are, *capias in withernam, et alvo et ſecure cuſtodiri facias, donec*, &c. which is to be interpreted, "that he muſt keep them to the plaintiff upon good ſecurity," for that is making them to be ſafely kept. The reaſon of the difference is this, that upon the *vicontiel* writ below, where it was found that the beaſts were eloigned, the award of taking the defendant's beaſts could be only *quouſque* he gaged deliverance. For even an execution in the ſheriff's court was no more than levying a pain, to make the party perform the ſentence of that court; for they could not execute the ſentence of that court

changing the property, or delivering it over to the ſuitor, but by levying pains to make the party perform it. And when the return of *elongata* is made into Chancery, the *withernam* goes out as a mere judicial proceſs, and is conceived in the ſame manner as it is below; and therefore in the writ *de excutione facienda in withernam*, there is no return into the king's courts. But, where the *elongata* is returned into the King's Bench or Common Pleas, there, the *withernam* goes out as a judicial proceſs, and there, the courts, who can alter the property, have made it *ſecundum legem talionis*, viz. that the defendant's goods ſhall be delivered to the plaintiff to make uſe of them, until his own are reſtored. And it was ſaid to be the practice of the King's Bench, becauſe that was the court, where the *lex talionis* in the caſe of murder and maihem ſettled the practice. Gilb. Replev. 122, 1.

(*Upon*) The writ of *withernam* therefore is *ad reſpondendum tam domino regi de contemptu, quam parti de damno et injuria.*

3. Of the Writ of Second Deliverance.

So, it has been determined, that the writ of ſecond deliverance is no ſuperſedeas of the writ of enquiry of damages upon the 17 *Car.* 2. *c.* Cooper v. Sherbrooke 2 Wilſ. 116.

Where a defendant puts in a plea to the writ of replevin, as, property in a ſtranger, or in the defendant; and theſe pleas diſaffirming the property of the plaintiff, are by verdict found for the plaintiff, or upon demurrer adjudged for him; in theſe caſes the defendant ſhall have return irrepleviſable: for there can be no new replevin at common law, as upon a nonſuit, becauſe the court have already given their judgment upon the regularity of the caption. For if the property be in the defendant or a ſtranger, the plaintiff can have no cauſe to complain; and therefore to grant a new replevin, or, which is the ſame thing, not to make the return irrepleviſable, would be to leave that ſame point open to an examination, which has already been determined: and no writ of ſecond deliverance can be given by the ſtatute, for that is only upon a nonſuit. But, if the defendant pleads property in the plaintiff and *I. S.* which only abates the writ under the preſent form; or pleads *cepit in alio loco*, which abates the count, and, conſequently, the writ; in theſe caſes, as there can be no return without an avowry; ſo that return cannot, in the nature of the thing, be irrepleviſable, becauſe theſe pleas only abating the writ, muſt neceſſarily allow a writ under a better form. And it were a contradiction to allow a new replevin to the plaintiff for the ſame beaſts, which the court have returned to the defendant irrepleviſable. So, if the plaintiff confeſſeth the plea of the defendant to be true, the defendant ſhall have return, but not irrepleviſable. Gilb. Replev. 219. 1 Ld. Raym. 217.

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(*Note by the* 17 *Car.* 2. *cap.* 7.) 3 Bl. Comm. 150

4. Of the Writ *de proprietate probanda*, and the Claim of Property.

The writ *de proprietate probanda* iſſues out of the Chancery, or out of *B.* or *C. B.* When it iſſues out of the Chancery, it is an original, and goes upon the ſheriff's return to the *alias* replevin: when out of either of the other courts, it is judicial, and granted on the return of the *pluries*. The reaſon why theſe courts do not grant it till the *pluries* is, that the *pluries* only is returnable there, for the original and *alias* give no day, but are merely *vicontiel*. Dy. 172. 3. 2 Salk. 583. Reg. 81.

A man cannot claim property in the county court by his bailiff or attorney: and the reaſon is, for that if the claim fall out to be falſe, he ſhall be fined for his contempt, which the lord cannot be, unleſs he make claim Co. Lit. 145. b. 1 Lev. 90. 2 Keb. 441.

claim himſelf: for *nemo punitur pro alieno delicto.* But in the king's bench one may make conuſance and claim property by a bailiff; for *there*, the bailiff is not liable to a fine.

(H) Of the Declaration in Replevin.

Walton v. Kerſop, 2 Wilſ. 354.

The plaintiff declared for taking his cattle at *Market Street*, and the defendant pleaded *non cepit modo & formâ;* at the trial the plaintiff proved that the cattle were in the defendant's poſſeſſion at *Market Street*, when he was driving them to the pound: the defendant proved that he first and originally took them at *Hardhall:* it was thereupon inſiſted, that the plaintiff had not proved the allegation in his declaration, that the cattle were taken at *Market Street*, for that the defendant had proved they were firſt taken at another place, *viz.* at *Hardhall.* But the judge at the trial and the whole of Common Pleas afterwards, were of opinion that the objection was groundleſs, becauſe if the defendant took them wrongfully at firſt, the wrong was continued to any place where the defendant had them in his cuſtody, and, conſequently, the place was well laid in the declaration.

Johnſon v. Wollyer, 1 Str. 507, at Guildhall, *coram* Pratt, C. J.—This caſe is treated by Wilmot, C. J. in the preceding caſe of Walton v. Kerſop, as a mere *niſi prius* note. But it does not appear here, as it did in that caſe, that the goods ever were in the place in which the declaration alleges them to have been.

Replevin in *London:* defendant appears upon an *elongata:* plaintiff declares *quas in quodam loco vocat' the Minories* in *London:* defendant pleads *non cepit modo et formâ:* at the trial the plaintiff proved the taking at *Rotherhithe* in *Surry:* upon which it was objected, that the plaintiff had not proved his iſſue, for the place is material, and therefore part of the iſſue under *modo et formâ.* The counſel for the plaintiff admitted, that it was traverſable: but inſiſted, that by not traverſing it particularly the place was admited, and could not be inſiſted on, upon *non cepit.* But the Chief Juſtice held, that where the defendant avows at a different place in order to have a return, he muſt traverſe the place in the count; becauſe his avowry is inconſiſtent with it: but, where he does not intitle upon a return, he may plead *non cepit*, and prove the taking to be in another place, for it is material. Whereupon the plaintiff was nonſuited.

(I) Pleas in Replevin.

2 Lutw. 1101. One of ſeveral defendants may plead *non cepit.*

(K) Avowries in Replevin; and herein, of the Seiſin and Services, and of the Certainty required therein.

Pool v. Duncombe, Tr. 1657, Bull. N. P. 56.

Tenant for life of a rent-charge confeſſed a judgment, and an elegit iſſued, under which the rent-charge was extended: tenant for life died, and the conuſee diſtrained and avowed in replevin for the arrears incurred in the lifetime of the tenant for life: on demurrer it was holden to be a bad diſtreſs, and not warranted by the above ſtatute: 1ſt, Becauſe

case of a conusee is not included in it: *2dly*, Because he comes in the *post*, not *under* the tenant for life.

The defendant avowed for rent under a lease dated the 24th *June*, *habendum a præd.* 24 Jun. *&c. virtute cujus* the plaintiff entered the said 24th of *June*. On demurrer it was objected, that the plaintiff was a disseisor by entering the 24th, when the lease was not to commence till the next day, and, consequently, the possession was not under the lease, but by virtue of a tortious fee. But the court gave judgment for the avowant, for that there was a great difference between this case and an ejectment; for here, be the entry tortious or not, it does not discharge the contract for the payment of the rent. Macdonnel v. Wilder, 1 Str. 550. 8 Mod. 54. S. C.

An avowant prescribed to have common for *all commonable cattle*, and upon issue joined thereon, he gave in evidence prescription for common *for sheep and horses only*: it was holden, that this did not maintain the issue, for a prescription is an entire thing. But, if he had had a general common, that is, for *all kinds of cattle*, and had prescribed for common *for any particular sort*, it would have been good, for it is within the general prescription. Pring v. Henley, *per* Ward, C.B. at Exeter, 1700. Bull. N. P. 59.

The defendant avowed under a custom, that the lord of the manor was entitled, upon the death or alienation of every tenant, to the second best beast, and if but one, then to that beast; and if no beast, then to a compensation in lieu of it. Upon evidence the custom appeared to be as stated, but with an exception of mesne seignories, burgage-tenures, and alienations to the use of the alienees and their heirs: and the avowry for the omission of that exception was adjudged to be ill. Griffin v. Blandford, Cowp. 62.

Where the rent reserved at the time of entering upon the premises was afterwards varied by agreement between the parties, yet it was holden, that the landlord might avow as on a demise at a rent certain, for that such subsequent agreement operated by relation to make it a reservation of the rent from the beginning. M'Leish v. Taite, Cowp. 781.

The defendant may avow in this general manner, whether the plaintiff be tenant or not, for the words of the statute are in the disjunctive, "Plaintiff in replevin *or* other tenant." Sullivan v. Strading, 2 Wils. 208.

Nil habuit in tenementis is not pleadable to an avowry under the statute. *Ibid.*

Heriot customs are not within this clause of the statute, which mentions services only, and therefore double costs were r sed the avowant upon a nonsuit. Loyd v. Winton. 2 Wils. 28.

To an avowry for rent by a tenant, his under-tenant may plead payment of the ground rent which he paid to the original landlord to protect himself from a distress: for that is a good payment of so much rent to the tenant, which is paid as part of the rent itself in respect of the land. Sapsford v. Fletcher, 4 TermRep. 521.

So, a tender and refusal may be pleaded to an avowry for rent, without bringing the money into court, because, if the distress was not rightfully taken, the defendant must answer the plaintiff his damages. Bull. N. P. 60.

But the plaintiff cannot plead a set-off, because this action is founded in tort, and the 2 G. 2. does not extend to such actions. Another reason why it may not be pleaded is, because a set-off supposes a different demand arising in a different right. Neither can a mutual demand be given in evidence, where the defendant justifies under a distress. 4 TermRep. 510. Bull. N. P. 181. 5th ed.

After an avowry for rent arrear, the plaintiff may pay the rent into court which the defendant avows, because the demand is certain; but not where the damages are unliquidated. Vernon v. Wynne, 1 H. Bl. 24. Barnes, 249. 2 Salk. 596.

(L) Of the Judgment in Replevin.

Gilb. Repl. 201. Co. Ent. 573. b.

ON the execution of the writ of replevin by the ſheriff, the beaſts diſtrained are actually returned to the plaintiff, ſo that he hath the poſſeſſion and uſe of the cattle pending the ſuit; conſequently if the plaintiff in replevin hath judgment, it can only be for damages; and therefore the entry is, "*quod* (the plaintiff) *recuperet verſus* the defendant, *damna* "*ſua occaſione præmiſſ.*, *ſed quia neſcitur quæd damna præd* (the plaintiff) *ſuſti-*
2d Book of Judgment, 203. "*nuit occaſione præmiſſ.*, a writ of enquiry is awarded to inquire; *quæ damna* "*præd.* (the plaintiff) *ſuſtinuit tam occaſione præmiſſ.*, *quam pro miſis et cuſtagiis* "*ſuis, per ipſum circa ſectam ſuam in hac parte appoſitis.* And on the re-
Carth. 367. 5 Mod. 118. Salk. 205. Co. Ent. 575. a. "turn of this inquiſition, the plaintiff hath final judgment, *quod recuperet* "*verſus præfatum* (the defendant) *damna ſua præd. ad.* &c. *per inquiſitionem* "*præd. in formâ præd. comperta, nec non,* &c. *eidem* (the plaintiff) *ad requi-* "*ſitionem ſuam pro miſis & cuſtagiis ſuis præd per curiam hic de incremento* "*adjudicata; quæ quidem damna in tòto ſe attingunt ad,* &c. *præd.* (the de-
"fendant) *in miſericordiâ.*"

This writ of inquiry muſt be underſtood to iſſue where the plaintiff hath judgment on a demurrer, &c. and not on a verdict; for if there be a verdict for the plaintiff, the jury on that verdict aſcertain the damages that the plaintiff hath ſuſtained by the unjuſt caption and detention, and alſo the coſts of ſuit, and then there is no occaſion for a writ of inquiry. The judgment is, "*quod* (the plaintiff) *recuperet verſus* (the defendant) "*damna prædicta per juratores prædictos in formâ prædictâ aſſeſſa, nec non,* &c. "—*pro miſis,* &c. *de incremento adjudicata,* &c.—And the defendant "*miſericordiâ.*

Co. Ent. 572. b, 2d Book of Judgment, 205.

On the other hand, if judgment be for the avowant on demurrer, the entry is, "*quod* (the plaintiff) *nil capiat per breve ſuum præd ſed ſit* "*miſericordiâ pro falſo clamore ſuo, & præd.* (the defendant) *eat inde ſine* "*die,* &c. *& habeat retornum averiorum præd. detined. ſibi irrepleg. in* "*petuum, & qualiter,* &c. *vic. conſtare faciat hic,* &c. *& quod præd.* (the "defendant) *damna ſua occaſione præmiſſ. recuperare debeat; ſed quia ne* "*tur,*" &c.

2d Book of Judgm. 206.

But if there be a verdict for the avowant, the jury in that verdict ascertains the damages, and then there needs no writ of inquiry; but the judgment is entered, "*quod* (the defendant) *habeat retornum averior* "*prædictorum,* &c. *Conſideratum eſt etiam quod præd.* (the defendant) "*cuperet verſus præf.* (the plaintiff) *damna ſua præd.*, &c. *per juratores præ* "*in formâ præd. aſſeſſa nec non,* &c. *eidem* (the defendant) *ad requiſitionem* "*ſuam pro miſis & cuſtagiis,*" &c.

2d Book of Judgm. 206.

So that wherever the judgment is given on a verdict, either for plaintiff or defendant, that verdict aſcertaining the damages, there needs no writ of inquiry to iſſue; but, where the judgment is not founded on a verdict, as on a demurrer or *non proſſ.* of the plaintiff, &c. there, the damages muſt be aſcertained by a jury on a writ of inquiry; becauſe what damages either party hath ſuſtained, is a matter of fact, and therefore to be ſettled by a jury. But, if both parties conſent that the court ſhall ſettle the damages without a jury, then the entry is, "*ſuper quæ juſtic. hic ad petitionem ipſ* "(the defendant) *ex aſſenſu præd.* (the plaintiff) *aſſident damna ipſius* "defendant) *occaſione præmiſſ.*, &c. *ultra miſas,*" &c. And this judgment is good, *quia conſenſus tollit errorem.*

In an action againſt two defendants where one avowed and the other made cognizance for taking the diſtreſs for rent in arrear, and the plaintiff in his plea in bar ſaid nothing was in arrear, on which iſſue was joined, the court held that a judgment entered that the defendant ſhould have a return of the cattle, and recover his damages and coſts aſſeſſed by the jury, was good, either as a judgment at common law, though the return be not adjudged irrepleviſable, or as a judgment under 21 *H.* 8. *c.* 19. which entitles the defendants to damages and coſts: becauſe now in point of law the return is irrepleviſable. Beſides, it is an invariable rule, that if a judgment be more favourable for the plaintiff than he is entitled to, he cannot take advantage of it, becauſe he is not injured by it.

Gamon v. Jones in error. 4 Term Rep. 509.

By the 17 *Car.* 2. *c.* 7. it is enacted, that "wherever the plaintiff in replevin, upon a diſtreſs FOR RENT, ſhall be nonſuit before iſſue joined, in any court of record, the defendant making a ſuggeſtion, in nature of an avowry or cognizacne for the rent in arrear, to aſcertain the court of the cauſe of the diſtreſs,—the court, upon his prayer, ſhall award a writ to the ſheriff, to inquire of the ſum in arrear, and the value of the goods or cattle diſtrained. And that, upon the return of ſuch inquiſition, the defendant ſhall have judgment to recover againſt the plaintiff the arrearages of rent, in caſe the goods or cattle diſtrained ſhall amount unto that value; and in caſe they ſhall not amount to that value, then ſo much as the value of the goods or cattle diſtrained ſhall amount unto, with his full coſts of ſuit; and ſhall have execution for the ſame by *fieri facias*, *elegit*, or otherwiſe." And by the ſame ſtatute, the like proceeding may be had, where judgment is given for the avowant, or for him that maketh cognizance for any kind of rent. And it is thereby further enacted, that "in caſe the plaintiff ſhall be nonſuit after cognizance or avowry made, and iſſue joined, or if the verdict ſhall be given againſt the plaintiff, then the jurors that are impanneled to inquire of ſuch iſſue, ſhall, at the prayer of the defendant, inquire concerning the ſum in arrear, and the value of the goods or cattle diſtrained. And thereupon the avowant, or he that maketh cognizance, ſhall have the like judgment," &c. as before (*a*).

(*a*) In the caſes of Valentine v. Faucet, 2 Str. 1021. and in Ca. temp. Hardw. 138. Ld. Hardwicke laid it down, that in every caſe, unleſs where the court is tied up by this ſtatute, a writ of inquiry may be granted in order to do complete juſtice.

If the plaintiff be nonſuited, the defendant is not bound to proceed on a writ of enquiry under the above ſtatute of 17 *Car.* 2. *c.* 7. but may, if he pleaſes, bring his action againſt the plaintiff and his ſureties on the replevin bond.

Waterman v. Yea 2 Will. 41.

If he does proceed under the ſtatute by ſuing out a writ of inquiry, and alſo a *returno habendo*, a writ of ſecond deliverance will be a *ſuperſedeas* to the latter, but not to the former; ſo that the plaintiff ſhall have his goods, and the defendant his arrears, coſts, and damages, by virtue of the proceedings under the ſtatute.

Cooper v. Sherbrooke, 2 Will. 116.

For the damages are not for the things avowed for, but are given by 21 *H.* 8. *c.* 19. as a compenſation for the expence and trouble the avowant has undergone; and therefore, though the writ of ſecond deliverance ſuperſedes the effect of the defendant's judgment or nonſuit, *viz.* a return of the goods, yet the damages ſtill continue. *Sed quære*, if under a writ of inquiry, the defendant ſhall not recover all the rent avowed for, beſides his coſts and damages? For *per Bathurſt*, J., By this ſtatute the legiſlature intended, that the proceeding by *writ of inquiry*, *fieri facias*, and

1 Salk. 95. Carth. 253.

Eſpin. 377.

2 Will. 117.

and *elegit*, ſhould be final, for the avowant to recover his damages, and that the plaintiff ſhould keep his cattle, notwithſtanding the courſe of awarding a *returno habendo*, which is the right judgment; for the ſtatute hath not altered the judgment at common law, but has only given a farther remedy to the avowant.

Freeman v. Lady Archer, 2 Bl. 763.

Where a defendant avowed for a year's rent, and had a verdict, but no value being found by the jury, a motion was made to the court for a rule to ſhew cauſe why a writ of inquiry ſhould not iſſue under 17 *Car.* 2. *c.* 7. to aſcertain the amount of the rent in arrear, and the value of the cattle diſtrained? *Gould*, J. doubted whether it could be granted to ſupply a defective verdict in caſe of rent, though he held that after judgment by default, it certainly would lie; and added, that *Burrow's* note of the caſe of *Andrews* v. *James*, *M.* 24 *G.* 2. *B. R.* which was cited in favour of the rule, ſtated that to be a judgment by default. However, no cauſe being ſhewn, the rule was made abſolute.

Carth. 255

The defendant had judgment upon demurrer for a return irreplevisable as at common law, upon which a writ of inquiry was awarded purſuant to the ſtatute. And on error brought, it was objected, that when the defendant proceeds on the ſtatute, he ought not to have judgment for a return; but the court held that the judgment was well given, for the reaſons before mentioned.

Ca. of Prac. in C. P. 42.

But, where the defendant pleaded *non cepit*, and after obtaining judgment of *returno habendo*, procured a writ of enquiry of damages to be executed,—the court ſet aſide the writ of enquiry, and the inquiſition taken thereon, becauſe there had been no avowry; for the avowry, which is in the nature of a declaration, is the only ground of an inquiry for the defendant in replevin.

1 Lev. 255.

Where the jury who try the iſſue, omit to enquire of the rent in arrear purſuant to the ſtatute, no writ of inquiry can be AFTERWARDS awarded to ſupply the omiſſion; and therefore, in ſuch caſe, the defendant muſt purſue the common law judgment of *returno habendo*. But, where the defendant avows, as overſeer, for a poor's rate, under the 43 *Eliz. c.* and the plaintiff is nonſuit, or a verdict paſſes againſt him, and the jury are diſcharged without inquiring of the treble damages, given by that ſtatute to the defendant, the defect may be cured by a writ of inquiry; becauſe ſuch inquiry is no more than an inqueſt of office.

Carth. 362. 3 Wilſ. 442.

Reesv. Morgan in error, 3 Term Rep. 349.

If the jury find a verdict for the defendant with damages, without finding either the amount of the rent in arrear, or the value of the diſtreſs, the defendant may take a judgment *pro returno habendo*; or he may amend the judgment for the damages, even after the record is removed into a court of error, by ſubſtituting a judgment for a *returno habendo*: and if he neglects making ſuch amendment, a court of error, though it reverſe the judgment for the damages, will award a judgment for a *returno habendo*, and give the defendant coſts up to the time of the judgment in the court below.

James v. Moody, 2H. Bl. 282.

Where the plaint in replevin was removed by the defendant into the court of *C. B.* from an inferior court by a *recordari facias loquelam*, which was filed on the appearance day of the return, and a rule to declare given, the court held, that the defendant might ſign a judgment of *non proſ.* for want of a declaration, without demanding a declaration, as in other actions.

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Reſcue.

(B) In what Caſes a Reſcue may be juſtified.

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(*There is*) But ſuch arreſt *virtute officii* being made on a juſt ground of ſuſpicion of felony, e party reſcue himſelf at his peril; for, according to Lord *Hale*, if in the attempt to make the ſcue he is upon neceſſity ſlain, it is no felony in the officer; and, upon the ſame principle, if e officer is killed, it will be murder. 2 H. H. P. C. 85, 86, 87, 92. 93. The obvious reaſon is, at the law makes it a duty in the ſheriff and certain other officers to arreſt for felony, on juſt ſpicion; and therefore reſcue from ſuch an arreſt is reſiſtance of lawful authority. If this be ſo, rd *Coke* is here too unqualified in his expreſſion. Co. Lit. 162. a. n,3. 13th edit.: and it hath been ely adjudged, that where a perſon is directly charged with a felony, peace officers are juſtified arreſting him without any warrant, though it ſhould afterwards turn out that no felony hath en committed. Samuel v. Payne, Dougl. 359.

(C) The offence of making a Reſcue, and how the Offenders are to be proceeded againſt.

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(*In the offence*) There muſt be a *return*. 1 Str. 531.

(*In an action*) But, to entitle him to recover, he muſt ſhew that he has complied with the rections of the ſtatute, and conclude *contra formam ſtatuti*. Anon. 1. Ld. Raym. 342.

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(*Thereupon*) This is not ſo; the fine is diſcretionary. Rex v. Elkins, 2129.—The attachment t be returnable at a general return. Rex v. Wilkins, Stra. 624.—The reſcuers, on ſubmit- to a fine, may be permitted to read affidavits to ſhew, there was not any real arreſt. Rex. v. ley, Str. 642.—The ſheriff's return of a reſcue, is of itſelf a conviction of a reſcue, and pro- immediately iſſues from the Crown-office againſt the reſcuer. Rex v. Pember Ca temp. dw. 112.——Return of reſcous is not traverſable, and the reſcuer muſt be brought into t to be fined. Barnes, 429. and not being traverſable, the offender ſhall be puniſhed without g examined upon interrogatories. 4 Burr. 2129.——The reſcuer may be admitted to give gnizance, to try falſe return againſt the ſheriff. Barnes, 430.——If there is a verdict for laintiff the recognizance ſhall be diſcharged. *Ibid.*

y ſtat. 8 & 9 *W*, 3. *c.* 27. § 14. the reſcuer of any perſon arreſted civil proceſs within the pretended privileged places therein mentioned, any perſon aiding, abetting or aſſiſting the ſame, ſhall, being lawful- victed thereof, forfeit to the plaintiff in the action 500*l*, to be re- ed by action of debt, &c. and if after ſuch recovery he ſhall neglect the money recovered with full coſts of ſuit within one month after ment ſigned thereupon, and demand made, he ſhall, upon producing of the judgment, and oath made that the money recovered is not by order of the court wherein he was convicted of the reſcue, be orted for ſeven years. And any perſon convicted of receiving or aling ſuch reſcuer, ſhall be likewiſe tranſported for ſeven years, within one month after his conviction he ſhall pay to the plaintiff in ction the full debt or duty for which the action was brought, with ts.

(D) The Form of the Proceedings on a Reſcous.

an indictment for a reſcue from the houſe of correction, it muſt ap- what the priſoner was committed there, ſo as to make the houſe of

Rex v. Freeman, 2 Str. 1226.

of correction a proper priſon which *prima facie* it is not for all offences. Beſides, on ſo general a charge, the court cannot judge of a proper puniſhment.

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(*In an action on the caſe*) The arreſt muſt be made *by the authority of the bailiff*, but he need not be the hand that arreſts, nor in the preſence, nor actually in ſight, nor within any preciſe diſtance, of the perſon arreſted. Blatch v. Archer, Cowp. 65. This, though *expedient*, is not *neceſſary*. Eſpin. 657.

(E) Of the Return of a Reſcous; And herein,

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(*It hath been*) A return made by a ſheriff that the perſon arreſted was reſcued out of the cuſtody of the bailiff has been held to be bad: the return muſt be that the perſon was reſcued out of *his* cuſtody, *Per* Buller, J. 2 Term Rep. 156.

Scandalum Magnatum.

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(*The laws on which*) Theſe two ſtatutes are ſaid to have been procured by the Duke of Lancaſter, who was extremely unpopular, and at the time of the inſurrection among the villains, had been ſingled out as a principal object of their fury. 3 Reeve's Hiſt. 211. 1 Parl. Hiſt. 360.

Scire Facias.

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Rex v. Miles, Tr. 37. G. 3. THE ſtatute 8 & 9 *W.* 3. *c.* 11. which gives coſts in all *ſuits* of *ſcire facias*, does not extend to a *ſcire facias* to repeal a patent proſecuted in the name of the king,

(A) The Nature of the Writ.

(*A Scire Facias*) 1 Term Rep. 268. 2. Wilſ. 251. 2 Bl. Rep. 1227. 2 Term Rep. 46.

A *ſcire facias* to repeal letters patent is an original writ. Rex v. Eyre, 1 Str. 43. Tr.

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(*Alſo it was formerly held*) 3 Burr. 1791.

(C) In what Caſes neceſſary; and herein in, who to be Parties to it, and of the Privity requir And herein.

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(*So if he be*) But *qu.* of this—it ſhould ſeem from Rolle's Report, that a *ſcire facias* is not in this caſe.

2 Cromp. 102. But, if the plaintiff do not take out execution within a year the *ceſſet executio* is determined, he muſt firſt ſue out a *ſcire facias*.

(*But though*) For they do not take notice of Chancery injunctions, as they do of writs of error. Beſides, it might be no breach of the injunction to take out execution within the year, and continue it down by *vicecomes non miſit breve*, which cannot be done in the caſe of a writ of error. However, it ſhould ſeem from a late caſe, that the ſtaying of the execution by injunction will make no difference, if the court are ſatisfied that the injunction bill was filed merely for the purpoſe of delay; for the rule of reviving a judgment by *ſcire facias*, before execution, was intended to prevent a ſurpriſe upon the defendant, and therefore ought not to be taken advantage of by one, who ſo far from being ſurpriſed by the delay, has himſelf been the cauſe of it. Michell v. Cue, 2 Burr. 660.

The plaintiff had recovered judgment in the *Petty-bag*; after which the defendant brought a bill, and had ſtopped the plaintiff two or three years by an injunction. It was moved, that the plaintiff at law might, under theſe circumſtances, ſue out execution without a *ſcire facias*, and not ſuffer by the act of the court. *Sed per cur.*—I cannot alter the courſe of the court, but muſt take care to preſerve it; and it being above a year and a day after the judgment, let the plaintiff ſue out his *ſcire facias*. But the reporter adds, Q. whether in this caſe the plaintiff *Hodſon* could not have taken out execution, and continued it by *vicecomes non miſit breve*, agreeably to what was ſaid by the court of *B. R.* in the above caſe of *Smith* v. *Booth*. Hodſon v. Earl of Warrington, 3 P. Wms. 36.

Judgment of *Michaelmas* term 1731, ſigned *November* 13, *fi. fa.*, bore teſte *November* 28, in *Michaelmas* term following. The defendant moved to ſet aſide the *fi. fa.* as irregular, the judgment not being revived by *ſci.* and the *fi. fa.* not being iſſued within the year. The plaintiff inſiſted, that the *fi. fa.* being iſſued within the fourth term from the time of ſigning judgment, it was regular, and produced an affidavit that execution had been ſome time ſtaid by an injunction out of Chancery. The court held the injunction to be quite out of the caſe, and that the year is to be computed from the day of ſigning the judgment, and therefore ſet aſide the *fa.* Sympſon v. Gray, Barnes, 197.

If a *fi. fa.* or *elegit* be ſued, and no execution be had thereon, there may be another *fi. fa.* or *elegit* ſeveral years after without a *ſcire facias*, if continuances are entered from the firſt *fi. fa.* or *elegit*. Welden v. Grey, 1 Sid. 59.

So, if a *fi. fa.* be taken out within the year, and a *nulla bona* returned, and continued down ſeveral years, a *capias ad ſatisfaciendum* may iſſue without *ſcire facias*. But it is otherwiſe (*a*), if no execution be returned by the roll to warrant the entry of continuances upon the roll. Aires v. Hardreſs, 1 Str. 100. Low v. Peart, Barnes, 210. S. P. in C. P. (*a*) Blayer v Baldwin, 2 Wilſ. 82. Barnes, 213. S. C.

The defendant obtained a *ſuperſedeas* for want of a declaration, in an action of debt on a judgment, and was afterwards taken in execution by *capias ad ſatisfaciendum* iſſued after a year and a day from the time of the judgment, without any *ſci. fa.* to revive. The defendant brought an action for falſe impriſonment, and the plaintiff juſtified under the execution. The defendant then applied to ſet aſide the *ca ſa.*, and it appearing that a *capias ad reſpondendum* only, and not a *ca. ſa.* had iſſued within the year, there was nothing to warrant the continuance of a *ca ſa.* upon the roll. The rule was therefore made abſolute to ſet aſide the *ca. ſa.* Martin v. Ridge, Barnes, 20.

Scire facias ſeems to be neceſſary in order to warrant an execution under the 31 G. 2. *c.* 28. § 20. or lords' act. 1 Term Rep. 80.

Scire facias in the Petty-bag will lie on a bond given to the late king, his executors and adminiſtrators, as within 32 *H.* 8. *c.* 39. Rex v. Bradford, 2. Ld. Raym. 1327.

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(*And though*) This proceeding in a *ſcire facias* to repeal letters patent is in a particular manner de- rived from the great ſeal; for the very end of the ſuit is, and ſo is the judgment, that they be recalled into the ſame place whence they went forth under the great ſeal, that they may be cancelled; that is, that the great ſeal may be taken off. In the caſe of the *Mayor and Burgeſſes of* Liverpool *againſt the Chancellour of the County Palatine of* Lancaſter, *in* B. R. *Trin.* 12. *Ann.* there was a *ſcire facias* to repeal a charter granted to that corporation under the great ſeal of the county palatine. To this ſuit a prohibition was moved for, for want of juriſdiction in the court. But it was reſolved that that court had juriſdiction of the cauſe, and amongſt other reaſons which were given for the judgment, it was declared, that this authority was incident to the ſeal of the county palatine; that the complaint of the writ being, that the Chancellour had wrongfully put the ſeal to it, it was proper to be examined in that court where the ſeal was kept. See Mr. Yorke's argument in 1 Str. 151.

Coke v. Hodges, 1 Vern. 25. An adminiſtrator *durante minoritate* obtained a decree to account: the infant married, and a new adminiſtration during her minority was granted to her huſband. It was objected, that ſuch an adminiſtrator cannot in law take execution on a judgment obtained by the former adminiſtrator. But it was ordered, that the defendant ſhould anſwer, and that matter be ſaved to him at the hearing of the cauſe.

See the caſes of Heapy v. Parris, 6 Term. Rep. 368. Walker v. Drawater, Anſtr. 680. A judgment on a warrant of attorney entered in the vacation againſt a defendant who died in the preceding term is good, and execution tested on a day *prior* to the death of the defendant may be ſued out upon *Secùs*, where it is teſted on a day *poſtérior* to the defendant's death, for in that caſe the judgment muſt be revived againſt his repreſentative by *ſcire facias*.

Bragner v. Langmead, 7 Term Rep. 20.

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(*If there be a ſequeſtration*) 1 Vez. 184-5.

6. By and againſt Huſband and Wife.

Wortley v. Rayner, Dougl. 637. On a plea of coverture in an action of debt on a judgment, a verdict was found for the defendant, and a writ of *fieri facias* ſued out for the plaintiff commanding the ſheriff to levy and pay them to the defendant, and her *huſband*. A rule was granted to ſhew cauſe, why the writ, and proceedings thereon, ſhould not be ſet aſide for irregularity, it being a maxim that a perſon, not a party to the record, cannot be benefited, or charged by the proceſs, without a *ſcire facias*. The court were clearly of opinion that the proceedings were irregular. And *Aſhhurſt*, J. added, that the plaintiff might have had proceſs in her own name, becauſe, the plaintiff having declared againſt her as ſole, he was concluded from denying it.

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(*In a ſci. fa.*) Glyn v. Yates. 1 Str. 511. 8 Mod. 31. S. C. Barry v. Barry, 2 Str. Ld. Raym. 1452, S. C. Filewood v. Popplewell, 2 Wilſ. 67. S. P.

Barlow v. Evans, 2 Wilſ. 98. *Scire facias* againſt bail in error, on a judgment for damages, may ſhew cauſe, why plaintiff ſhould not have execution of the debt ſaid (the ſpecifick ſum in the recognizance) not of the damages.

Simmonds v. Middleton, 1 Wilſ. 269. If a *capias ad ſatisfaciendum* againſt the principal is left with the before the allowance of a writ of error, and appears afterwards to turned *non eſt inventus*, it ſhall be preſumed to be returned after the error ſpent, and it is ſufficient to found a *ſcire facias* againſt the bail.

2 Mod Ca. 305. If the *ſcire facias* againſt the principal after judgment has only between the *teſte* and return, and a *ſcire facias* is brought againſt proceedings ſhall be ſtayed, upon motion by the bail.

Where after error brought by the principal, a *ſcire facias* was ſued out againſt the bail, the court ordered the proceedings to be ſtopped on the bail conſenting, if the judgment were affirmed, to ſurrender the principal, or give judgment on the *ſci. fa.* Myer v. Arthur, 1 Str. 419.

Where the writ of error by the principal was allowed before the time was expired within which the bail had indulgence to ſurrender the principal, though notice of ſuch allowance was not given to the plaintiff's attorney until after the expiration of that time; the court of *B. R.* gave the bail the ſame terms as are uſual where they apply within the time indulged to them for ſurrendering the principal. Capron v. Archer, 1 Burr 340.

On the return of the ſecond *ſcire facias* againſt bail, a four day rule was given, and on the fourth day the principal brought error, whereupon it was moved to ſtay proceedings againſt the bail pending the writ of error; and the above caſe of *Myer* v. *Arthur*, and *Church* v. *Throgmorton* in the Houſe of Lords, were cited; in which laſt caſe, the Houſe threatened to commit the attorney for proceeding againſt the bail pending error in Parliament. As to the firſt caſe, the court ſaid, it differed, for there, the bail came in time, while they might ſurrender the principal; which they cannot do here, after the return of the ſecond *ſcire facias*, at which time no writ of error was brought. And as to the caſe in the Houſe of Lords, it was there agreed, that the court below could not reſtrain them; but the Lords ſaid they expected more reſpect. We can make no rule. Everett v. Gery, 1 Str. 443. Richardſon v. Jelly, 2 Str. 1270. So, in Aldridge v. Snowden, 8 Mod. 130. the bail did not move til both *ſci. fa.* were out and the rules upon them, and the court held they came too late

The ſecond *ſcire facias* was returnable the firſt day of the term, and a week within term the bail moved to ſtay the proceedings on the common terms of giving judgment in the *ſcire facias*, and taking four days to ſurrender after affirmance in the principal cauſe. But the court held they came too late, after their time to ſurrender was gone, and would not relieve it again: all they would do was to ſtay the ſuing out of execution till after affirmance. Cole v. Buckland, 2 Str. 872.

It is immaterial whether the *ca. ſa.* be actually returned, or ſuch return actually filed, before the iſſuing of the *ſcire facias* againſt the bail; for if the bail ſhould plead that no *ca. ſa.* was returned and filed before the *teſte* of the *ſcire facias*, ſuch return may be filed at any time before putting in a replication to the plea. Hunt v. Coxe, 3 Burr. 1360.

If the firſt *ſcire facias* bears the *teſte* the ſame day with the *ca. ſa.*, and the bail have rendered the principal after judgment, both writs of *ſcire facias* may be quaſhed. Wilcox v. Proſſer. Barnes, 95.

The court have refuſed to ſet aſide a judgment actually ſigned againſt bail, becauſe error was pending by the principal. Fiſher v. Emerton, 1 Str. 526.

Sayers v. Daniel, Barnes 202. S. P. But Taſwell, v. Stone, 4 Burr. 2454. and Benwell v. 3 Term Rep. 636. *contra.*

The form of the Writs and Proceedings, and how far it muſt purſue the Nature of the original action.

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(at laſt) That is, where a *ſcire facias* is an original writ, as, where it is to repeal letters patent 1 Sid. 43.

(*If the bail*) That a *ſcire facias* is not amendable but the proper way is for the plaintiff to move to quaſh it. See Hillier v. Froſt, 1 Str. 401. Grey v. Jefferſon, 2 Str. 1165.

Morſoot v. Chivers, 1 Str. 631. In a *ſci. fa.* on a judgment recovered by an executor, it is not neceſſary to ſtate the death of the teſtator.

Manning v. Bois, 3 Salk. 320. Where it was objected to a writ of *ſcire facias* grounded upon a judgment in an aſſiſe, which is an original, that it ought to have been returnable *ubicunque*, whereas it was returnable on a day certain, Holt, C. J. ſaid, it is good one way or the other. Weſt v. Sutton, 2 Ld. Ray. 853-4. After a writ of error brought on a judgment in *C. B.* there was a *ſcire facias* teſted 28 *November*, returnable *die Veneris proximo poſt octab. Sanct. Hilarii ubicunque tunc fuerimus in Angliâ*, to ſhew cauſe *quare executionem non haberet*, to which the defendant demurred. It was held, that ſuch writs of *ſcire facias* were made returnable ſometimes at a day certain, and ſometimes on common days; but that this writ returnable on a day certain *ubicunque*, &c. was bad, for it ought to be returnable on a common day, as it be *coram nobis ubicunque*, &c.

Rex v. Hare and Mann, 1 Str. 146. A *ſcire facias* returnable *ubicunque tunc fuerit* generally, is good, without limiting it to *England*. But, if made returnable *ubicunque tunc fuerit in* [illegible] *nâ Britanniâ*, it is bad.

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(*There muſt*) But note, this rule extends only to a *ſcire facias* againſt bail: a *ſcire facias* in [illegible] needs not lie in the office four days before the return of it. Millar v. Yerraway, 3 Burr. [illegible] Groſs v. Naſh, 4 Burr. 2439. But, where it is againſt bail, it muſt lie the laſt four days before the return. Forty v. Hermer, 4 Term Rep. 583. In the caſe of Obrian v. Frazier, 1 Str. it is ſaid, that if the *ſcire facias* lies four days in the office, that is all which is required: that ſummons may be made at any time before the court is up on the day of the return. And Hunt v. Coxe, 3 Burr. 1360. But in Poole v. Willis, E. 16 G. 3. 2 Term Rep. 758. n. ceedings in a *ſcire facias* againſt bail were ſet aſide, becauſe the ſheriff had ſummoned the party the return day after the riſing of the court; and in Webb v. Harvey, 2 Term Rep. 757. were ſet aſide on the authority of that caſe, becauſe the bail were ſummoned only an hour before the court roſe on the return day.

Elliot v. Smith, 2 Str. 1139. If there be fifteen days between the teſte of the firſt and the return of the ſecond *ſcire facias* againſt bail, it is ſufficient, without any regard to the number of days between the teſte and return of each.

Bell v. Jackſon, 4 Term Rep. 663. But, where there is only one *ſcire facias*, the ſheriff returning *ſcire feci* and the proceedings are by bill, four days excluſive between the teſte and return are ſufficient.

Follett v. Trill, Barnes, 96. Pickering v. Thompſon, *Id.* 207. In *C. B*, where the caption is in another county, and enrolled in *Middleſex*, the *ſcire facias* may be in either county; but where the caption is in *Middleſex*, the *ſcire facias* muſt be there.

Bond v. Iſaac, 1 Burr. 409. 1 Term Rep. 388. A *ſcire facias* ſued out on a bail-piece remaining in *Middleſex* may be ſued out in *Middleſex*, though the original cauſe of action was in *London*.

Dixon v. Heſlop, 6 Term Rep. 366. A *ſcire facias* to revive a judgment in this caſe, is a continuance of the firſt ſuit. Hence, whatever engagements would be binding on the principal, will be ſo on his repreſentatives. So, the proceedings on a *ſcire facias* againſt the bail, ſhall be in the ſame court with thoſe againſt the principal, and if the latter be carried back by *procedendo* to an inferior court, a *ſcire facias* afterwards removed thereout againſt the bail ſhall be likewiſe remanded.

Phillips v. Brown, 6 Term Rep. 282. So, the coſts of a *ſcire facias* after bankruptcy to revive a judgment recovered before the bankruptcy, relate back to the original judgment, and are recoverable under the commiſſion.

Where a *ſcire facias* is brought in *B. R.* upon a judgment in an inferior court, it muſt appear by the writ itſelf how the judgment came into *B. R.*, whether by *certiorari*, or by writ of error, becauſe the execution is different: for if it came by *certiorari*, the *ſcire facias* muſt ſet forth the limits of the inferior juriſdiction, and pray execution within thoſe limits, and alſo that the judgment came in by *certiorari*. But, if it came in by writ of error, that muſt be ſhewn likewiſe in the *ſcire facias* itſelf, and it muſt pray execution generally. Guillam v. Hardiſly, 3 Salk. 320. 1 Ld. Raym. 216. S. C.

It was moved to quaſh a *ſcire facias quare executionem non*, &c., ſued by the defendant in error to make the plaintiff aſſign his errors, becauſe the original ſuit in *C. B.* was by bill of privilege, and the *ſcire facias* ought therefore to be returnable on a day certain, but this was made returnable upon a common return. And of that opinion was the court, becauſe the *ſcire facias* ought to be made returnable according to the nature of the original ſuit below in *C. B.* And *Trin.* 11 *Ann.* between *Vavaſor* and *Parker* it was adjudged ſo by the court of *B. R.* in the very ſame caſe. And the writ of error was quaſhed. Eden v. Wills, 1 Ld. Raym. 141.

Where an executor pleads *plenè adminiſtravit*, and the plaintiff does not take iſſue upon it, but takes a judgment of aſſets, *quando acciderint*, the *ſcire facias* on that judgment muſt only pray execution of ſuch aſſets as have come to the executor's hands ſince the former judgment; if it pray execution of aſſets generally, without confining it to that time, it cannot be ſupported, becauſe it does not purſue the terms of the judgment, on which it is founded. Mara v. Quin, 6 Term Rep. 1.

Upon the ſame principle, a *ſcire facias* on a judgment againſt a perſon who has been twice a bankrupt, under the ſtat. 5 *G.* 2. *c.* 30 § 9. which ſays "the future eſtate and effects of ſuch perſon ſhall be liable to his creditors, *unleſs* the eſtate ſhall produce ſufficient to pay 15*s.* in the pound," &c, is bad, if it do not aver, that the bankrupt's eſtate is ſufficient to produce 15*s.* in the pound. Gill v. Scrivens, 7 Term Rep. 27.

If the defendant dies after a writ of inquiry executed, and before the return, and the *ſcire facias* is, to ſhew cauſe why a new writ of inquiry ſhould not be awarded, it ſhall be quaſhed; for it ſhould be, to ſhew cauſe why the damages aſſeſſed ſhould not be recovered. Guldſworthy v. Southcott, 1 Wilſ. 24

(E) Pleadings to a *Sci. Fa.*

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(*ſci. fa.*) But the *ſcire facias* being an action, the concluſion by an *actio non*, though ſomeformal, will yet not vitiate the plea. Grey v. Jones, 2 Wilſ. 251.

(*that the defendant*) So, Trail v. Edwards, 6 Mod. 308. Earl v. Hinton, 2 Str. 732. Skelton v. Ewing, 1 Wilſ. 238. Wharton v. Richardſon, 2 Str. 1175. Ramſden v. Jackſon, 1 Atk. 289. Irving v. Peters, 3 Term Rep. 685.

(*ſubſiſtere in a*) So, Middleton v. Hill. Cro. Eliz. 588. Buſh v. Gower, Ca. temp. Hardw. 1 Str. 1043. S. C. Cooke v. Jones, Cowp. 727. From the two laſt caſes, it ſeems, the court may relieve againſt the uſury on motion.

To a *ſcire facias* againſt bail they plead, that the principal died before the return of any *ca. ſa.*, a replication ſtating a particular *ca. ſa.*, and that the plaintiff was alive at the return of that *ca. ſa.* muſt conclude with an averment; for the *ca. ſa.* in the replication is new matter; and by the rules of pleading, whenever new matter is introduced, the other party muſt have the opportunity of anſwering it. Henderſon v. Withy 2 Term Rep. 576. So, Filewood v. Popplewell, 6 Wilſ. 65. Chandler v. Roberts, Doug. 58.

Judgment

Henriques v. Dutch West India Company, 2 Str. 897. 2 Ld Raym. 1532 Knox v. Costello, 3 Burr. 1789.

Judgment on a *scire facias* cannot give damages for delay of execution but if it does, it may be reversed for that, and affirmed *pro residuo*. Be when the jury found that plaintiff was *damnified, and put to costs to* 6*d*., was holden to be well enough; for it is only meant as a foundation for t costs *de incremento*. Damages may mean costs.

As no damages are recoverable in a suit upon a *scire facias*, so no co were recoverable therein previously to the statute of 8 & 9 *W*. 3. *c*. 11. third section of which enacts, "That in all suits upon any writ or writ "*scire facias*, the plaintiff, obtaining judgment, or any award of executi "after plea pleaded, or demurrer joined therein, shall likewise recover "costs of suit; and if the plaintiff shall become nonsuit or suffer a disc "tinuance, or a verdict shall pass against him, the defendant shall reco "his costs, and have execution for the same by *capias ad satisfaciend* "*fieri facias*, or *elegit*."

Bellew v. Aylmer, 1 Str. 188. Smith v. Harmer, 1 Lill. Pr. Reg. 475. G.

It has been adjudged, that this action does not extend to executors or ministrators; therefore, if the plaintiff or defendant in this action, s be sued in that capacity, he is not liable to costs.

Huer v. Whitebread, Cas. Pr. P. C. 47. Pr. Reg. 378. S. C. Pool v. Broadfield, Ca. Pr. C. P. 209. Pr. Reg. 378.

Neither are any costs payable, where a writ of *scire facias* is quashe fore plea pleaded, or abated by plea. As, where, upon a motion b plaintiff to quash his own *scire facias*, the defendant insisted upon cost leging, that he had entered an appearance, and thereby incurred expen was determined, that costs were never due in proceedings on a *scire fa* until a declaration was delivered, and the defendant had pleaded.

Pocklington v. Peck, 1 Str. 638.

So, the plaintiff moved for leave to quash a writ of *scire facias*, th fendant having pleaded thereto in abatement, which was granted out costs. And by the court—It is the same in a *scire facias*, as in an on, where you plead in abatement, and the plaintiff's writ is abate pays no costs. But, they added, that, if there had been no plea in ment, and the party had moved to quash his own writ, they would made him pay costs.

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Sequestration.

(A) The Nature and first Introduction of Process.

1 Fowl. Exch. Pr. 170.

It is now, however, become the common process in courts of and may be said to be two-fold, that is, it issues, either as me cess on the defendant's default in not appearing, or not answering the whole process of contempt hath spent against him; or, it iss judicial process in pursuance of a decree, and to enforce the perfo

of it; and it is the execution and life of a court of equity; and as it is the fruit of a long ſuit, it is to be favoured, and in this caſe it is ſaid to be analogous to an execution at common law. 1 P. Wms. 308.

The order for the ſequeſtration after a decree is, in the firſt inſtance, only *niſi*. 3 Br. Ch. Rep. 373.

A ſequeſtration ſhall not be granted upon petition (*a*), nor without oath (*b*)

(*a*) Rules and Orders of Chancery, 27. (*b*) Harris Ch. Pr. 261. but *qu.* the reference. In the caſe of Eyre v. Counteſs of Shafteſbury, 2 P. Wms. 110. a ſequeſtration was ordered by Lord Macclesfield againſt the Counteſſes of Shafteſbury and Gainſborough, for a contempt in marrying an infant, who was under the protection of the court. But upon this matter being brought before the Lords Commiſſioners, after the removal of Lord Macclesfield, it was obſerved by Lord Commiſſioner Gilbert, that this contempt was *ex parte* upon the Lady Gainſborough; whereas an order for ſequeſtration in the caſe of a peer, or a commitment in the caſe of a common perſon, is a judicial act of the court, and therefore muſt be founded upon a proper affidavit, as he apprehended. The order is the judgment of the court, the ſequeſtration or commitment is but the execution of it. The judgment therefore is to be founded upon truth, and not upon a conjecture only. For, if ſhe be examined upon interrogatories, this will not make good the determination of the court by a matter *ex poſt facto*. Gilb. Rep. 178.

Upon affidavit of oppoſition to ſequeſtrators, the court of exchequer will iſſue a writ of aſſiſtance. Granſlade v. Baker, Bunb. 168.

It was once a queſtion, whether the court of exchequer could grant a ſequeſtration after a decree for a perſonal duty? It was admitted, that in proceſs for appearance a ſequeſtration was always grantable by that court, but for a perſonal duty after a decree there were many inſtances in my Lord C. B. *Hale*'s time, and in the Lord *Montague*'s time, where it had been denied, and the precedents that had been produced for it, were moſt of them where it was the ſuit of the king; and it was admitted on all hands, that where the king was plaintiff it might be granted. But by the opinion of *Jenner*, *Heath*, and *Powell*, Barons, it ought to be granted: for they thought, that if it might be granted in meſne proceſs, where it did not appear whether there was any duty or not, *a fortiori*, after a decree where the duty was adjudged and aſcertained. And it being always the practice in the Chancery, it ought much more in this court, where the plaintiff was ſuppoſed to be a debtor to the king. And they thought, that the juriſdiction of the court of equity would be to little purpoſe, if the court had not ſufficient authority to ſee their decrees executed.—The Lord Chief Baron doubted, becauſe the Lord Chief Juſtice *Hale* could never be prevailed with to grant it, nor the Lord *Montague*, to whoſe learning, he ſaid, he muſt greatly ſubſcribe.—But by the opinion of the other three it was granted. Guavers v. Fountain, 2 Freem. 99

B In what Caſes to be awarded: And herein, Page 426

(*A ſequeſtration is alſo*) *Vide* ſtat. 10 G. 3. c. 50.

(*If there be a ſequeſtration*) *Vide ſupra*, 4 vol. 239.

If before a ſequeſtration is awarded, the defendant ſhall have conveyed his land by covin, the ſequeſtration ſhall be awarded againſt the defendant and his aſſigns, and the perſon to whom the land is aſſigned may be taken upon the ſequeſtration. 2 Ch. Ca. 44.

2. To

2. To what Places.

Darwent v. Walton, 2 Atk. 510. Where a defendant is out of the reach of the court, and cannot be made to appear, it amounts to the ſame thing as if the plaintiff had taken out proceſs for want of an appearance. and carried it through the whole line of proceſs to a ſequeſtration. And therefore where a bill for an account is filed againſt two partners, one of whom is out of the kingdom, the court will decree an account to be taken, and that the whole which appears to be due ſhall be paid by the defendant partner, who is brought to a hearing.

3. What Eſtate or Intereſt ſhall be liable to a Sequeſtration, and from what Time.

1 Ch. Rep. 247. Where lands of the huſband, out of which an annuity to the wife iſſued, were ſequeſtered, the huſband dying, the ſequeſtration was diſcharged as to the annuity.

Moſely v. Warburton, 1 Salk. 320. If a prebendary has a diſtinct corpſe, or eſtate incident to his prebend, it may be ſequeſtered: but, where he is only a member of the body aggregate, and the inheritance is in the dean and chapter, there cannot be a ſequeſtration.

Martin v. Kerridge, 3 P. Wms. 240. But no ſequeſtration lies, until the time for the return of the attachment, upon which the body was taken, is out.

Martin v. Willis, May 10, 1745. *in Scacc.* 1 Fowl. Excheq. Pr. 188. A perſon claiming title to goods ſeiſed under a ſequeſtration obtained an order, that the party proſecuting the ſequeſtration might exhibit interrogatories againſt him, to examine him *pro intereſſe ſuo*, and in the mean time that the goods might be reſtored to him on his giving ſecurity.

N. B. This order was directed to be made by the court ſimilar to that in Mackenzie v. the Marquis of Powis, 6th July 1739. which was ſettled by the court.

1 Br. Ch. Rep. 434. Papers had been delivered out ſeveral years, for the purpoſe of being examined, and an order had been made, that they ſhould be reſtored. Application had been made for the return, and refuſed. The order had been ſerved perſonally, but no writ of execution of the order had been ſerved or ſued out. It was moved for a ſequeſtration *niſi*, and the rule was granted as of courſe.

(C) Of the Power and Duty of the Sequeſtrator.

Wood v. Freeman, 2 Atk. 542. Hawkins v. Crook, 3 Atk. 594 A ſequeſtrator is not entitled to any ſtated fee; nor can he call upon the plaintiff for any fee, before he has made a return of what he has ſeized under the ſequeſtration.

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(*It was moved*) This caſe is alſo reported by Bunbury, pag. 272. under the name of Deſbrow v. Crommie, but the ſtatement of facts, as well as the language of the court, is different. It follows:—A ſequeſtration iſſued againſt the defendant *for want of an anſwer*; the ſequeſtrators entered the defendant's houſe, and removed all the goods, to the value of ſeventy pounds at leaſt, though the thing in demand by the bill was little more. It was moved to have reſtitution of the goods, in regard the removal of them was not in the power of the ſequeſtrators without a parti-

…er of the court for that purpoſe. And *per curiam*—There is a difference between a ſequeſtra-…n for want of an appearance, and for want of an anſwer. Even in the firſt caſe, it is to be …ked upon as a *diſtringas in infinitum* at law; and the diſtreſs *there* ought to be only, at firſt …thing, then increaſing by degrees*, as the court directs, in order to compel an appearance: ſo …e ſequeſtrators ought in the firſt caſe, after ſeizure of ſome goods, to apply to the court for …ther directions for ſeizure, in order to compel an appearance. But, in the ſecond caſe, the …queſtrators have no power to remove any goods, much leſs to ſell; for the goods are only to be …ained in nature of a pledge to anſwer the contempt; and the plaintiff receives no injury by …, for he may ſet down his cauſe, and his bill may be taken *pro confeſſo*. And in this caſe the …queſtrators had a day given to ſhew cauſe why an attachment ſhould not go againſt them.

It was moved to ſell goods taken on a ſequeſtration upon meſne pro- …ſs: but Lord *Thurlowe* refuſed the motion, a ſequeſtration upon meſne …ceſs being only to found the further proceſs of taking the bill *pro …feſſo*. Hales v. Shafto, 3 Br. Ch. Rep. 72.

The defendant was proſecuted to a ſequeſtration for want of an anſwer; …d the ſequeſtrators having taken eleven hogſheads of cyder, and other …iſhable commodities, the plaintiff petitioned to have them ſold. But …e court refuſed to do it, until the hearing of the cauſe, and ordered the …tion to come on at the ſame time with the cauſe. And now they came …to be heard together, and the bill was taken *pro confeſſo* againſt the de- …dant; and the cyder and other periſhable goods were ordered to be …d by auction, and the money to be paid into the Bank, ſubject to the …her order of the court. Wilcocks v. Wilcocks, Ambl. 421. at the Rolls.

A ſequeſtration partakes not of the nature of a *fieri facias*, but of a writ …tent on a recognizance or *diſtringas*, veſting no right in the party, …ſe the execution is not complete, but a further act of the court ne- …ary; which whether by proceſs or order makes no difference: and that …her act is, that after ſeizure by the commiſſioners of the goods and …s of the lands, and return to the court, the party muſt apply to the …, to have an account of the ſequeſtration taken, and an order made …ſale of the goods towards ſatisfaction of the duty decreed him, with- …which he cannot have it. For the writ of ſequeſtration does not re- …e the ſequeſtrators to levy to the uſe of the plaintiff, but only to de- …and keep in their hands until the ſum is duly paid, the contempts …ged, and the court make further order to the contrary. It is not of a …many years ſtanding, that the court has ordered goods to be ſold *to …payment after a decree*: but it is very lately, that the court has or- …d it for a collateral contempt in proceeding *before a decree*; which that …now does in aid of its proceedings. 1 Vez. 183. 4. *per* Lord Hardwicke.

…here there had been an order for payment of money, and the party …in contempt for non-payment, and a ſequeſtration had iſſued, and the …s were taken; the ſequeſtrators were ordered to ſell the goods. Cavil v. Smith, 3 Br. Ch. Rep. 362.

…pon a commiſſion of ſequeſtration, the commiſſioners ſequeſtered ſome …ttle, which not being ſufficient to anſwer the debt, it was moved to …But the motion was denied, becauſe the commiſſioners had not re- …d the commiſſion. But when that was done, and it appeared what …had ſequeſtered, and the value as to ſo much in part of the debt, then …e remainder, a new ſequeſtration ſhould iſſue, and a *venditioni exponas* …the goods ſequeſtered upon the firſt. Yarroth v. Seys, Bunb. 62.

…e act of 5 *Geo.* 2. *c.* 25. empowers the plaintiff to go on, as well …a ſequeſtration for not appearing, as upon a ſequeſtration for not complying

* diſtreſs, where there is *nothing* ſeized, and a *gradual increaſe* of that *nothing*, ſhould …to common underſtandings rather extraordinary.

complying with a decree, which could not be done in equity until then for according to the firſt ſection of that act, where a perſon does n enter an appearance within the uſual time after a ſubpœna iſſues, and ther is juſt ground to believe, ſupported by affidavit, that he is gone out the kingdom to avoid the proceſs, the court out of which the proceſs iſſue is to ſue a day for his appearance, to be inſerted in the *London Gaz* and publiſhed on the Lord's Day in the pariſh church of the defendan and a copy of the order of the court is to be poſted up in ſome publi place at the *Royal Exchange* in *London*, if ſuch order be made by t Court of Chancery, Court of Exchequer, or Court of the Duchy Cha ber of *Lancaſter*; but, if by any of the courts of equity of the Coun Palatine of *Cheſter*, *Lancaſter*, and *Durham*, or of the Great Seſſions *Wales*, then in ſome publick place in ſome market-town within the ju diction of any ſuch court, neareſt to the place of the defendant's u abode, if within the juriſdiction; and on the defendant's not appear within the time limited by the court, the court may order the plainti bill to be taken *pro confeſſo*, and make ſuch decree thereupon as they think juſt, and to enforce it, may order the defendant's eſtate or ef to be ſequeſtered, and the plaintiff to be ſatisfied his demand out of eſtate and effects ſo ſequeſtered, he firſt giving ſecurity to abide ſuch o touching the reſtitution thereof as the court may make, upon the de dant's appearing to defend the ſuit, and paying ſuch coſts as the court order; but in default of ſuch ſecurity being given by the plaintiff, court ſhall order the eſtate and effects ſequeſtered to remain under the rection, either by appointing a receiver, or otherwiſe, until the defe ſhall appear to defend the ſuit, and pay ſuch coſts to the plaintiff a court ſhall think reaſonable, or until ſuch order ſhall be made there the court ſhall think juſt.

Maynard v. Pomfret, 3 Atk. 468.

Although a ſequeſtration iſſue only as meſne proceſs to compel a ſwer, yet, if there is any duty to be performed, it ſhall remain not ſtanding the defendant offer to pay the coſts of the contempt.

Shaw v. Wright, 3. Vez. jun. 22.

The court cannot make an order under a ſequeſtration to ſell a ſ which paſſes by title and not by delivery,

Howell v. Ld. Coningſby, Bunb. 219.

Where a bill is taken *pro confeſſo* for want of an anſwer, qu. w the decree ſhall be abſolute, or only *niſi*?

Hughes v. Owen, *Id.* 299.

(D) Sequeſtration, when determined.

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(*It ſeems*) So, Wharam v. Broughton, 1 Vez. 182. White v. Hayward. 2 Vez. 4 *contr.* Hawkins v. Crook, 3 Atk. 594.

Anon. Bunb. 31.

A ſequeſtration iſſued againſt *J. S.* for not performing a decree which lands were ſeized. *J. S*, died, whereupon it was moved, ſequeſtration ſhould be diſcharged. But the court refuſed it, bec ſequeſtration was not returned, for the ſequeſtrators are anſwer what profits they have received of the lands, and they have nothin demnify them, but the authority given by the ſequeſtration.— ſequeſtration being returned, the court diſcharged it, as to the lan the death of *J. S.*

SET

SET-OFF.

(A) When first allowed.
(B) In what Actions.
(C) What Debts may be set-off.
(D) Where the Defendant must plead a Set-Off, and where he may give Notice of Set-Off; and herein, of the Form of each.

(A) When first allowed.

AT common law, if the plaintiff was as much, or even more indebted to the defendant, than the defendant was indebted to him, yet he had no method of striking a balance: the only way of obtaining relief was to go into a court of equity. To remedy this inconvenience, it was enacted by the statute of 2 *G.* 2. *c.* 22. § 13. "That where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other; and such debt may be given in evidence on the general issue, or pleaded in bar, as the nature of the case shall require, so as at the time of pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt intended to be insisted on, and upon what account it became due; otherwise such matter shall not be allowed in evidence upon the general issue." 2 Burr. 826.

Where a set-off is admissible, the parties are alternately plaintiff and defendant; so that if the cross demand or any part be within the statute of limitation, that objection may be replied to it, in like manner as it may be pleaded in bar to the declaration. Remington v. Stevens, 2. Str. 1271.

(B) In what Actions.

A Set-off is allowable in actions of *debt*, *covenant*, and *assumpsit*, for the non-payment of money; but not in *actions upon the case*, *trespass*, or *trover* (*a*), &c.; nor of a penalty, in debt on bond conditioned for the performance of covenants (*b*); nor of *general* damages in covenant (*c*), or *assumpsit* (*d*). But, where a bond is conditioned for the payment of an annuity (*e*), or of *liquidated* damages (*f*), a set-off may be allowed. (*a*) Barnes, 450. Bull. N. P. 181. S. C. Graham v. Fraine, Hil. 24 G. 2. and Lay-Term Rep.

(*b*) Bull N. P. 179. 2 Burr. 1024. (*c*) Howlet v. Strickland, Cowp. 56. (*d*) Freeman v. Tuffnell, E. 27. G. 3. B. R. S. P. Tidd's Pr. 404. Sapsford v. Fletcher, 4 Term Rep. 511. (*e*) Collins v. Collins, 2 Burr. 820. (*f*) Fletcher v. Dyche, 2 Term Rep. 32.

(C) What

(C) What Debts may be ſet-off.

The day after this act of 8 G. 2. paſſed, Lord Hardwicke, C. J. delivered the opinion of the court of King's Bench, that a debt by a ſimple contract might, by the former act, have been ſet off againſt a ſpecialty debt. Brown and Holyoak, 8 G. 2.

IT having been doubted, whether mutual debts of a *different* nature could be ſet againſt each other under the above clauſe in the act of 2 *Geo.* 2. *c.* 22. it was enacted by 8 *Geo.* 2. *c.* 24. § 5. "That by virtue of the ſaid clauſe, mutual debts may be ſet againſt each other, either by being pleaded in bar, or given in evidence on the general iſſue, in the manner therein mentioned, notwithſtanding that ſuch debts are deemed in law to be of a different nature; unleſs in caſes where either of the ſaid debts ſhall accrue by reaſon of a penalty, contained in any bond or ſpecialty; and in all caſes where either the debt for which the action hath been or ſhall be brought, or the debt intended to be ſet againſt the ſame hath accrued or ſhall accrue by reaſon of any ſuch penalty, the debt intended to be ſet off ſhall be pleaded in bar, in which plea ſhall be ſhewn how much is truly and juſtly due on either ſide; and in caſe the plaintiff ſhall recover in any ſuch action or ſuit, judgment ſhall be entered for no more than ſhall appear to be truly and juſtly due to the plaintiff, after one debt being ſet againſt the other as aforeſaid."

Bull. N. P. 179.

Bull. N. P. 180.

A debt barred by the ſtatute of limitations we have ſeen cannot be ſet off: if pleaded, the ſtatute may be replied to it; if offered in evidence under a notice of ſet-off, this objection may be made to it at the trial.

The debt ſued for, and the debt intended to be ſet off, muſt be mutual, and due in the ſame right. Hence a defendant ſued as executor or adminiſtrator cannot ſet off a debt due to him in his own right; nor, when ſued for his own debt, can he ſet off a debt due to him as executor or adminiſtrator. Neither can a joint debt be ſet off againſt a ſeparate debt, nor a ſeparate debt againſt a joint one. Nor in an action againſt a man on his own bond, can he ſet off a debt due to him in right of his wife.

Bull. N. P. 180.

Slipper v. Stidſtone, 5 Term Rep. 493.

But a debt due to a defendant as a ſurviving partner, may be ſet off against a demand upon him in his own right: and ſo *vice verſâ*.

French v. Andrade, 6 Term Rep. 582.

Bottimley v. Brooke, M. 22 G. 3.

So, to an action brought by or againſt a *truſtee*, ſet-off may be made of money due to or from the *ceſtuy que truſt*.

C. B. Rudge v. Birch, M. 25 G. 3. B. R. 1 Term Rep. 621-2.

Ryal v. Larkin, 1 Wilſ. 155. Ridout v. Brough, Cowp. 133. (*a*) Marſh v. Chambers, 2 Str. 1231. (*b*) Dickſon v. Evans, 6 Term Rep. 57.

It was formerly holden that the ſtatutes of ſet-off did not extend to aſſignees of a bankrupt; but it has been ſince determined, that in actions by their ſuit, the defendant may ſet off a debt due to him at the time of the bankruptcy; for a note indorſed *after* the bankruptcy cannot be ſet off: and ſets-off being in the nature of croſs-actions (*b*) the defendant muſt ſhew that the note in reſpect of which he makes the croſs demand, was indorſed to him, or, if payable to bearer, came into his poſſeſſion before or at the time of the bankruptcy.

Evans v. Proſſer, 3 Term Rep. 186. Baſkerville v. Brown,

As in caſes of bankruptcy the debt claimed to be ſet off muſt have exiſted at the time of the bankruptcy, ſo in other caſes it muſt be in exiſtence at the commencement of the ſuit, and muſt be ſo pleaded. If they were then in exiſtence, the defendant's right to ſet it off cannot be

his having brought an action upon it, in which he has recovered a ver- 2 Burr. 1229. Reynolds v. Burling, M. 25 G. 3. B. R. 3 Term Rep. 188.
ct, or the plaintiff has paid the money into court. Hence a judgment ay be pleaded by way of ſet-off pending a writ of error.

As a ſet-off cannot be pleaded to an action of covenant for *general* da- Wrigall v. Waters, 6 Term Rep. 488.
ages, ſo neither can uncertain damages be pleaded by way of ſet-off to an ion of covenant for rent.

(D) Where the Defendant muſt plead a Set-Off, and where he may give Notice of Set-Off; and herein, of the Form of each.

WE have ſeen in the above clauſe of the ſtatute of 8 *Geo.* 2. *c.* 22. that where either of the debts accrues by reaſon of a ſpecialty, the debt ended to be ſet off muſt be pleaded in bar; and the defendant in his muſt aver what is really due; which averment is traverſable. Symmons v. Knox, 3 Term Rep. 65.

In all other caſes, the defendant may either plead, or give notice of ſet- at his election. 2 Burr. 1231. Bull N. P. 179.

If, at the time of the action brought, a larger ſum was due from the ntiff to the defendant, than from him to the plaintiff, the action being red, it ſeems more proper to plead the ſet-off; and it is uſually pleaded country cauſes to ſave the trouble and expence of proving the ſervice of tice. But, where the ſum intended to be ſet off is leſs than that for ch the action is brought, a notice of ſet-off ſhould be given. Buſl. N. P. 179. Tidd's Pr. 406-7.

The ſeveral parts of a plea of ſet-off are as ſeveral counts in a declaration; hat if one part be good, a demurrer to the whole plea is bad. Dowſland v. Thompſon, 2 Bl. Rep. 910.

The notice of ſet-off ſhould regularly be given with, or at the time of ding the general iſſue. Though if it be not then given, the court will per- the defendant to withdraw the general iſſue, and plead it again with a e of ſet-off. And ſuch notice may be given with the general iſſue, af- he defendant has been ruled to abide by his plea. Tidd's Pr. 407. 2 Str. 1267. 1 Term Rep. 634. *in notis.*

A point of form the notice ſhould be almoſt as certain as a declaration: fore where the notice of ſet-off was in theſe words, "Take notice that u are indebted to me for the uſe and occupation of an houſe, for a long e held and enjoyed, and now lately elapſed;" this was holden in- ient (*a*): and it afterwards appearing, that the debt intended to be ſet a rent reſerved on a leaſe by indenture, which was not mentioned in tice, the Chief Juſtice ſaid, it was bad on that account alſo: for if ad been ſhewn, the plaintiff might probably have proved an eviction, e other matter to avoid the demand. Fowler v. Jones, Bull. N. P. 179. (*a*) But, note, this was before the ſtatute 11 G. 2. c. 19. which gives the action for uſe and occupation.

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SHERIFF.

(A) The Nature of his Office.

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(*It ſeems that*) It was ordained by the ſtatute of 28 E. 1. c. 8. that the people ſhould have election of ſheriffs in every ſhire, where the ſhrievalty is not of inheritance. For, anciently, in ſome counties the ſheriffs were hereditary; as it ſeems they were in Scotland till the ſtatute of 20 G. 2. c. 43. and ſtill continue in the county of Weſtmoreland, of which the Earl of Thanet is the hereditary ſheriff. The city of London too have the inheritance of the ſhrievalty of Middleſex veſted in their body by charter. 1 Bl. Comm. 339. This office may alſo deſcend to, and be executed by a female; for Anne Counteſs of Pembroke had the office of hereditary ſheriff of Weſtmoreland, and exerciſed it in perſon. At the aſſizes at Appleby ſhe ſat with the judges on the bench. Hargr. Co. Litt. 326.

(B) Who are qualified or exempt from ſerving.

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(*An information*) It is now declared to be a publick act by 19 G. 3. c. 44. It was ſaid at the bar that the Lord Keeper was of the ſame opinion with Mr. J. Eyre.

2 Vent. 247 Gibſ. 506.

Four years before, *M.* 2 *W.* & *M.*, this was adjudged as a good plea, in the caſe of *Guildford Town* v. *Clarke*, viz. that he being a diſſenter, and unqualified by the act, the election was void; and that the by-law for forfeiting 20*l.* upon refuſal after election did not take place, becauſe the perſon being abſolutely incapacitated by the ſtatute, there was really no election; and ſo he could not refuſe after election.

Rex v. Groſvenor. 2 Str. 1193.

The defendant was one of the diſſenters who was choſen ſheriff of *London* and *Middleſex*, and refuſed to take upon him the office; for which an information was moved againſt him, as it is an office in which the public are intereſted, and therefore not to be compenſated by a pecuniary ſatisfaction to the city. But, upon ſhewing cauſe, the court diſcharged the rule: it appearing there were acts of common council that had provided penalties upon refuſers, which is the proper remedy; eſpecially where it is doubtful, whether the refuſal is a crime or not, which has never yet been ſettled. In this caſe, the facts are agreed, and the only doubt is in point of law, and therefore more proper for a civil ſuit: and ſo was the opinion of the court, in the caſe of *Shackleton* of *York*, in Lord *Hardwicke*'s time. However, they declared, that if, after the point was determined againſt the diſſenters, others ſhould refuſe; it might be a foundation to move for an information,

Harriſon v. Evans, 2 Burn's E. L. 185. 6 Br. P. C. 181.

But this much agitated queſtion, concerning the fining of diſſenters not ſerving corporation offices, is now ſettled.—In the year 1748, the corporation of *London* made a bye-law, impoſing a fine of 600*l.* upon every perſon, who, being elected, ſhould refuſe to ſerve the office of ſheriff. An action was brought in the ſheriff's court upon this bye-law, for the penalty of 600*l.* againſt the defendant *Allen Evans*, for refuſing to ſerve the ſaid office. The defendant pleaded the ſtatute of 13 *Car. II.* 2. that no perſon ſhall be choſen into ſuch office, who ſhall not, within a year next before, have taken the ſacrament according to the rites of the church of *England*; and in default thereof, every ſuch choice is declared to be void. The defendant further pleaded the ſtatute of 1 *W.* & *M.*

ct. for exempting proteſtant diſſenters from penalties contained in former
ts. Then the plea averred, that the ſheriffs of *London* are officers who
efore 13 *Car.* 2. were perſons bearing ſuch office; that the defendant
as and ſtill is a proteſtant diſſenter from the church of *England*, a perſon
f a ſcrupulous conſcience in the exerciſe of religion, and during all that
me has and ſtill does frequent the congregation of religious worſhip
mong proteſtant diſſenters. The defendant then ſtated that he took the
aths, and ſubſcribed the declaration, acording to the act of toleration,
the year 1751, at the ſeſſions holden for the county of *Middleſex*; and
at his taking the oaths was duly regiſtered in the court of ſeſſions: that
e had not within one year before the ſuppoſed election taken the ſacra-
ent of the Lord's Supper according to the rites of the church of *Eng-
nd*, nor has he at any time ſince done it, nor was he bound to take the
me ſince *May* 1751: that of theſe premiſes the lord mayor, aldermen,
d citizens had notice; and that by reaſon thereof, and of the act
parliament made for governing corporations, the mayor, aldermen, and
izens aſſembled in *July* 1754, and the livery were prohibited from
ecting, and had no power to elect him ſheriff: that he was diſabled
om, and incapable of being elected, and that the ſuppoſed election of
m was void. To this plea the plaintiff replied, that by the ſtatute of
Geo. 2. c. 6. § 3. it is enacted, that no perſon choſen into ſuch
ice, ſhall be removed or otherwiſe proſecuted for omiſſion of taking
e ſacrament, nor ſhall any incapacity or diſability be incurred by rea-
n of the ſame (unleſs he be removed or proſecution commenced within
months). To this replication the defendant demurred; and the
intiff joined in demurrer. And judgment was given for the
intiff in the ſheriff's court; which was afterwards affirmed in the
urt of the huſtings. But this judgment was reverſed by the commiſſio-
rs delegates, viz. Lord Chief Baron *Parker*, Mr. Juſtice *Foſter*, Mr.
ſtice *Bathurſt*, and Mr. Juſtice *Wilmot*; and the judgment of the com-
ſſioners delegates was afterwards affirmed in the Houſe of Lords.
e Houſe, when the matter was brought before them, ordered this
eſtion to be propoſed for the opinion of the judges, How far the de-
dant might, in the preſent caſe, be allowed to plead his diſability in
of the accuſation brought againſt him? It was allowed on all hands,
t if his non-conformity and conſequent diſability, was criminal, he
uld not plead it. And for this reaſon one of the judges, *Perrot*, B.,
s of opinion (contrary to the reſt of his brethren), that the defendant's
ability, in the preſent caſe, could not be pleaded, becauſe, as he ſaid,
e toleration act amounted to nothing more than an exemption of pro-
ant diſſenters from the penalties of certain laws therein particularly
tioned; and the corporation act not being mentioned therein, the
eption act could have no influence upon it; and therefore his diſability
urred by his non-conformity in conſequence of the corporation act,
, in his opinion, a culpable one, and rendered him liable to any penal-
, to which any others are liable for refuſing to ſerve the office of ſhe-
; inaſmuch as no man can diſable himſelf; but, if he refuſed to take the
rament according to the rites of the church of *England*, he diſabled
lf, and the fine impoſed was a puniſhment upon him for the crime of
non-conformity, from which he could plead no legal exemption.—But
the other judges were of a contrary opinion, That the corporation act
olely rendered the diſſenters ineligible and incapable of ſerving; its
n being to keep them out, as perſons at that time ſuppoſed to be
ected to the government; and though the diſability ariſing from hence

Furneaux's Letters to Blackſtone.

could

could not *then* have been pleaded againſt ſuch an action as is now brought againſt the defendant, non-conformity being *then* in the eye of the law a crime, and no man being allowed to excuſe one crime by another; yet the caſe is different ſince the toleration act was enacted, that act amounting to much more than a mere exemption from the penalties of certain laws, and having an influence upon the corporation act conſequentially, though the corporation act is not mentioned therein, by freeing the diſſenters from all obligation to take the ſacrament at church, aboliſhing the crime as well as penalties of non-conformity, and allowing and protecting the diſſenting worſhip. The defendant's diſability, therefore, they ſay, was a lawful one, a legal and reaſonable, not a criminal excuſe; it was not in the ſenſe of the law diſabling himſelf; the meaning of that maxim "That a man ſhall not diſable himſelf," being only this, that no man ſhall diſable himſelf by his own wilful fault or crime; and non-conformity being no longer a crime ſince the toleration act was enacted, he is diſabled by judgment of parliament, namely, by the corporation act, without the concurrence or intervention of any crime of his own; and therefore he may plead this diſability in bar of the preſent action.

Rex v. Woodrow, 2 Term Rep. 731.

By the 9 *Geo.* 2. *c.* 9. § 3. any perſon elected ſheriff of *Norwich* worth 3000*l.* may be excuſed ſerving the office on paying a fine of £ within fourteen days: but the fourth ſection provides, that no perſon ſhall be diſcharged from bearing the ſaid office for any longer time than one year, without the conſent of the mayor, ſheriffs, and commonalty of the city. The defendant, who was worth 3000*l.*, had been regularly elected to the office, and had tendered his fine, on condition that he ſhould be diſcharged from ſerving the office in future; but this was not accepted. On a motion for an information againſt him, the court were clearly of opinion, that the payment of the fine did not exempt the perſon paying it for more than a year, without the agreement of the corporation that he ſhould be diſcharged for a longer time. And they granted an information againſt the defendant, becauſe the vacancy of the office occaſioned a ſtop of publick juſtice, and the year would be nearly expired before an indictment could be brought to trial.

2 Hatſ. Pr. 34.

By a reſolution of the Houſe of Commons of the 7th of *January* 1[6]... it is declared, "That the nominating any member of that Houſe to the "king to be made a ſheriff, is a breach of privilege." The Houſe therefore addreſſed the king to appoint another ſheriff in the room of *Jonathan Jennings* High Sheriff of *Yorkſhire*, which the king complied with. From this caſe Mr. *Hatſell* ſays, it ſeems to be ſettled that it is not lawful for a member of the Houſe of Commons to be appointed ſheriff by the king: but where the ſheriffs are elected by the people, as for *Middleſex*, it is ſtill very cuſtomary; and indeed in the inſtance of *Middleſex*, the two ſervices being both in the ſame county, are not, as in other caſes, ſo incompatible with each other.

(C) Manner of appointing him; and herein, of Oath.

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(*And yet the king*) *Vide* 1 Bl. Comm. 341. and Mr. Chriſtian's note.

(*The ſheriffs*) By ſtat. 1 W. & M. c. 27. § 4 the nomination of three proper perſons for ſheriffs of the Welch counties is now veſted in the juſtices of the great ſeſſions, who are to certify the names of ſuch perſons to the privy council *cruſtine animarum*, that the king may appoint one of

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(*But there being*) The ſheriffs of thoſe places are to take the old oath, with the omiſſion only of the words impoſing conſtant reſidence in their bailiwicks. 3 Geo. 1. c. 15. § 20

(F) That he muſt be reſident in his County, and whether he hath any Juriſdiction out of it.

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(*Hence it is*) He may aſſign a bail-bond out of his county. 2 Ld. Raym. 1455. 2 Str. 757.

(H) Of the High Sheriff's Power and Duty in appointing an Under-Sheriff, and other Deputies: And herein,

1. Of the Under-Sheriff, and in what Manner appointed.

The ſheriff cannot depute two perſons, under-ſheriffs extraordinary, to take an inqueſt. Denny v. Trapnell, 2 Wilſ. 378.

Although ſervice of a rule on the under-ſheriff's *agent* in town is not good ſervice, yet ſervice at the offices of the *agents* for the under-ſheriff of *London*, *Middleſex*, and *Surry*, is, becauſe they are conſidered as the offices of the under-ſheriffs. Rex v. Coles, Dougl. 420.

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(*But it was reſolved*) 2 Wilſ. 351.

(*As it was*) It is a public law. 2 Term Rep. 575.

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(*As it is*) But this caſe was denied to be law by Lord Mansfield, in the caſe of Harris v. Bailey, Sittings in Middleſex, Mich. Term 30 G 2. where the aſſignment was under the ſeal of office, and was made by the under-ſheriff's clerk, in his office, and that appeared to be the uſual practice of making ſuch aſſignment; and in French v. Arnold, Tr. 5 G. 3. this caſe of Harris v. Bailey being mentioned, Lord Mansfield ſaid, he had mentioned it before he had determined it, to Mr. J. Denniſon, and afterwards to the other judges of the court, and they concurred with him in opinion that the bond was well aſſigned. 1 Str. 60. Nolan's edition, notes.

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(*But though*) The arreſt muſt be made *by the authority of the bailiff*; but he need not be the hand that arreſts, nor in the preſence, nor actually in ſight, nor within any preciſe diſtance, of the perſon arreſted, Blatch v. Archer, Cowp. 65.

(*But though the high*) This diſtinction that the ſheriff is anſwerable *civiliter*, but not *criminaliter*, for the acts of his bailiffs, is perfectly correct, and adopted in ſeveral modern caſes. And it is no objection to his being called upon to anſwer *civiliter*, that the acts done by his officers would alſo ſupport a criminal proſecution againſt them. Nor is it neceſſary to found a proceeding againſt the ſheriff, to ſhew a recognition by him of his bailiff's act. Ackworth v. Kempe, Dougl. 40. Emerſon v. Baker, 3 Wilſ. 309. 2 Bl. Rep. 832. S. C. Woodgate v. Knatchbull, 2 Term Rep. 148.

(*And therefore*) That is, *criminaliter*; for all *actions* for breach of duty of the office of ſheriff, for default of the under-ſheriff or bailiffs, muſt be brought againſt the high ſheriff, ſo that the law in the text is not law. Cameron v. Reynolds, Cowp. 403.

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(*But although*) He cannot return, that the perſon was reſcued out of the bailiff's cuſtody; the return muſt be, that he was reſcued out of *his* (the ſheriff's) cuſtody. *Per* Buller, J. 3 Term Rep. 156.

De Moranda v. Dunkin, 4 Term Rep. 119. Hamilton v. Dalziel, C. B. Hil. 1774, S. P.

If the ſheriff appoint a ſpecial bailiff at the nomination of the plaintiff the latter muſt take the conſequences of the acts of the bailiff, and cannot rule the ſheriff to return the writ.

Drake v. Sykes, 7 Term Rep. 113.

In an action of treſpaſs againſt the ſheriff for the wrongful act of his bailiff, it is not enough to prove the bailiff a general bailiff, and that he had given a bond of indemnity to the ſheriff as ſuch, and alſo to prove a copy of the warrant under which he entered and ſeized the plaintiff's goods; but the privity between the bailiff and ſheriff muſt be eſtabliſhed in the particular tranſaction, by proving the original warrant of execution directed by ſuch ſheriff to ſuch bailiff, or, at leaſt, by proving ſuch notice to produce it, as will, in caſe of the non production of it, let in ſecondary evidence to prove its contents.

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(*The gaoler*) The modern acts of parliament for the regulation of gaols ſeem to interfere a little with the ſheriff's power over his gaoler, and to introduce at leaſt a concurrent power, acting a check both upon the ſheriff and his officer, *Vide* ſtat. 24 G. 3 ſeſſ. c. 2. 54. 31 G. 3. c. 34 G. 3. c. 84.

(I) Of the preceding and ſucceeding Sheriff; and herein of the Acts neceſſary to be done by each of them.

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(*It hath been*) No ſheriff ſhall be liable to be called upon to make a return of any writ or proceſs, unleſs he be ſo required ſo to do within ſix months after the expiration of his office. *Id.* A ſheriff is not liable to an attachment for not returning a writ, if not called upon *by a rule of* within the above time, though he was requeſted by the party to return it before the expiration the ſix months. Rex v. Jones, 2 Term Rep. 1.

1 St. Tr. 662.

It is ſaid by Sir *George Croke* in his argument in Mr. *Hampden's* that the *certiorari* which was directed in that caſe to the two that were ſheriffs at the time of the aſſeſſment, and not to the ſheriff that was at the time of the *certiorari* awarded, who is the only immediate officer to return the writs, was not legal: for all writs are directed to ſome immediate ſheriff, requiring him to demand of the former ſheriffs, what they did the former writ; and they are to return to him what hath been done, and he is to return the ſame to the court, whereunto he is an immediate officer, and the former are not any officers.

(M) Of his Duty and Acts as a Miniſterial Officer. And herein,

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(*If one be taken*) Wright. See the ſame diſtinction, and this caſe cited with approbation De Grey, C. J. in 3 Wilſ. 344-5.

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(*This depends*) *Vide* Tom 3 pag 476.

(*In the conſtruction*) *Vide* Tom. 3. pag. 476.

(*Alſo the court*) Note, in the preceding caſe, the court refuſed to relieve upon motion; this caſe, Holt ſaid, it muſt be by *audita querela*; the arreſt on a Sunday being a fact tran

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(*On these writs*) He cannot perhaps where there is a tenant in poſſeſſion, and the execution is againſt the landlord, whoſe term is to be ſold, turn the tenant out of poſſeſſion: but the caſe might be very different, where *the debtor himſelf* is in poſſeſſion. In the caſe in Shower, the proceeding was under the ſtatute for a forcible entry, which by no means negatives the power of the ſheriff to put the tenant out of poſſeſſion peaceably. Taylor v. Cole, 3 Term Rep. 292.

So, in pleading the taking of a term under a *fieri facias*, it is ſufficient to ſtate, that the party was poſſeſſed of a certain intereſt in the reſidue of a certain term of years. Taylor v. Cole, 3 Term Rep. 292.

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(*The ſheriff in executing*) This inquiſition, it ſeems, the courts cannot ſet aſide. Roberts v. Thomas, 6 Term. Rep. 88.

(*The ſheriff cannot*) Tulley v. Peachey, Hil. 23 Geo. 3. 4 Term Rep. 640.
4 Term Rep. 640.
Or the goods were not *legally* ſeized, 4 Term Rep. 651.

How far the ſheriff is juſtifiable in ſeizing the goods of a teſtator in the hands of his executor in execution of a judgment againſt the executor in his own right, hath been very amply diſcuſſed in a late caſe. It was an action againſt the ſheriff for a falſe return to a *fieri facias*. The ſpecial verdict ſtated, that in *Eaſter* term 30 *G.* 3. the plaintiffs recovered againſt *L.* and *R.* and *A.* his wife, executors of *L.* 236*l.* 10*s.*; and on 17th *May*, 30 *G.* 3. ſued out a *fi. fa.* to levy that ſum of the goods and chattels which were of *L.* in the hands of the executors to be adminiſtered. That on the 28th *May* 1790 the writ was delivered to the defendants, then ſheriff. That in *Eaſter* term 1790 *B.* recovered againſt *R.* 1047*l.* debt, and 63*l.* damages and coſts; which judgment was ſigned 27th *May* 1790. That on 28th *May* 1790 *B.* ſued out a *fi. fa.* on that judgment, teſted the 28th *May*, which writ, on the 28th *May* 1790, and a few hours before the delivery of the plaintiff's writ, was delivered to the ſheriff, who under that writ, a few days before the delivery of the plaintiff's writ to him, ſeized goods in an houſe wherein *R.* and his wife reſided, and in which houſe the teſtator at his death did reſide; and which goods were the teſtator's. That on the ſame 28th *May* 1790, after the ſheriff had ſeized the goods, the attorney for the plaintiff gave notice to the attorney for *B.* and alſo to the ſheriff, that the goods ſo ſeized were the goods of the teſtator in the poſſeſſion of *R.* and his wife, as executors, liable to the payment of the debt recovered by the plaintiffs, and alſo liable to the payment of 116*l.* recovered by one *S.* and not liable to the payment of any debt of *R.*, the ſame being ſufficient to ſatisfy the ſaid judgments and other debts of the teſtator; and that the ſaid attorney meant to take out executions on the ſaid judgments; and unleſs they quitted poſſeſſion, actions would be brought againſt them. That afterwards, on the ſaid 28th *May* the attorney for the plaintiff procured a warrant from the defendants, then ſheriff, on the back of *fi. fa*, mentioned in the declarations, which warrant was on the ſame day delivered to the officer to be executed. That the officer went with the warrant to the houſe where the goods were before they were ſold, and did not levy thereon; and the ſheriffs afterwards returned *nulla bona* to the writ, and that by means of the premiſes, the plaintiffs were hindered in recovering their damages and had loſt the ſame. In this caſe, three judges, viz. Lord *Kenyon*, Ch. J., *Aſhurſt* and *Groſe*, J., were of opinion that the plaintiffs were entitled to judgment. But *Buller*, J., *contrà*, held that the property in the goods, after the teſtator's death, is veſted in the executors, who may grant, alien, give, or releaſe them; that the execution Farr v. Newman, 4 Term Rep. 621.

ecution in this case was equivalent to a sale, which it was admitted would be good, and that as to the notice, if the sheriff acted legally in seizing the goods, he was bound to proceed in the execution; and a subsequent notice would not make that unlawful, which was lawful at the time: if the seizure were unlawful, the sheriff was liable to an action without any notice at all; and if it were not unlawful, no notice could make it so. So that the notice in such case was a perfect novelty, unknown to the common law, with regard to any effect which it could have.

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(*Upon a writ.*) But, though such be the practice, it is not part of the duty of the sheriff to execute a bill of sale to the plaintiff at an appraised value, nor is he compellable to do so, though he even promise it. For this might be very inconvenient and highly injurious if it were allowed. The legal and proper mode of compelling a sale by the sheriff, where he makes delay or refuses, is by writ of *venditioni exponas*; upon which he must return the money into court. Camera Reynolds. Cowp. 406.

(*Where since*) And agreeably to this doctrine two modern cases have proceeded; that where *fieri facias* is delivered to the sheriff, and the officer has levied the debt, and *made a bill of sale*, shall have priority of a former execution in the office; Rybot v. Peckham, M. 19 Geo. 3. 1 Term Rep. 731. *in notis*; and when two writs of *fieri facias* against the same defendant are delivered to a sheriff on different days, and *no sale is actually made* of the defendant's goods, the execution must have the priority, even though the seizure were actually made under the subsequent execution. Hutchinson v. Johnston, 1 Term Rep. 729.

The sheriff is not liable for seizing goods in execution after an act of bankruptcy; but, if he sells them after the commission issues, trover will lie.

(O) Of his Duty in admitting Persons to Bail, herein of Securities taken for Ease and Favour

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(*The party*) If the plaintiff dislikes the security, he should not take an assignment of the bail-bond; for by so doing, he discharges the sheriff. Gilb. C. P. 21. 1 Salk. 99 1 Wil. Williams and Jacques, M 24 G. 3. but, if the same bail be put in above, he cannot after except against them. Tidd's Pr. 153.

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(*On an attachment*) But, though the sheriff may perhaps bail in such case, he is clearly bound to do so; nor will an action lie against him on the above statute for refusing to do so, the statute referring only to process in courts of law. Studd v. Acton, 1 H. Bl. 468.

(*On an indictment*) But the sheriff's power of taking a bond under this act upon an indictment found before himself at his tourn was taken away by 1 Edw. 4 c. 2, and upon indictments in any other courts has been denied in a late case by all the Judges except Eyre, C. J. Gosgough v. Rossiter, 4 Term Rep. 505. 2 H. Bl. 418.

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(*So if a capias*) Where the undertaking is given to the *sheriff*, the form directed by 23 G. 2. c. 9. must be strictly pursued, and therefore an agreement in writing to put in good bail for a party arrested on mesne process at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the sheriff's officer, in consideration of his discharging the party arrested, is void. But, where the undertaking is given to the plaintiff, it is not within the statute, and therefore the undertaking of an attorney for the appearance of a defendant is not void, because it is given to the plaintiff in the action and not to the sheriff. Rogers v. Reeves, 1 Term Rep. 418.

(*It is now*) But see *contr.* 2 Term Rep. 569. Samuel v. Evans.

Cresswell v. Houghton, 6 Term Rep. 355. A party grieved who recovers damages against the sheriff for not taking bail under this statute, is entitled to his costs: before the statute

eriff would not bail the party arreſted, the latter had a remedy againſt im; and wherever a ſtatute ſubſequent to the ſtatute of *Glouceſter* gives a emedy, where damages were ſuſtained before, there the party ſhall have is coſts.

If a ſheriff's officer upon an arreſt take an undertaking for the appear- Fuller v. nce of the party inſtead of a bail-bond without the plaintiff's aſſent, and Preſt, il above be not duly put in, the ſheriff is liable to an action for an eſcape; 7 Term Rep. d the court will not relieve him by permitting him to put in and juſtify 109. il afterwards.

SIMONY. Page 465

(It has been) Simony, as ſuch, was unknown to the common law; though I agree that corrupt ntation was. Burnett's Paſt. Care, 22. But what is or is not ſimony now depends on the ute of 31 Eliz. c. 6. which did not adopt all the wild notions of the canon law; but has defined to be a *corrupt* agreement to preſent. In Co. Entr. 516, it is expreſſed *ſimoniacé et corruptè*; but latter is the legal and effective word. *Per* De Grey, C. J. 2 Bl. Rep. 1054.

(A) In what the Offence of Simony does conſiſt.

Page 469

(In a caſe) 2 Bl. Rep. 1052. S. C.

(B) How far a Bond for reſigning a Benefice is good at Law.

Page 470

(It has) So, a bond given by the incumbent to the patron to reſign if he did not reſide upon living, hath been holden good. Bagſhaw v. Boſsley, 4 Term Rep. 78. And where a bond was ditioned to reſide, to reſign for the patron's ſon to be preſented, and to keep the parſonage-ſe and chancel in repair, the court of King's Bench gave judgment for the plaintiff without ar-ment, ſaying, as this was not preciſely ſimilar to the caſe of the Biſhop of London v. Ffytche, were bound by the eſtabliſhed ſeries of precedents. Partridge v. Whiſton, *Id.* 359.

(The doctrine) Sir Wm. Jon. 220. S. C. Watſon v. Baker, Sir T. Raym. 175. S. P.

ad in the caſe of *Grey* v. *Heſketh*, Lord *Hardwicke* ſaid, theſe ſort of Ambl. 268. ds are held good at law, and ſo they are in equity, unleſs an ill uſe is (a) This de-mpted to be made of them, in which caſe that court will interfere. ciſion, wever, notwithſtanding theſe deciſions, general bonds of reſignation which was e declared void at law by the Houſe of Lords in the great caſe *(a)* brought he Biſhop of *London* v. *Diſney Ffytche* (*May* 1783;) and the judg- about by t of the court of Common Pleas, affirmed by the King's Bench, was the great ingly reverſed. eloquence and ability of the Chancel-Thurlowe, and the honeſt zeal of the biſhops, was contrary to the opinion of all the Judges, Lyttelton, B. and ſeems not likely to be acquieſced in. *Vide* 4 Term Rep. 78. 359.

(C) Of

(C) Of the Power exercised over a Bond for resigning a Benefice by Courts of Equity.

Grey v. Heskett, Amb. 268.

A patron having obtained judgment against the incumbent on a general bond of resignation, the latter filed a bill in equity for a discovery, whether the advowson was not sold with a promise to procure an immediate resignation. The defendants demurred to the discovery, as tending to subject him to the penalties of the statute against simony. But Lord *Hardwicke* overruled the demurrer.

(D) Whether the Penalty of a Bond for resigning a Benefice be saved, where the Ordinary has refused to accept a Resignation.

(4 *In a late*) See this case in 3 Burn's E. L. 304-5, where it is said, that in the course of the former argument, the Chancellour held, *that it is in the power of the ordinary to accept or refuse a resignation.*——It seems to be clear, that the bishop may refuse a resignation, on a sufficient cause his refusal; but, whether he can merely at his will and pleasure refuse to accept a resignation without any cause, and who shall finally judge of the sufficiency of the cause, and by what means he may be compelled to accept it, are questions undecided. In the case of the Bishop of London v. Ffytche, the Judges in general declined to answer the question proposed to them, whether a bishop was compellable to accept a resignation? one thought he was compellable by *mandamus*, if he did not shew sufficient cause; and another observed, if he could not be compelled, he might prevent any incumbent from accepting an Irish bishoprick, as no one can accept a bishoprick in Ireland till he has resigned all his benefices in England. But Lord Thurlowe seemed to be opinion, that he could not be compelled, particularly by *mandamus*, from which there is no appeal or writ of error. 3 Burn's E. L. 337, &c. Cunningh. Law of Simony.

(8 *In an action*) Lord Hardwicke expressed himself of the same opinion, as to this point, when this case came before him in Chancery. Ambl. 268.

(E) Some Objections to a Bond for resigning a Benefice considered.

(3 *Another objection*) *Vide* 4 Term Rep. 78.

(I) Of the Pleadings in an Action upon the 31 *Eliz.*

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(4 *Non is*) *Sed quære*, for where a person not bound to recite a statute will yet hazard a recital if he errs, according to modern resolutions, it is fatal. And note, in the principal case, no exception was taken to the misrecital.

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SLANDER.

(*It is no excuse*) It is not in compassion to men's infirmities, that the law allows the speaking of words to be a justification in an action, but, because, if the words spoken are true, the individual of whom they are spoken can complain of no *injury*. In one case Lord Camden is reported to have said, that if words are true they are *no slander*, but may be justified. 2 Wils. 304. But surely this is taking the word slander, only in its ordinary acceptation, as signifying mere circulation of mischievous *falsehoods*. For *malicious* slander, and the slander must be malicious to found a legal proceeding, is the relating of either truth or falsehood, for the purpose of causing misery; for truth may be made instrumental to the success of malicious designs as well as falsehood. See Paley's Phil.

(*Slander*) Hence a libel is punishable both criminally and by action, when speaking the

would not be punishable either way; for speaking the words *rogue* and *rascal* of any one, an action will not lie; but, if those words are written and published of any one, an action will lie: if one man should say of another, *he has the itch*, without more, an action would not lie: but, if he should write those words of another, and publish them maliciously, no doubt but the action well lies. *Per* Gould, J. 2 Wilf. 204.

(A) In what Cases an Action for Words in the general lies.

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(1 *An action*) There are two general rules for determining whether words are actionable, The first is, that the words must contain an express imputation of some crime liable to punishment, some capital offence or other infamous crime or misdemesnour; and the charge upon the person spoken of must be precise. The other is, if the words may be of probable ill consequence to a person in a trade, profession, or an office. These are the two general rules which have usually governed cases for slanderous words. There must be some certain or probable temporal loss or damage to make the words actionable. No imputation of the breach of legal or moral obligation, unless enforced by temporal sanctions; no charge of the want of chastity, unless under special circumstances, 1 Lev. 64 will be sufficient to found an action. 3 Wilf. 186. 2 Bl. Rep. 752. 6 Term Rep. 694.

(B) What Words are in themselves actionable.

(11 *No action*) Holt v. Scholefield, 6 Term Rep. 691.

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(34 *But no action*) But this case was over-ruled by the court of Common Pleas in the case of Jones v. Herne, 2 Wilf. 87. and these words, *You are a rogue, and I will prove you a rogue, for you have my name*, were holden to be actionable.

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(45 *An action*) It seems that this custom has never been proved, so as to maintain an action in Westminster-hall: in the City-court, the action is maintained, because they take notice of their own customs without proof. Dougl. 380. 4 Burr. 2032.

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(55 *It has*) For though imprisonment be the punishment for this offence, yet *per Holt*, C. J. it is not a scandalous punishment. A man may be fined and imprisoned in trespass. There must not only be imprisonment, but an infamous punishment. I think, says my Lord C. J. De Grey, Holt, in this case carries it too far, as to precision; for it is laid down in Finch's Law, 185, if a man maliciouby utters any false matter to the endangering one in law, as to say, *He hath reported that money is fallen; for he shall be punished for such a report, if it be false.* Here is the case of a crime, and the punishment not infamous; and yet Finch seems to say an action lies for these words. 3 Wilf. 186.

1. Words which import the Charge of having a contagious Distemper.

But charging another with *having had* a contagious disorder is not actionable; for unless the words impute a continuance of the disorder at the time of speaking them, the gist of the action fails; for such a charge cannot produce the effect which makes it the subject of an action, namely, exclusion from society. To make such words actionable, some special damage must be alleged in consequence of them. Carslake v. Mapledoram, 2 Term Rep. 473. Taylor v. Hall, 2 Str. 1189.

(5 *But no action*) See 3 Wilf. 186.

2. *To a Person in an Office of Trust.*

For these words spoken of a member of parliament, *As to instructing our members* Onslow v. Home,

3 Wilſ. 177. 2 Bl. Rep. 753. S. C. *members to obtain redreſs, I am totally againſt that plan; for as to inſtruc* *Mr.* Onſlow, *we might as well inſtruct the winds; and ſhould he even prom* *his aſſiſtance, I ſhould not expect him to give it us,* were holden not to b actionable.

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(104 *If a Bariſter*) Qu. whether any action will properly lie for Words ſpoken of Phyſici and Barriſters, their fees being merely honorary, and not demandable in the court of Law.

Page 491

(111 *It is laid*) For imputation of Ignorance to one in a profeſſion, I think an action will c tainly lie. *Per* De Grey, C. J. 3 Wilſ. 186.

Day v. Buller, 3 Wilſ. 59. So, for theſe words, *what, does he pretend to be a lawyer? he is no m a lawyer than the devil.*

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(143 *In an action*) Fitzg. 121. 235. S. C. 1 Barnard. B. R. 289. 438. S. C.

(C) Some Words which become actionable by re ſon of the Damage received from them.

Page 496

(10 *An action*) For wherever ſome certain or probable temporal loſs or damage ariſeth f the imputation of the want of chaſtity, it is actionable; as to ſay, a woman is a whore in L don, where ſhe is ſubject to be whipped for whoredom; or to ſay that ſhe is ſo, where ſhe h an eſtate *dum ſola et caſta fuerit.* 1 Lev. 134. 3 Wilſ. 187.

(D) Certain Circumſtances which are to be regar ed in the Conſtruction of Words.

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(20 *It is not*) *Sed quære,* for though it be indiſpenſably neceſſary to ſet forth the original w yer, it ſeems, the plaintiff ſhould alſo tranſlate them, and ſhew their application to him. Z v. Axtell, 6 Term Rep. 163.

5. The Intention in publiſhing the Words.

Weather- ſton v. Hawkins, 1 Term Rep. 100. See St. 32 G. 3. c. 56. Nor will an action lie for a character of a ſervant communicated in c fidence to one, who aſks it from the former maſter or miſtreſs.

(G) How far Words muſt be affirmative, in or to render them actionable.

Oldham v. Peake. 2 Bl. Rep. 959. So, for theſe words, *I am thoroughly convinced that you are guilty,* for *I am thoroughly convinced* is equal to a poſitive averment; for a only avers a thing, becauſe he is convinced of the truth of it.

Beaver v. Hides. 2 Wilſ 300. So, theſe words were holden actionable, *He was put into the roun for ſtealing ducks at* Crowland, they being alleged to be ſpoken *falſely maliciouſly.*

(H) How far Words muſt be certain, in orde render them actionable.

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(10 *No Action*) *Sed vide ſupra* (B. 4.) this caſe over-ruled.

(S) Of the Pleadings in an Action for Words

(1 *If two perſons*) 2 Burr. 984.

In an action for ſeveral ſets of words, the firſt ſet were theſe: *That* Tindal v. Moore, 2 Wilſ. 114
we J. T. (meaning the plaintiff) *that ſet the houſe on fire* (meaning the mmer-houſe that was burnt, in the occupation of one Mr. *Cotton*), *and if body will give me charge of him, I will carry him to New Priſon.* The ſet were theſe: *J. T.* (meaning the plaintiff) *ſet the houſe on fire* aning the ſame houſe). It was moved in arreſt of judgment, that the er ſet of words were not actionable, for that every count in a declaration ſubſtantive count, and the *innuendo* (*meaning the ſame houſe*) ſhall not re- to the ſummer-houſe mentioned in the firſt ſet of words. But by the rt—Although the latter ſet of words be not of themſelves actionable, they ſhall have relation to the former ſet; and we muſt take them to e been ſpoken *maliciouſly*, as the jury have found for the plaintiff.

If it be laid, that the defendant *in clauſo eccleſiæ* Lichfield ſpoke the words, Bull. N. P. 5
as been holden, that the place not being laid as a *venue*, but as a deſ- tion of the offence, it is a circumſtance that muſt be proved. But, if words are laid to be ſpoken before *A.* and others, it is ſufficient to prove n to be ſpoken before others only.

It was formerly holden, that the plaintiff muſt prove the words preciſely 2 Roll. Abr. 718.
aid; but that ſtrictneſs is now laid aſide, and it is ſufficient for the plain- Avarillo v. Rogers.
to prove the ſubſtance of them. However, if the words be laid in the d perſon, *e. g. He deſerves to be hanged for a note he forged on* A., proof Bull N. P. 5.
words ſpoken in the ſecond perſon, *e. g. You deſerve*, &c. will not ſup- Rex v. Barry.
the declaration: for there is a great difference between words ſpoken in 4 Term Rep 217.
ſion to a man's face, and words ſpoken deliberately behind his back.

In an action for theſe words, *Mr.* Purdy *gave* 200l. *for his warrant to be* Purdy v. Stacy.
r of the Magnanime, (a man of war,) judgment was arreſted, becauſe 5 Burr. 2699.
charge, as laid, was ſo looſe, that it did not of itſelf import a crime: e was nothing to ſhew, *to whom* the money was given; and as it was averred, the court could not intend it.

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(*It is not*) *Sed vide ſupra* D. 3.

4. What is the uſe of an *Innuendo*.

Page 56

(*It has*) For the office of an *innuendo* is to explain matter ſuffi- Cowp. 684.
ly expreſſed before; but the *innuendo* in this caſe is not an *explanation* hat was ſaid before, but an *addition* to it.

The plaintiff declared, that on a *colloquium* concerning the *death* of one Oldham v. Peeke 2 Bl. Rep. 959.
D. the defendant ſaid to the plaintiff, *You are a bad man, and I am ghly convinced that you are guilty* (meaning of the murder of the ſaid *D.* It was objected, that the *innuendo* of *murder* is overſtrained, there being no thing laid of *murder*, but only of *death*. But by the court—The *in-* of *murder* is warranted, though the *colloquium* is laid to be of *death*. is the genus, and *murder* the ſpecies. When the converſation was e death of *D.* and the defendant ſays the plaintiff is *guilty* of it, he mean ſuch a ſpecies of death as would infer guilt. Murder is ſuch a It is not therefore contradictory, but explanatory; not introduc- of new matter, but aſcertaining the meaning of the old; and limiting general word *death* to one particular ſpecies of it, *murder*.

5. What may be pleaded in Juſtification of Words.

, if the perſon repeating the ſlander at the ſame time mentioned the Davis v. Lewis.
name

7 TermRep. 17. name of the perſon from whom he heard it, that may be pleaded in ju cation to an action brought againſt the former.

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(87 *A complaint*) 2 Burr. 807. S. C.

(89 *Heretofore the*) It was holden prior to this caſe, that where the charge is of a particular ſpecified criminal act not capital, the defendant may give the truth of it in evidence. Smith Harriſon, per Holt, C. J. 1 Ld. Raym. 727. However, where the words charged impute a c tal crime, if the plaintiff gives evidence of other expreſſions to the ſame purpoſe in aggrava the defendant may, in mitigation, give evidence that theſe laſt are true, for he had no opportu to plead it. Colliſon v. Loder, Oxon. 1750, per Burnet, J. Bull. N. P. 10.

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SMUGGLING.

(A) Of Cuſtoms in the general.

Page 524

(4 *The firſt*) The cuſtoms are denominated in the barbarous Latin of our ancient records *ma*; not *conſuetudines*, which is the language of our law, whenever it means merely uſages. appellation ſeems to be derived from the French word *couſtom*, or *coûtum*, which ſignifies toll bute, and owes its own etymology to the word *couſt*, which ſignifies price, charge, or, as we adopted it in Engliſh, *coſt*. 1 Bl. Comm. 324.

(C) Of the ancient State of certain Cuſtoms.

Page 532

(11 *The duty*) Priſage of wines, ſays my Lord Hale, ſeems to be an ancient duty by the crown in all times. It is no part of that prerogative, which is called purveyan take proviſions for the king's houſehold; but it is a fixed ſettled inheritance, though poſſibly original it might have taken its riſe from thence. And therefore it was agreed, 40, 41 Eliz *quo warranto* againſt Haughton, who had the priſage of London, and the ports adjacent, the office of butler there, for years by the king's grant, that it was grantable for years or wiſe. In Ireland, it hath been received to the uſe of the crown by the family of the B now Earls of Ormond, being the king's chief butlers of Ireland by tenure. See Hale's concerning the Cuſtoms, 116.

15 *This duty*) All the books that ſpeak of *butlerage* mention it as a favour to the foreign chant, that inſtead of a pre-emption of wine in ſpecie, there was this duty of 2*s.* laid upo ton; and no doubt, when the duty was firſt laid on, it was put upon this colour, that it was of the priſage, and as if better for the merchant. And indeed thus far it was better for the chant, that it compounded with him for the king's ſetting the price upon the two tons, whic often created grievous exactions; for now the tribute of *butlerage* being laid *per* ton, the me knew upon what terms he imported wine into England. But the policy of Edward the F much deeper; for by this he hindered all frauds in the importing of wine; for, if the ve held above twenty tons, the king had no more than two tons by way of pre-emption; and fore enlarging the veſſel was in fraud of the king. Beſides that by this means, the king received money from the merchant, whereas before the merchant uſed to receive money fr king, and to agree with the king for the pre-emption before he would break bulk; and priſage lying only on the king's ſubjects; when they had imported wine, it was neceſſary fo to come to the king's terms of pre-emption, and that money being paid to the ſubject was ried out of the realm: ſo that by this policy of Ed. I. all the money was kept within the for on the wine imported by foreign merchants, they paid the *butlerage* in money to the and for the wine imported by the ſubject, on which *priſage* was due, the money which the paid for pre-emption was paid to the ſubject. Gilb. Hiſt. Exchcq. 211, 212.

3. Of the Duty of Poundage.

For the hiſtory of the cuſtoms before, and during the time of E

e Firſt, the reader is referred to the fifth and ſixth chapters of my Lord
l's Treatiſe upon the Cuſtoms, and to the eighteenth chapter of Mr.
ndox's Hiſtory of the Exchequer.

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(4 *In proceſs*) Upon the acceſſion of his preſent Majeſty, a fixed revenue was granted to the
wn, and this ſubſidy was carried to the aggregate fund. 1. G. 3. c. 1. That fund now forms
rt of the *conſol dated fund* created by 27 G. 3. c. 13. to which the ſeveral duties of the cuſtoms,
iſe, &c. thereby granted or conſolidated are directed to be carried.

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(23 *In an action*) Parker, 209. S. C. cited by the Chief Baron, and Lord Trevor's argument in
ſtated. The queſtion determined by this caſe appears to have been a long time in agitation.
manuſcript book in the office of the Committee of Trade, which was obligingly communicatd
the editor by Mr. George Chalmers, the author of ſeveral valuable political tracts, he has met
h the following caſe:—Upon an action of aſſumpſit brought, term Paſch, *anno* 13 W. 3. by
n. Paul, Eſq. leſſee of the priſage wines, againſt Thomas Cooks, Eſq. collector of the duty
n wines in the port of London, for 50*l.* the queſtion upon the ſpecial verdict was this, viz.
ether priſage wines were liable to pay the ſecond ſubſidy, or the duty laid by the act of 9 &
W. 3.?—Note, it was admitted by the ſpecial verdict, that the wines in queſtion had paid the
poſt laid by the act of 1 Ja. 2. c. 3. and alſo the additional impoſt by the act of 4 & 5 W. & M.
t. and alſo 25*l. per* ton, by the act of 7 & 8 W. 3. c. 20—The caſe depended in the court
Exchequer about three years, and had been argued thrice by counſel on both ſides, and this
being 16th June 1705, it ſtood for the judgment of the court; but the barons being divided in
r opinions, viz. Mr. Baron Smith and Mr. Baron Price for the defendant, and Mr. Baron Bury
the Lord Chief Baron for the plaintiff, no judgment could be entered; and therefore upon the
ntiff's motion the cauſe was adjourned into the Exchequer-chamber *proper difficultatem*, to be
d before the twelve judges.

Abſtract of the argument of the two barons who were of opinion for the defendant.

When the duty of priſage was in the crown, no ſubſidy could be paid, becauſe the crown could
pay duty to itſelf; but when it was granted out of the crown, then the contradiction ceaſes.
the ſame caſe with that of a rector, who demiſes or lets out his glebe, and is entitled to receive
s from his own leſſee. The words in Sir Wm. Waller's patent, that they ſhall be free from all
s and ſums of money whatever, could not extend to exempt priſage wines from duties ſubſe-
nt to the patent, but only from ſuch as were then in being, and in the power of the crown.
ſtatute of Ja. 2. expreſsly provides, that the duty laid by the act ſhould be paid by the perſon
was entitled to the priſage; and the act of 9 & 10 W. 3. § 7 appointing that all the clauſes,
s, directions, &c. in any former acts, ſhall be practiſed and put in execution for levying the
as fully as if thoſe acts had been recited, priſage wines are as plainly ſubjected to that duty,
the ſaid clauſe in the 1ſt of James had been recited in the act of 9 & 10 W. 3. The caſe
s from wreck, priſage wines being imported, which wreck is not, and then they are imported
ay of merchandize, for all wines in the ſhip are originally imported by way of merchandize till
lection of the priſage wines is made; and even then, it is not to be imagined, that the paten-
had it for his own conſumption, whatever the crown had before the grant. Although the clauſe
12 Car. 2. § 16. to exempt priſage wines from the tonnage be declaratory, yet the words
be governed by the ſubject-matter of the act; and to what purpoſe was the declaring clauſe,
ſage wines were not chargeable with the duty by the former part of that act?

Abſtract of the argument of the two barons who were of opinion for the plaintiff.

ſage wines was a right originally veſted in the crown by the common law, and ſo differs from
duties which were granted by parliament; *inhæret exceptio*, and therefore ſtood exempt from
ties. The cuſtoms called *magna et parva cuſtuma* were not due of common right or by pre-
ion, the one being granted the 12 Edw. 1. the other *lege mercatoriâ*, in 31 Edw. 1., and by
on law no impoſition could be laid upon goods; and ſo in the ſtatute of 12 Car. 2. of tonnage
oundage, § 7. Tonnage was firſt granted 5 R. 2. and afterwards ſucceſſively the kings received
m the parliament, generally for lives. Priſage was an inheritance; and King James the Firſt
as ſuch: but he had but an eſtate for life in the tonnage: the firſt was his own eſtate, the
was a gift; ſo one could not operate on the other. Priſage is very different from purvey-
which is only a power or privilege, but the other is a property, and may be granted. It was
ly not chargeable with any duty, and carried along with it an exemption in its own nature.
s not originally imported for ſale, or by way of merchandize. At the making of the ſtatute
Car. 2. of tonnage and poundage, and the clauſe relating to priſage, *ut res, ita tempora rerum*
be conſidered; and that clauſe firſt declares the original right of exemption, and then gives
emption or particular diſcharge in virtue of that act. The duty laid by 9 & 10 W. 3. is
a further ſubſidy, and has ſuch a relation to the act of tonnage and poundage, which is the
d, that the whole act ſeems incorporated into it; conſequently, the ſame exemption takes

The

Newerry, *q.t.* v. Colegate. The editor has taken this case from the above book, communicated to him by Mr. Chalmers. The date of it is not mentioned: it appears, however, to have been before the year 1695.

The ship *Eagle* was a vessel that carried timber from *Faversham* in the port of *Sandwich* to the port of *London*. She had no midship beam, no any deck, and was an open vessel. All this was found by verdict on an information of seizure for the duty of tonnage, and the court was of opinion, that she was not chargeable with the duty of tonnage within the 5 and 6 *W.* & *M.* for that statute prescribes no other rule to measure a ship by, but from the midship beam, and from the deck. Now no oth duty is created by that act, but according to the measure; so not bei measurable according to the act, she cannot be charged by the act. T court also doubted, whether the vessel could be said to trade coastwise, she was an open vessel, and never was at sea, nor could live at sea.

2. Of the Duty of Poundage.

1 Bl. Com. 316. by Christian.

The above books of rates, however, are now declared to be of no av by the statute of 27 *Geo.* 3. *c.* 13. called the consolidation act. By t statute all the former statutes imposing duties on customs and excise are pealed with respect to the *quantum* of the duty; and all the former du are consolidated, and ordered to be paid according to a new book of ra annexed to the statute. All the articles enumerated in that book, p upon importation or exportation, the sum therein specified, according their weight, number, or measure. And all other goods and merchandi not being particularly enumerated or described, and permitted to be imp ed and used in *Great Britain*, shall pay upon importation 27*l.* 10*s.* *per c ad valorem*, or for every 100*l.* of the value thereof; but subject to a dr back of 25*l.* *per cent.* upon exportation. Very few commodities pay a d upon exportation; but, where that duty is not specified in the tables, the exportation is not prohibited, all articles may be exported without p ment of duty, provided they are regularly entered and shipped; but failure thereof, they are subject to a duty of 5*l.* 10*s.* *per cent. ad valorem.* to prevent frauds in the representation of the value, a very simple and eq ble regulation is prescribed by the act, *viz.* the proprietor shall himself clare the value, and if this should appear not to be a fair and true estim the goods may be seized by the proper officer; and four of the com oners of the customs may direct that the owner shall be paid the price w he himself fixed upon them, with an advance of 10 *per cent.* besides all duty which he may have paid; and they may then order the goods t publickly sold, and if they raise any sum beyond what was paid to owner, and subsequent expences, one half of the overplus shall be pa the officer who made the seizure, and the other half to the public rev

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(48 *It has been*) The point determined in the case of Sheppard v. Gosnold was, that for *not intended to be imported into* England, and which were wrecked, no customs were due: for t expressly found by the jury, that *the goods in question were shipped in foreign parts, as merch and not intended to be imported into* England, *but to be carried into other foreign parts.*——The que whether goods wrecked were customable, had long depended without receiving any judicial on. In Queen Elizabeth's time, it was raised upon a record, but not decided. To an inform claiming goods as forfeited under the stat. of 1 E. 6. because they had been landed witho customs due for them having been paid or agreed for, the defendant justified as vendee of the Cobham, upon whose manor they had been wrecked, and who had seized them under a prescr right to wreck of the sea appurtenant to his manor. It does not appear, whether in this c question was ever argued, the report only adds, *Quære si sit bona justificatio.* Saunders's case, 224. In the mean time the practice had uniformly been in favour of the claim of the crown the case of Sheppard v. Gosnold was not generally considered as countervailing it. The qu therefore was again raised: Molloy (lib. 2. c. 5. § 9.) says, that in the like case in all circum

1. 6. W. 3. C. B. between Power and Sir Wm. Portman, the judges, and more particularly Treby C. J. ſeemed to be of opinion, that goods wrecked, or flotſam, ſhould pay cuſtom. The latter, however, appears to have been brought in the ſame year to a final deciſion in the caſe of Courtney v. Bower, which was an action brought by Sir William Courtney as lord of the manor of Soar in Devonſhire, againſt two cuſtom-houſe officers, for ſeizing goods that had been wrecked upon that manor. The cauſe was tried before Holt at Exeter, who was with difficulty prevailed with to allow it to be found ſpecially, conceiving the law to have been thoroughly ſettled by the caſe of Sheppard v. Goſnold. The ſpecial verdict was argued four times in the court of Common Pleas, where it was at length adjudged by three judges againſt the claim of the crown; but Treby, Ch. J. being of a contrary opinion, a writ of error was brought in B. R., where the judgment was affirmed ſimply upon the authority of the caſe of Sheppard v. Goſnold. 1 Ld. Raym. 561. Whether this caſe of Courtney v. Bower were the ſame in all its circumſtances with that of Sheppard v. Goſnold, we are not informed; but the reporter ſtates it as a general propoſition, that for wreck and flotſam no cuſtoms ought to be paid. Lord Holt, too, upon this caſe being mentioned a few years afterwards, ſaid, that always ſince the caſe of Sheppard v. Goſnold, it had never been a doubt, but that wreck ſhould not pay cuſtom; and that if the caſe of Courtney v. Bower had been in B. R. he would not have ſuffered more than one argument, and that *pro formâ tantum*. 1 Ld. Raym. 388.——But though no cuſtom be due for wreck, yet another queſtion ariſes: Where are the goods to be depoſited till it ſhall appear whether they are wreck or not? By the ſtat. of 27 E. 3. c. 13. no goods are wreck, but where no property can appear in any perſon; for though no living creature be ſaved out of a ſhip wrecked, as it is ſaid in ſtat. 3 E. 1. c. 4, yet, if the owner's property can be made out by marks, cocket, letter, or otherwiſe, the owner ſhall have his goods, paying what is reaſonable for ſalvage, and he hath a year and a day given him by the 3 E. 1. to prove his property. Therefore it ſhould ſeem, the lord of a manor, or vice-admiral, hath right to ſeize any wrecked goods, till that time be expired; but they ought to be preſerved as directed by 3 E. 1. and 4 E. 1. *de officio coronatoris*, that is, to be placed, ſo as the town where they ſhall be found may be charged with them during that time. And in regard if any owner of the goods ſhould make out his property to them, he will be liable to pay the cuſtoms, if he do not export them again (as he may) but ſell them, here it ſeems, the officers of the cuſtoms ſhould take care by depoſiting the goods by conſent of the towns that would be anſwerable for them, or by delivering them to the towns, to be ſecured, that if any owner can be made out within the year and the day, the king ſhall have his cuſtoms; and the lord of the manor, or vice-admiral, claiming wreck, hath right to take the goods from them, till after the year and day by the expreſs proviſion of ſtat. 27 E. 1.——In the mean time, if the goods are of a periſhable nature, it is uſual to permit the lord of the manor, or vice-admiral, to diſpoſe of them, upon giving ſecurity for the payment of the cuſtoms, if any ſhould appear to be due. It has indeed been determined, that the ſheriff may in ſuch caſe make ſale of them. Eyſton v. Studd, Plowd. Comm. 465, 466. See too, 5 Burr. 2738.

It has been adjudged, that ſhips taken as prize by a *Britiſh* man of war, and, upon ſale, liable to the duty of 5*l. per cent. ad valorem* charged upon goods and merchandizes by the ſtatute of 12 *Car.* 2. But it was determined in this ſame caſe, that *French*-made ſails, belonging to a *French* ſhip ſo taken, were not chargeable with the additional duty of 1*d.* an ell by 12 *Ann.* ſt. 1. *c.* 16. and 19 *Geo.* 2. *c.* 27. for the plain intent of the proviſions of theſe acts was, that *Britiſh* ſhips ſhould be furniſhed with *Britiſh* ſails; and if they uſed foreign-made ſails, that the additional duty ſhould be paid for them. But it would be abſurd to extend them to the ſails of foreign ſhips brought in by capture, which muſt be ſuppoſed to be furniſhed with ſails of the manufacture of their own country. Camplin v. Bullman, Parker, 198. [The act of 34 G. 3. c. 70. exempts ſhips of war, and private ſhips taken as prize, from the payment of any duty whatever.]

3. Of the Duties to which Aliens are liable.

By the ſtatute of 24 *Geo.* 3. *ſeſſ.* 2. *c.* 16 it is enacted, that the *petty* cuſtom, impoſed by 12 *Car.* 2. *c.* 4. or additional duty on all the goods of aliens or ſtrangers, ſhall ceaſe, except the duties on goods imported or exported in any foreign ſhip or veſſel, and except alſo thoſe which had been granted to the city of *London*, called package and ſcavage.

Of the pecuniary Penalties and Forfeitures incurred by Perſons guilty of Smuggling, or of ſuch Practices as have a direct Tendency thereto.

1. In Ships at Sea, or hovering upon the Coaſt.

By ſt. 24 G. 3. *ſeſſ.* 2. *c.* 47. and 34 G. 3. *c.* 50. § 8. if any ſhip or veſſel

veſſel, having on board any brandy or other ſpirituous liquors in any caſk not containing 60 gallons at the leaſt (except only for the uſe of the ſeamen then on board the veſſel, not exceeding two gallons for each ſeaman,) or any wine in caſks (provided the ſhip ſhall not exceed 60 tons burden) or having on board 6 lbs. of tea or 20 lbs. of coffee, or any tobacco or ſnuff exceeding, together or ſeparately, 100 lbs. weight, or any goods liable to forfeiture on being imported, ſhall be found at anchor, or hovering within the limits hereafter mentioned, *viz.* within a ſuppoſed ſtraight line from *Walney Iſland* in the county of *Lancaſter* to *Great Ormſtead* in the county of *Denbigh*, from *Burdſey Iſland* in the county of *Caernarvon* to *Strumble Head* in the county of *Pembroke*, from the *Lizard* in the county of *Cornwall* to the *Prall* in the county of *Devon*, from the *Prall* to the *Bill of Portland* in the county of *Dorſet*, from *Cromer* in the county of *Norfolk* to the *Spurn Head* in the county of *York*, from *Flamborough Head* to *Staples* in the county of *Northumberland*, from the *Mull of Galloway* in *Scotland* to the *Point of Ayre* in the *Iſle of Man*; ſueh ſhip or veſſel not proceeding in her voyage, (wind and weather permitting) unleſs in caſe of unavoidable neceſſity and ſtreſs of weather, (of which the maſter or perſon having the charge or command of the veſſel ſhall give notice and make proof before the collector or other chief officer of the cuſtoms of any port within the limits of which the veſſel ſhall be found immediately after her arrival within thoſe limits, then not only the goods, but the veſſel, with her guns, ammunition, and furniture ſhall beforfeited.

The ſtatute of 24 *G.* 3. § 2. provides, that nothing in that or any former act ſhall prevent evidence from being received in any ſuit for the forfeiture of a veſſel on account of goods contained therein, in order to ſhew, from the ſmallneſs of the quantity of ſuch goods, and other circumſtances of the caſe, that they were on board without the knowledge either of the owner or maſter; and in every caſe where ſuch proof ſhall be made, ſuch veſſel, (exceeding 100 tons in burden,) ſhall not be forfeited; but the goods found on board, whether with or without the knowledge of the maſter, ſhall be forfeited in ſuch caſe; and the perſon in whoſe cuſtody they ſhall be found, ſhall forfeit treble the value thereof.

§ 3.

34 G. 3. c. 50 § 9. 10.

If any open boat (not being a whale-boat belonging to any ſhip or veſſel employed in the fiſheries in the *Greenland Seas* or *Davis's Straits*, or in any fiſhery to the ſouthward thereof,) which ſhall be built for rowing or ſailing, or for rowing and ſailing, being of the length of 14 feet, and under that of 18 feet, to be meaſured by a ſtraight line from the fore-part of the ſtern to the aft-ſide of the tranſum or ſtern poſt aloft; the depth of which ſhall be greater than in proportion of one inch and one-quarter of an inch to every foot in length, ſuch depth to be taken from the upper part of the plank next the keel to the top of the upper ſtrake, whether ſuch upper ſtrake ſhall be fixed to the boat, or ſhall be uſed as a looſe or ſhifting ſtrake, ſhall be found either upon the water within any port of this kingdom or member or creek thereof, or within four leagues of the coaſt, or within the diſtance by this act particularly deſcribed, or within any port upon land in this country, ſuch boat ſhall be forfeited, and may be ſeized by any officer of the exciſe or cuſtoms, unleſs ſhe ſhall have plank of three quarters of an inch thick, and her timbers one inch and a half ſquare, not more than nine inches from timber to timber; and ſuch boat being found on board, or belonging to any cutter, lugger, &c., ſuch cutter, lugger, ſhall be forfeited.

24 G. 3. ſeſſ. 2. c. 47

Every cutter, lugger, ſhallop, or wherry, (of what built ſoever,)

every veſſel of any other deſcription, whoſe bottom is clench-work, unleſs § 4.
ſquare rigged, or fitted as a ſloop with ſtanding bow-ſprits, and every veſſel, 27 G. 3.
the length of which ſhall be greater than in the proportion of three feet and c. 32. § 1.
a half to one foot in breadth; every cutter, lugger, ſhallop, wherry, ſloop, 34 G. 3.
ſmack, or yawl, of which the bowſprit exceeds more than two-thirds of c. 50.
its length from the fore-part of the ſtern to the aft-ſide of the ſtern-poſt
aloft; and every cutter, lugger, ſhallop, wherry, ſmack, or yawl, of which
the bottom is clench-work, unleſs ſuch cutter, *&c.* ſhall be ſquare rigged,
or fitted with a ſtanding bowſprit, the keel of which ſhall be fixed to the
main deck by an iron claſp, ſuch claſp being without bits ſecurely bolted
through the bow-ſprit and beam of ſuch deck, and the bowſprit to be
heaved or elevated at leaſt two inches in every foot from the ſtrait line of
the range of the deck, and rigged with a fixed ſtay for the jibb to work
upon, ſuch ſtay not being leſs than a two-inch rope for a veſſel of 20 tons,
and increaſing in ſize not leſs than half an inch for every other ten tons,
the bowſprit being without any traveller or other materials to conduct the
jibb out and in upon the bowſprit, and without any flying jibb ſet thereon,
which ſhall be found within the above limits; and every cutter, lugger, *&c.*
found within the ſame limits with arms or ammunition on board without a
licence from the Admiralty, ſhall be forfeited with all her goods, guns,
tackle, and furniture.

But theſe acts do not extend to any veſſel on a voyage from *America*,
the *Eaſt* or *Weſt Indies*, *Africa*, or the *Mediterranean*, ſo as to ſubject the
ſame to forfeiture on account of her built, or for having ſpirits, tea, coffee,
tobacco, or ſnuff on board, or for having arms or ammunition, nor to any
ſhip, cutter, *&c.* in the ſervice of the navy, victualling, ordnance, cuſ-
toms, exciſe, or poſt-office, on account of her built, or for having on
board arms or ammunition; nor to any veſſel, cutter, lugger, *&c.* the
owner of which ſhall have a licence for navigating the ſame from the com-
miſſioners of the Admiralty, on account of her built, or for having on
board ſuch arms or ammunition as ſhe ſhall be licenſed to have; nor to any
lighters or barges uſed ſolely in rivers, or for inland navigation; nor to 27 G. 3. c. 32.
any veſſels which ſhall have on board any arms or ammunition, regularly
entered as merchandize, or for the uſe of his Majeſty's ſtores or garriſons,
being regularly ſtowed in the hold, or put on board for neceſſary defence,
by licence from the ſaid commiſſioners; nor to any cutter, lugger, *&c. bonâ*
fide, ſolely employed in the cod, herring, mackerel, or other fiſheries
carried on from this country, and having on board a ſufficient quantity of
nets and lines or nets for properly carrying on ſuch fiſheries reſpectively,
and clearing out at ſome port in this country for that purpoſe.

For the above licence from the Admiralty, or for the regiſtering of it,
fee ſhall be demanded. But the owner of every veſſel ſo licenſed ſhall,
before ſhe proceeds to ſea, bring ſuch licence to the collector of the cuſtoms
of the port from which ſhe is about to ſail, who is required to regiſter the
ſame, and ſhall alſo produce the ſame to the proper officer of the cuſtoms
at any port at which he ſhall arrive. And by 27 G. 3. *c.* 32. § 7. the
maſter of the veſſel ſhall produce the licence to every officer of the cuſtoms
or exciſe, who ſhall board him within the above limits; and if the maſter
ſhall not have the licence on board, or ſhall not produce it, or if it is pro-
duced without an indorſement, importing that proper ſecurity has been
given, the veſſel ſhall be forfeited. And the licence ſhall ſpecify the ton-
nage of the veſſel, and deſcribe whether ſhe is a cutter, lugger, ſhallop or
yawl, or what ſort of built ſhe is, and who is the owner, and for what

port

port, &c., or to or from what places she is to sail, and what quantity number, and sort of arms she is licensed to have on board; and the own shall also give sufficient security by bond in double the value thereof, to approved of by the collector of the customs, with condition, that the s vessel shall not be employed in the importation of any tea or foreign s rituous liquors, or any prohibited goods; or in the exportation of any go prohibited to be exported, or in the relanding of any goods contrary law, which are entered for exportation for any drawback, or which prohibited to be used in *Great Britain*; on failure whereof the licence s be void, and the vessel liable to seizure. And further, by 36 G. 3. c. § 3. the owner shall give security by bond, that if the vessel so licence lost, broken up, or disposed of, the licence shall be delivered up to officer who took the security within three months after the loss, &c. the vessel. And in case such licence shall not be delivered up within above time, the commissioners of the customs may at any time direct be cancelled.

By 27 G. 3. c. 32. § 5 & 6. if vessels, having a licence from the miralty, shall be found out of the limits therein mentioned, they ma seized; unless it be made appear, to the satisfaction of the commiss of the customs, that they were driven beyond the prescribed limi distress of weather.

Attorney-General v. Brown, Anstr. 720. Anstr. 23. 724.

If a vessel, having a licence to go to any particular port, or to vigate within any particular limits, go out of those limits, she abat her licence, and may be seized on her return, as having no licence.

It should seem, that a licence to a vessel generally, "*to be employed coasting trade*," is not good. But, if a vessel has obtained a licen navigate to a particular place, or within certain limits, it is not the pra if she makes another voyage to the same place or within the same limi a fresh licence.

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(14 *Heretofore*) These limitations being contrary to the liberty and *jus publicum* of ports not be imposed without an act of parliament. Hale De Port. Maris, 100.

(15 *The great*) Besides the ports here mentioned, there are customers and comptrollers several ports following, viz. Feversham, Rochester, Dover, Rye, Weymouth, Lyme, Dart Barnstable, Minehead, Aberdowy, Liverpool, Presull, Colchester.

3. In Ships in Port inward bound.

By 27 G. 3. c. 13. § 12. & 36 G. c. 82. "if any goods, wa "merchandizes imported into this country, (except diamonds, "pearls, precious stones, and bullion, and fresh fish, *British* take "imported in *British*-built ships or vessels owned, navigated, and re "according to law, and also except turbots and lobsters, however "or imported,) whether such goods, wares, or merchandizes are "be liable to duty or not, shall be unshipped or landed witho "presence of the proper officer of the customs, either on Sunda "lidays, or any other days, all such goods shall be forfeited, a "be seized by any officer of the customs."

4. In ships in Port outward bound.

By 26 G. 3. c. 40. § 15. no vessel shall be cleared out for parts until the master and mate shall severally give bond in the pe 200*l.* that they will not land illegally any goods, or take on boa

with that intent, nor will oppoſe any officer in the execution of his office, or until the maſter ſhall produce a certificate from the principal officer of the cuſtoms at ſome other port in *Great Britain* of ſuch ſecurity having before been given. The maſter of any veſſel, on board of which goods ſhall be ſhipped for exportation, ſhall upon demand deliver to every officer of the § 17
cuſtoms who ſhall come on board, either within the limits of any port there, or within four leagues of the coaſt, the cockets from the port of clearance, under penalty of 100*l.*; and if ſuch officer find any of the goods not to correſpond therewith, he ſhall ſeize them as forfeited; or, if he diſcover that any of the paſſages indorſed upon the cocket are not on board, the maſter ſhall forfeit 20*l.* for each package.

If the maſter of any veſſel, inward or outward bound, ſhall paſs the § 22.
uſual places for ſtationing revenue-officers, or ſuch other places as may hereafter be appointed by the commiſſioners, without bringing to and receiving the revenue-officers on board, for the purpoſe of the cargo being examined, and of relieving or landing ſuch officers, unleſs in caſe of unavoidable neceſſity, he ſhall forfeit 100*l.*

By 27 *Geo.* 3. *c.* 32. § 10. where the maſter of any veſſel ſhall report bales or other packages for exportation, any officer of the cuſtoms may open and examine the contents thereof, or may bring them to his Majeſty's warehouſe for the port where ſuch report is made. But this act ſhall not extend to any veſſel coming from any port of *Aſia*, *Africa*, or *America*.

6. In the Caſe of Certificate and prohibited Goods.

By 26 G. 3. *c.* 40. no goods ſhall be imported in any veſſel belonging to *Britiſh* ſubjects, unleſs the maſter have on board a manifeſt in writing ſigned by him, containing the names of the ſeveral ports where the goods mentioned in the manifeſt ſhall have been taken on board, the name and burden of the veſſel, and the true admeaſurement or tonnage thereof, according to the regiſter of the ſame, together with the chriſtian and ſurname of the maſter, and the port or place to which the veſſel belongs; and a true and particular account of all the cargo, and of all packages of goods and parcels taken on board, with the ſeveral marks thereon; and of the particulars of the cargo which is ſtowed looſe; and of the following particulars in caſe they be at length, *viz.* the ſeveral numbers of the packages, with a particular deſcription thereof; whether leaguer, pipe, butt, puncheon, hogſhead, tierce, or other caſk or package, deſcribing ſuch other caſk or package by the uſual or ordinary name; or whether caſe, bale, pack, truſs, cheſt, trunk, bundle, or other package, or by ſuch other name or deſcription as the ſame is uſually called or known. And no wine ſhall be imported from any place not ſubject to the crown of *Great Britain* in any ſhip or veſſel whatever, unleſs there be ſuch manifeſt on board, verified upon oath by the maſter, at the place where the wine ſhall be taken on board, before the *Britiſh* conſul or other chief *Britiſh* officer, if there be any one reſiding at or near to ſuch place. Before any ſhip ſhall clear out for this port from any place in the *Britiſh* dominions in foreign parts, the maſter ſhall deliver a manifeſt in writing to the chief officer of the cuſtoms at or near to ſuch place, who ſhall cauſe a duplicate thereof to be made, and ſhall indorſe on the original manifeſt his name, with the day of the year on which it was produced to him, and ſhall then return the original to the maſter, and ſhall immediately, upon the clearing of the ſhip, tranſmit the duplicate under his hand and ſeal to the collector at the port in

For the mode of authenticating manifeſts of ſhips importing goods from the Eaſt Indies and China, ſee 27 G. 3. *c.* 32. § 1

in this country to which the goods are conſigned, and to which the mani-
feſt refers. And any maſter importing goods without a manifeſt, or no
included therein, or importing any wine without a manifeſt ſo verified a
aforeſaid, ſhall forfeit double the value of the goods, together with th
full duties payable on them. The maſter, on his arrival within fou
leagues of the *Britiſh* coaſt, is to produce his manifeſt to the firſt offic
of the cuſtoms, who ſhall come on board, and give him a copy of i
on pain of forfeiting double the value of the goods, and the full duties d
thereon; and the officer, having certified ſuch production on the ba
of the manifeſt, is to tranſmit the copy to the proper officer at the p
of conſignment, under a penalty of 100*l.* If the maſter or mate
any veſſel importing goods ſhall ſuffer bulk to be broken in any part
this country, or within the above limits, unauthorized by the proper
ficer, except in caſe of unavoidable neceſſity and diſtreſs of weather,
which proof ſhall be made on oath by the maſter and two or more of
mariners, he ſhall forfeit 200*l.* If, upon the arrival of any veſſel, th
ſhall be any goods, which muſt be unavoidably ſtowed out of the m
hold, (except ſuch part of the cargo as is ſtowed on the chains, or in o
parts on the outſide of the veſſel,) the officer who ſhall firſt go on bo
ſhall mark or ſeal ſuch packages in ſuch manner as the commiſſioners
the cuſtoms ſhall direct, and ſhall keep a particular account there
which mark ſhall not be altered before the goods contained in ſuch
kages ſhall be landed, by ſpecial ſufferance in the preſence of a ſup
officer: and if any of ſuch marks ſhall be defaced with the privity o
maſter, he and the mate ſhall forfeit 200*l.* each. The maſter of any
veſſel ſhall, within 24 hours after her arrival, at ſuch places as ſhall b
pointed by the commiſſioners of the cuſtoms, make entry upon oath
her built, burden and lading, with the marks and contents of every
cel on board, to the beſt of his knowledge and belief, and perform
thing in relation thereto before the chief officer of the cuſtoms of the
as directed by 13 and 14 *Car.* 2. *c.* 11. under the penalty of 100
whom he ſhall at the ſame time deliver his manifeſt, and on refuſal
forfeit 200*l.* If the report, manifeſt, and goods found on board d
agree, the maſter ſhall loſe 200*l.* But, where it ſhall be made appe
the ſatisfaction of the commiſſioners, that the cargo imported was w
taken on board in foreign parts, naming the particular places, that n
thereof has been unſhipped, and that the manifeſt has been loſt w
fraud, defaced by accident, or incorrect by miſtake, no penalties ſh
incurred; and if any goods ſhall, from urgent neceſſity, be taken on
of any veſſel after the manifeſt ſhall have been atteſted, the maſte
make out and ſign a ſeparate manifeſt of all ſuch goods, which m
ſhall be ſubjected to every proviſion to which manifeſts properly a
are ſubjected; and in ſuch caſe the penalties inflicted with reſpect to
imported without a manifeſt ſhall not be incurred, if the urgent n
of ſo taking ſuch goods on board ſhall be made appear to the ſatisfac
the commiſſioners. If any part of the cargo ſhall, after the veſſel's
within the above limits, or, after the firſt production of the mani
the officers of the cuſtoms, (whether inſerted in the manifeſt or n
thrown overboard or deſtroyed, except in caſe of unavoidable n
proof of which ſhall be made to the ſatisfaction of the commiſſion
maſter ſhall forfeit 200*l.* Every importer, &c. of any goods ſo i
ſhall, within 20 days after the maſter of the veſſel ſhall hav
his report, or after the expiration of the time within which he is

law ſo to do, make a due entry thereof with the proper officer, and pay the duties; and on failure thereof the officers of the cuſtoms ſhall convey the goods to his Majeſty's warehouſe; and if the duties are not paid within three months, they ſhall be ſold, and the produce applied agreeably to 9 *Anne*, *c.* 8. But this ſhall not apply to the ſelling of any goods which may by law be entered and warehouſed, upon bond given for the duties.

No drawback ſhall be paid on the exportation of any goods, if they are in bales preſs-packed, unleſs the ſpecies, quantities, and qualities thereof ſhall be verified by the maſter-packer, or, in his abſence, by his ſervant, who ſhall have actual knowledge of the contents of the bales, in the following manner, *viz.* if the goods are packed at the port of exportation, or within 10 miles thereof, then, by oath ſubſcribed on the entry or cocket, before the chief officer of the cuſtoms; and if packed up at any greater diſtance, then by the like oath made before ſome magiſtrate where ſuch maſter-packer reſides.

§ 18. No entry ſhall paſs, nor any debenture be made out, upon exportation of goods entitled to drawback or bounty, but in the name of the real owner, if reſident in this country, who, before he receives the drawback, ſhall, upon the debenture, verify by oath that he is the real owner, and that the goods are *bonâ fide* exported to foreign parts, and have not been relanded in this country: but, if he ſhall not have a property in the drawback, he ſhall, at the entry of ſuch goods, acknowledge thereon the perſon who is entitled thereto, who ſhall, after the requiſites of the act complied with, receive the drawback. But this act ſhall not prevent the agent of any corporation or company from making oath to entitle them to drawback; nor any proprietor of lands in any *Britiſh* colony, nor any perſon, from exporting goods from any other place than that of his reſidence, if he ſhall reſide at any greater diſtance than 20 miles thereof, nor any perſon from exporting from any place other than that at which he reſides, any goods of *Britiſh* manufacture (being his property) in the name of an agent, who ſhall teſtify on oath, on the back of the debenture, beſides what is already by law required to be teſtified, the name of the real proprietor of the goods, and his place of abode: and ſhall, if required by the officer, give ſufficient reaſons for his knowledge of the port to which the goods are to be exported.

§ 19. No bounty ſhall be paid for any goods exported to *Ireland*, and no drawback or bounty ſhall be paid for goods exported to *Guernſey* or *Jerſey*, nor any debenture made out for the ſame, until a certificate ſhall be produced from the collector, comptroller, and ſurveyor of the cuſtoms, by any two of them, in *Ireland*, or from the regiſtrar of certificates, or the chief officer of the cuſtoms in *Guernſey* or *Jerſey*, at the reſpective port of importation, certifying that the ſame have been duly landed there.

§ 20. Goods entitled to drawback, *&c.* ſhall be ſhipped for exportation by the proper officer only, or ſuch perſons as ſhall be licenſed for that purpoſe by the commiſſioners; which perſons ſhall, on carrying ſuch goods on board any veſſel, give information thereof in writing to the maſter, for warning him to give notice as required by this act; and ſuch licenſe, when granted, ſhall not be withdrawn, unleſs the perſon licenſed ſhall be convicted of ſome treſpaſs againſt the revenue laws.

§ 21. No licences ſhall be granted to ſuch perſons as are by law entitled to ſhip ſuch goods on board, and ſhall give proper ſecurity.

7. In divers other Cases.

By the 24 G. 3. *ſeſſ.* 2. *c.* 47. § 32. if any officer of the navy, cuſtoms, or exciſe, ſhall make any colluſive ſeizure, or deliver up, or agree to deliver up, or not to ſeize any veſſel or goods liable to forfeiture, or ſhall take any bribe for non-performance of his duty, he ſhall for every offence forfeit 500*l.* and be rendered incapable of ſerving in any office civil or military; and if any perſon ſhall give, or promiſe to give, any bribe, or make any colluſive agreement with any ſuch officer, to connive at any act whereby any of the proviſions relative to the cuſtoms or exciſe may be evaded, he ſhall for every ſuch offence (whether ſuch offer or agreement be accepted or performed or not) forfeit 500*l.*

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(64 *By the*) Extended by 19 G. 3. c. 69. § 3. to all boats, &c. built to row with more than ſix oars, which ſhall be found either upon the land or water, in any port of Great Britain, or within two leagues of the coaſt; and by 24 G. 3. ſeſſ. 2. c. 47. § 25. to all boats, &c. exceeding 28 feet in length from the fore part of the ſtern to the aft ſide of the ſtern-poſts aloft, and the length of which ſhall be greater than in the proportion of three feet and an half to one foot in breadth; ſubject to the proviſos in the former acts.

3. Tranſportation.

See further for obſtructing officers in the execution of their duty, *ſ.* 24 G. 3. *ſeſſ.* 2. *c.* 47. § 15, 16. and 34 G. 3. *c.* 50. § 5.

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(14 *By the*) See a ſimilar proviſion in 24 G. 3. ſeſſ. 2. c. 47. § 13.

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(20 *But ſo much*) A ſimilar proviſion is now inſerted in 24 G. 3. ſeſſ. 2. c. 47 § 12.

(21 *Harvey*) Foſt. Cr. L 51. S. C. 1 Wilſ. 164 S. C.

By 24 G. 3. *ſeſſ.* 2. *c.* 47. § 11. if any perſon upon the ſhore, or on board any veſſel, ſhall maliciouſly ſhoot at any veſſel, &c. belonging to the navy, or in the ſervice of the cuſtoms or exciſe, within the limits of any port, harbour, or creek of *Great Britain*, or within four leagues of the coaſt; or ſhall maliciouſly ſhoot at or wound any officer of the navy, cuſtoms, or exciſe, acting in the due execution of his duty, or any perſon aſſiſting ſuch officer, every perſon ſo offending or aiding therein, ſhall ſuffer death as a felon.

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SOLDIERS.

(A) Of enliſting Soldiers.

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(1 *By* 17 G. 3. *c.* 3. *par.* 71) This clauſe is copied into every mutiny act.

26 G. 3. c. 107. § 95. In all caſes of actual invaſion, or upon imminent danger, and caſes of rebellion or inſurrection, his Majeſty is empowered (the occaſion being firſt communicated to parliament, if the parliament be then ſitting) declared in council, and notified by proclamation, if no parliament

then ſitting or in being) to order the lieutenants, or in caſe of the death or abſence of any of them, any three or more of the deputy-lieutenants, with all convenient ſpeed to draw out and embody the militia within their reſpective counties, or ſuch part of them as his Majeſty may judge neceſſary, and in ſuch manner as ſhall be beſt adapted to the circumſtances of the danger, and to put ſuch forces under the direction of ſuch general officers as his Majeſty may be pleaſed to appoint, to be led by their reſpective officers into any parts of the kingdom, for the repelling of the invaſion, or ſuppreſſing the rebellion; and during ſuch time as the militia ſhall be ſo drawn out and embodied, they ſhall be ſubject to all the proviſions contained in any act of parliament which ſhall be then in force for puniſhing mutiny and deſertion, and for the better payment of the army and their quarters.

(B) In what Caſes Soldiers are free from Arreſt.

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(3 *The exemption*) This act is now expired.

(6 *In the words*) Maſon v. Vowſon, *Id.* 252. In both theſe caſes there was fraud; the defendants enliſted themſelves for the mere purpoſe of protection; the one after judgment, the other after verdict.

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(5 *But it is*) By the late acts increaſed to twenty pounds.

(11 *Upon*) So are ſerjeants and drummers: for by Deniſon, J. "a ſerjeant is a ſoldier with a halbert; and a drummer is a ſoldier with a drum." Goodall's caſe, 1 Wilſ. 216. S. C. 1 Bl. Rep. 29 under the name of Lloyd v. Woodall.

These acts are confined to proceedings in civil actions, and will not protect ſoldiers impriſoned for diſobeying orders of juſtices, or on any other *criminal* account. Rex v. Archer, 2 Term Rep. 270 Rex v. Bowen, 5 Term Rep. 156.

(C) Of quartering Soldiers.

By § 29. after reciting that inconveniencies ariſe from billeting dragoons and their horſes at different houſes, it is enacted, "That in all places where horſe or dragoons ſhall be quartered or billeted in purſuance of the act for the future, the men and their horſes ſhall be billeted in one and the ſame houſe (except in caſe of neceſſity); and that in no other caſe whatever there be leſs than one man billeted where there ſhall be one or two horſes, nor leſs than two men where there ſhall be four horſes, and ſo in proportion for a greater number; and in ſuch caſe each man ſhall be billeted as near his horſe as poſſible.

By § 31. it is enacted, "That the officers, men, and horſes belonging to his Majeſty's horſe or dragoons, ſhall be quartered in the inns, livery ſtables, ale-houſes, victualling-houſes, and other houſes in which officers and ſoldiers are by the act allowed to be quartered, and ſhall be received and furniſhed by the owner or occupier of ſuch inns, *&c.* with diet and ſmall beer, and with ſtables, and hay, and ſtraw for their horſes, paying and allowing for the ſame the ſeveral rates hereinafter mentioned, to be payable out of the ſubſiſtence-money for diet and ſmall beer, and hay and ſtraw for their horſes."

Made by § 32. "When any horſe or dragoons ſhall be quartered upon the owner or occupier of any ale-houſe, victualling-houſe, or other houſe

"in

" in which officers or ſoldiers may be quartered, who have no ſtables, then,
" upon complaint made by the perſon having no ſtables, to two or more of
" the juſtices of the peace of the diviſion, city, or liberty where ſuch horſe
" or dragoons ſhall be ſo quartered, and upon his making ſuch allowance
" in lieu of his quartering ſuch horſe or dragoons, as ſuch juſtices
" ſhall think reaſonable, ſuch juſtices may order the men and
" their horſes to be removed, and quartered upon ſome other perſon
" who by the act is liable to have officers and ſoldiers quartered
" ed upon him who has ſtables, and may order and ſettle a proper allow
" ance to be made by the perſon having no ſtables in lieu of his quartering
" ſuch horſe or dragoons, ſo to be removed as aforeſaid: and alſo may or
" der and direct ſuch allowance to be paid by the perſon from whom the
" men or horſes ſhall be removed, to or amongſt the perſon or perſons
" whom ſuch men and their horſes ſhall be ſo removed, or be applied
" the furniſhing of quarters for ſuch men and their horſes, as the caſe ma
" require, and as ſuch juſtices ſhall think fit."

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(13 *But by*) Note; the 36 G. 3. c. 36 § 4. repeals ſo much of this act as relates to furnish
with diet non-commiſſioned officers and ſoldiers on a march or recruiting.

By the above act, § 21. 2*d. per diem* is now allowed for theſe articles.

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(14 *By par.* 36.) By 36 G. 3. c. 36. § 1. the allowance for non-commiſſioned officers and ſo
diers, both horſe and foot, is raiſed to 10*d. per diem* for diet and ſmall beer; and the allowance
hay and ſtraw for each horſe by § 3. is raiſed to 10½*d. per diem.*

By 36 G. 3. *c.* 36. § 5. " All non-commiſſioned officers and ſoldiers
" ſhall be entitled to receive their diet and ſmall-beer from the innholder
" or other perſons on whom they may be billeted, at the rates in this act
" preſcribed, while on the march, as alſo on the day of their arrival at
" place of their final deſtination, and on the two ſubſequent days, unl
" either of the two ſubſequent days ſhall be market days in or for the to
" or place where ſuch ſoldiers ſhall be billeted, or within two miles there
" in which caſe the innholder or other perſon may diſcontinue on and fr
" ſuch market day the ſupply of diet and ſmall beer, and furniſh in lieu the
" of the articles ſpecified in the mutiny act, and at the rate in this act p
" ſcribed."

" Provided, by § 6. That if the regiment, troop, company, or detachm
" when on the march, ſhall be halted, either for a limited or indefinite t
" at any intermediate place, the non-commiſſioned officers and ſold
" belonging thereto ſhall be entitled to receive their diet and ſmall b
" from the perſons on whom they ſhall be billeted at ſuch interme
" place, for ſuch time only for which they would be entitled to receiv
" ter arriving at the place of their final deſtination, according to this a

But by § 7. " Whenever any regiment, troop, *&c.* when on
" march, ſhall be halted, and it ſhall appear by the marching orders,
" it is not intended that ſuch regiment, *&c.* ſhall halt for any longer
" than one entire day after the day of their arrival at the place of ha
" and the day after their arrival ſhall be ſuch market day as aforeſai
" ſhall not be lawful for the innholders or other perſons, on whom the
" commiſſioned officers or ſoldiers ſhall be billeted, to diſcontinue on
" market day the ſupply of diet and ſmall beer to any ſuch officers o
" diers; but all ſuch officers and ſoldiers ſhall be entitled to receive
" diet and ſmall beer from ſuch innholders and perſons, at the rates a
" preſcribed, as they would have been entitled, if ſuch day had not b
" market day."

By § 8. "All non-commiſſioned officers and private men employed in recruiting, and the recruits by them raiſed, ſhall, while on the march, and for two days after their arrival at any recruiting ſtation, be entitled to the ſame benefits as are hereinbefore provided in regard to troops upon the march; but no recruit enliſted after the two days ſubſequent to the arrival of the party at their recruiting ſtation, ſhall be entitled to be ſupplied with diet and ſmall beer at the rate above preſcribed, except at the option of the perſon on whom he ſhall be quartered. Provided, that if any ſuch recruiting party, with the recruits by them raiſed, ſhall remove from their ſtation, and after a time ſhall return to the ſame place, they, and the recruits by them raiſed, ſo returning, ſhall not be again entitled to the ſupply of diet and ſmall beer for ſuch two days as aforeſaid, unleſs the period between the time of their removal from ſuch place, and their return thereto, ſhall have exceeded twenty-eight days."

[I] Of the Liberty given to Soldiers of exerciſing Trades.

By § 4. this act is extended to all officers and ſoldiers who have been drawn by ballot, and have perſonally ſerved in the militia, or any fencible regiments, from the 1ſt day of *April* 1763, for the term of three years, and have been honourably diſcharged.

But this exception does not appear in the above act of 24 *G.* 3. *ſeſſ.* 2. However, in the general militia act of 26 *G.* 3. *c.* 107. it is referred to the ſection which authorizes militia men, who have been drawn out of actual ſervice, being married, to exerciſe trades.

Of divers Things, which did not fall under any of the foregoing Heads.

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(By the 17 *G.* 3. *c.* 3.) The *original examination* is evidence, as well as the *atteſted copy*, Rex v. Harley, 6 Term Rep. 534. but no other atteſted copy beſides this which the act points out is admiſſible, Rex v. Clayton Le Moors, 5 Term Rep. 704.

STAMPS.

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THE ſtamps depend upon a great variety of acts of parliament, the introduction of which into a work of this kind, the editor conceives, would only increaſe its bulk and its price, without adding to its intrinſick value. Some of thoſe acts were inſerted very much at length under this head in the former editions of this work; but they are now withdrawn, and the editor has merely ſtated the few adjudications he has been able to find upon the ſubject,

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(*Upon a trial*) See acc. Dougl. 217. And in the caſe of Gilby v. Lockyer there reported, it was adjudged, that two or more defendants cannot be holden to bail upon one affidavit, as being within the ſtamp duties.

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(*An apprentice*) *Vide* Rex v. Holbeck, Burr. S. C. 198. Rex v. Lanvair Duffryn Clwyd. Ibid. S. P. But where the conſideration-money is under 20*s.* Baxter v. Faulam, 1 Wilſ. 129. Yarmouth, Burr. S. C. 379. where, in the caſe of a voluntary binding, it is paid by the pariſh

riſh officers, (for in that caſe it comes within the exception in the fortieth ſection of the act, as *being at the public charge of the pariſh*;) where it is given to any one elſe than to the maſter or miſtreſs: Rex v. St. Petrox in Dartmouth, 4 Term Rep. 196. or where the thing contracted for is not in truth in lieu of money or premium to the maſter or miſtreſs, Rex v. Leighton, 4 Term Rep. 732. the ſtamp under this act is not neceſſary.

Rex v. St. Paul's Bedford, 6 Term Rep. 452

By the act of 23 *G.* 3. *c.* 58. which impoſes a 6*s.* ſtamp upon agreements, it is provided, that it ſhall not extend to "any memorandum or "agreement for the hire of any labourer, artificer, manufacturer, or menial "ſervant, or to any memorandum or agreement, where the matter of the "memorandum or agreement does not exceed the ſum of 20*l.*" It was holden that an agreement for the aſſignment of an apprentice, from one maſter to another, was not within this proviſo, but that it muſt be ſtamped as required by the act.

1 Bl. Rep. 288. 2 Burr. 1177.

In ejectment, the plaintiff offered to give in evidence an examined copy of a bill in Chancery, contained in two cloſe ſheets of paper, each ſtamped with treble ſix-penny ſtamps; but the matter was equal in quantity to forty office-copy ſheets: and alſo an examined copy of an amended bill, in three cloſe ſheets, each ſtamped with a treble ſix-penny ſtamp, the matter whereof would have extended to ſixty office-copy ſheets. By the ſtamp act 9 & 10 *W.* 3. *c.* 25. § 64. every copy of proceedings in Chancery charged with a duty of three-penny ſtamps on each ſheet; otherwiſe, cannot be given in evidence. And it is alſo provided, that all proceedings in any court ſhall be written in the uſual manner. A verdict being obtained for the plaintiff, ſubject to the opinion of the court, whether the evidence ought to have been admitted, it was inſiſted for the defendant that the copy meant by the ſtatute was an office-copy. But by Lord *Mansfield*—When ſtamps were originally impoſed, there were two kinds of copies in common uſe: one an office-copy, to be made uſe of in the court to which the cauſe belonged. This contained only a ſtated number of words, by immemorial cuſtom, probably introduced to enlarge the fees of the officers. The other, a common cloſe copy to be uſed, when produced in any other court or place. Then comes the act, and lays (in one clauſe) a duty upon every ſheet of copy; and the next clauſe directs all proceedings in any court to be written in the ſame manner as before. Is this latter clauſe a legiſlative proviſion that the office-copies only ſhall be uſed in evidence, where they were not uſed before? It is not be conceived, that in order to raiſe ſo ſmall a duty, (for originally it was only 1*d.* a ſheet,) the legiſlature intended to put the parties to the expence of 60*l.* to take office copies, merely to give in evidence. The ſtamp acts have not always been conſtrued ſtrictly. It has been determined that the ſtamp duties do not extend to proceedings before either houſe of parliament.—The poſtea was delivered to the plaintiff.

Stonelake v. Babb, 5 Burr. 2673.

By 1 *Ann. ſt.* 2. *c.* 22. § 2 it is enacted, "That if any perſon ſhall write "or cauſe to be written, part of any writ, mandate, bond, affidavit, "other writing, in reſpect whereof any duty is payable, on any piece "of vellum, *&c.* whereon there ſhall have been before written any other "writ, *&c.* in reſpect whereof any duty is payable, before ſuch vellum, "ſhall be again ſtamped: or ſhall fraudulently eraſe the name of any perſon "or any ſum, date, or other thing, or cut off any ſtamp from any piece "vellum, *&c.* with intent to uſe ſuch ſtamp for any other writing, in reſpect whereof any duty ſhall be payable; every perſon ſo offending ſhall forfeit 20*l.* with coſts." In an action for the penalty under this act, it was adjudged, that it was incurred by the eraſure of names and dates out

ter of attorney that had been granted by the defendant to collect debts in *Newfoundland*, and the inſertion of others, without getting the inſtrument ſtamped.

A bill of exchange was drawn on a proper ſtamp, dated 2d *September*, yable 21 days after date. It was afterwards altered, and made payable days after date; and on 30th of *September*, it was again altered to 21 ys after date, and the date was brought forward to the 14th of *September*. was determined, that at the time when the laſt alteration was made, ere ought to have been a new ſtamp, the operation of the bill, as it ori- ally ſtood, being then quite ſpent; and this being quite a new and inct tranſaction between the parties. Bowman v. Nichol, 5 Term Rep. 537.

The plaintiff, through the medium of the defendant, his broker, had e two purchaſes of cotton; and the defendant engaged to indemnify the intiff from any loſs on the reſale of them. At the trial, the plaintiff e parol evidence of this contract of indemnity; and for further proof, led upon the defendant to produce his book, wherein he had entered a ote of the contract for the purchaſe of the cotton, with the letter *G.* at bottom, which was explained to ſignify *guarantee*. It was objected, that entry ought to have been ſtamped by virtue of the 23 *G.* 3. *c.* 58. which uires a ſtamp on every piece of paper whereon any agreement ſhall be ten, whether the ſame be only evidence of the contract, or obligatory n the parties from its being a written inſtrument. But the court held, the entry required no ſtamp; for that it came within the exception in fourth ſection of that act, whereby it is provided, that it ſhall not ex- d to any memorandum, letter, or agreement, made for *or relating to the of any goods*; under which latter deſcription this contract fell. Corry v. Edenſor, 3 Term Rep. 524.

In an action on the defendant's undertaking to pay the debt of his mo- who was in trade, it appeared, that the debt aroſe in the courſe of buſineſs, which the defendant aſſiſted her in carrying on, though with- any ſhare in it. The evidence of the undertaking was a letter written the defendant to the plaintiff. The queſtion was, Whether the letter ht to have been ſtamped as all agreements in writing are required to be the above act of 23 *G.* 3. *c.* 58. or, whether the letter came within the eption of 32 *G.* 3. *c.* 51. §. 1. whereby it is provided, "That the ſaid act all not extend to make liable to the ſtamp duty any letter paſſing by the ſt between merchants or other perſons carrying on trade or commerce this kingdom, reſiding at 50 miles diſtance from each other." The t held, that as it appeared that the defendant did carry on the buſineſs his mother, and this debt aroſe in the regular courſe of trade, any r written by him on account of that very trade, whereby he bound lf to another tradeſman, might fairly be conſtrued to fall within letter and ſpirit of the laſt act, which meant that the correſpondence erchants and tradeſmen at a diſtance from one another, on the faith hich they had conſiderable dealings, ſhould not be fettered with ſtamps. Mackenzie v. Banks, 5 Term Rep. 176.

written agreement in theſe words, "*A.* doth let and ſell to *B.* for the m of three years," &c. was offered in evidence in an action of *aſſumpſit* ſpecial agreement. The defendant objected to its being read, becauſe a leaſe, and was not ſtamped. For the plaintiff it was ſaid, this nly a memorandum of a parol leaſe, which, being for three years is good as ſuch, and that the ſtatute in uſing the words "indenture, e, or deed-poll," meant only deeds. But it was holden, that though l leaſe for three years is good, yet, if a man, through caution, will re- it into writing, he muſt pay for the ſtamp; otherwiſe the court are ed from receiving it in evidence. Proſſer v. Phillips, Hereford, Summer Aſſizes 1765, *coram* Perrott, B. Bull. Ni. Pri. 269. Hearne v. James. 2 Br. Ch. Rep. 309. S. P.

By

37 G. 3. c. 19 § 3. By an act which has just passed for more effectually securing the stamp duties on indentures, leases, bonds, and other deeds, a penalty of twenty pounds is imposed upon any attorney, solicitor, clerk, officer, or other person, who shall engross, print, or write any indenture, lease, bond, or other deed, on vellum, parchment, or paper, not duly stamped according to the directions of that act, and who shall neglect to bring the same to be duly stamped within the time thereby directed and allowed; and no such indenture, lease, bond, or other deed, shall be pleaded or given in evidence, or be good, useful, or available in any manner whatever, unless the same shall be stamped as required by that act.

Rex v. Hawkeswood, cited by Buller, J. in 2 Term Rep. 606. It was holden by all the judges of *England*, that in an indictment for forging a bill of exchange, the instrument need not be stamped in order that it may be received in evidence, though the statute of 23 *G.* 3. *c.* 2 which imposes the duty, expressly says, that no bill of exchange shall be received in evidence, unless it be first duly stamped.

Robinson v. Drybrough, 6 Term Rep. 317. Where the legislature have appropriated a stamp to any particular form of instrument, a substitution of another stamp, though of equal value, will not give validity to such instrument; for as long as a distinction of the several stamps is preserved by the legislature, it must be adhered to by the courts of justice. Hence articles of agreement, under seal, stamped with an agreement stamp, were holden to be inadmissible in evidence, though the agreement stamp which they bore was of the value with the stamp which they required, *viz.* a deed stamp.

See further tit. *Agreement*, Vol. VI. p. 46 & 7.

Alves v. Hodgson, 7 Term Rep 241. Though it has been said that one country will not take notice of the revenue laws of another; yet it hath been holden, that a party cannot give in evidence a written contract made in *Jamaica* which by the laws of the island was void for want of a stamp.

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STATUTE.

Per Wilmot, C J. 2 Wilf. 348. THE statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time. All our

(*a*) Hale's Hist. of the Com. Law, 66. began by consent of the legislature, and whether it is now law by usage or writing is the same thing. For many (*a*) of those things that we take for common law, were undoubtedly acts of parliament, though now to be found of record.

1 Reeves's Hist. Engl. Law, 215. Indeed our lawyers have made a distinction between statutes themselves they have distinguished between statutes made before the time of legal memory, *viz.* 1 *R.* 1. and those made since. The former are considered part of the common law, the *leges non scriptæ*; for notwithstanding copies of them may be found, their provisions obtain at this day, not as acts of parliament, but by immemorial usage and custom. The latter, or those since time of memory, are again distinguished; those from 1 *R.* 1. to *E.* called *antiqua statuta*: and all subsequent statutes are called *nova statuta*

A statute) It would be more correct to say, "By the king, with the advice and consent of the two houses of parliament."

An act of parliament is a law agreed upon by the king or queen of *England*, having regal authority, the lords spiritual and temporal, and the commons, lawfully assembled; which taketh strength and life by the assent royal; so that the rest of the consents may be accounted to be parcel of the substance, and the royal assent to be *forma interna et informans, quæ dat esse*. Hatton on the Statutes, p. 2. &c.

No new laws can be made to bind the people of this land, but by the king, with the advice and consent of both houses of parliament, and by their united authority; neither the king alone, nor the king, with the concurrence of any particular number or order of men, have this high power. 2 Atk. 654. *per* Lord Hardwicke.

The binding force of these acts of parliament ariseth from that prerogative which is in the king, as our sovereign liege lord; from that personal right which is inherent in the peers and lords of parliament, to bind themselves, and their heirs and successors, in their honours and dignities; and from the delegated power vested in the commons as the representatives of the people. And therefore Lord *Coke* saith, 4 *Inst.* 1. these represent the whole commons of the realm, and are trusted for them. By reason of this representation, every man is said to be party to, and the consent of every man is included in an act of parliament:—And though it be undoubtedly true, that many amongst the commons have no votes, as persons having no freehold, freeholders in the ancient demesne, women, *&c.*, yet this does not make it cease to be an actual representation of the people. Nobody ever imagined, that, in exercising a right of this kind, every person could possibly join, but some rule of qualification must be laid down, such that hath been taken from the most worthy, and such as have the most valuable and fixed sort of property; which also, to avoid confusion, hath been restrained by later acts of parliament. *Ibid.*

Of some Things necessary to the Validity of a Statute.

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This is) It is remarkable, that though the bishops always decline to vote on acts of attainder, most of those acts make express mention of the lords spiritual. *Vide* st. 16 Car. 1. c. 1. in the case of Stafford, 756-7. and the act for attainting Sir John Fenwick, 8 W. 3. c. 4. in 5. St. Tr. 1. edit.

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Some ancient) *Vide* Reeves's. Hist. Engl. Law, vol. 1. 215. vol. 2. 354. vol. 3. 143. 252. 379. The mode of stating the enacting authority hath varied exceedingly at different periods; but the present correct style hath uniformly obtained from the 13 Car. 2. In the famous act of Tonnage and Poundage, 12 Car. 2. c. 4. it is remarkable that the enactment is not stated to be by the royal authority. The language of the act is, *by the commons, by and with the advice and consent of the lords spiritual and temporal in this present parliament assembled.* Perhaps, as the statute was to convey an interest to the crown, some lawyers of it might think the royal assent was sufficiently implied.

Vide Prynne) See farther on this subject Hargr. and Butl. Co. Litt. 159. b. *notis*; Whitlocke on Writ of Parliament, vol. 2. 294; Elsynge on Parliaments, 28. and Barrington's Observations on the more Ancient Statutes, p. 46. With regard to the PARLIAMENTARY FORMS of the laws, thus much seems to be agreed; that where the proceeding consisted only of a petition from parliament, and an answer from the king, these were entered upon the PARLIAMENT ROLL; and if the matter was of a publick nature, the whole was then usually styled an ORDINANCE: if, however, the petition and answer were not only of a publick, but a novel nature, they were then formed into an ACT by the king, with the aid of his council and judges, and entered on the STATUTE ROLL. Many instances of these distinctions are to be found upon the rolls of

of parliament. See 22 E. 3. n. 20. 30. vol. 2. p. 203. Rot. Parl.—28 E. 3. n. 16. vol. 2. p. 257.—E. 3. n. 39. vol. 2. p. 280.—and 1 R. 2. n. 56. vol. 3 p. 17. Hargr. and Butl. Co. Litt. *ubi supra*. 3 Reeves's Hist. Engl. Law., 146. An ordinance on the parliament roll, with the king's assent upon it, has nevertheless equal force with a statute: and a *respectuatur* entered upon the roll in no degree lessens its authority. See it: 11 H. 4. n. 28. cited and admitted in evidence on Lord Macclesfield's trial, St. Tr. vol. 6.—See The Report from the committee upon temporary laws, expired or expiring.

(12 *If a*) "Acts of parliament that are impossible to be performed, are of no validity: and "if there arise out of them, collaterally any absurd consequences, manifestly contradictory to com"mon reason, they are, with regard to those collateral consequences, void. I lay down the rule "with these restrictions; though I know it is generally laid down more largely, that acts of par"liament, contrary to reason, are void. But, if the parliament will positively enact a thing to be "done which is unreasonable, I know of no power in the ordinary forms of the constitution that is "vested with authority to controul it; and the examples usually alledged in support of this sense "the rule do none of them prove, that where the main object of a statute is unreasonable, the "judges are at liberty to reject it; for that were to set the judicial power above that of the legisla"ture, which would be subversive of all government. But, where some collateral matter arises "of the general words, and happens to be unreasonable; there, the judges are in decency to con"clude, that this consequence was not foreseen by the parliament, and therefore they are at li"berty to expound the statute by equity, and only *quoad hoc* disregard it. Thus, if an act of par"liament gives a man power to try all causes that arise within his manor of *Dale*; yet, if a cause "should arise in which he himself is party, the act is construed not to extend to that, because it is "unreasonable that any man should determine his own quarrel. But, if we could conceive it possi"ble for the parliament to enact, that he should try, as well his own causes as those of other per"sons, there is no court that has power to defeat the intent of the legislature, when couched in "such evident and express words, as leave no doubt whether it was the intent of the legislature "or no." 1 Bl. Comm. 91.]

(15 *Before the*) This mode of promulgating the statutes seems to have fallen into disuse soon after the introduction of the art of printing. The last proclamation writ to be found on the statute rolls in the Tower, bears date 8 Rich. 2. viz. in the year 1385. See Report from the committee for promulgation of the statutes, p. 5, 6.

(16 *But a*) Ordinances were never promulgated in this manner; but it was sometimes recommended by the king to the Commons (probably by a *charter* or *patent*) to publish them in their counties. 3 Reeves's Hist. Eng. Law, p. 147.

(17 *It has*) However, as arguments are frequently drawn from the title of a statute, it may be wished, that there was a little more attention to the settling of it. For example, who would expect to find a most material alteration of the statute of *Distributions*, in a law, the title of which is, *An act for the renewal and continuance of several acts of parliament?* 1 Ja. 2. c. 17. § 8. or in an act the title of which is, *An act to enforce the execution of an act of this session of parliament, for granting to his Majesty several rates and duties upon houses, windows, or lights*, to find a provision, that all existing, and all future statutes which mention England, shall extend to Wales and Berwick upon Tweed, though not particularly named? 20 G. 2. c. 42. § 3. It becomes indeed impossible, when statutes relate to matters of a very miscellaneous nature, that the title can be co-extensive with the views of the legislature: it is, therefore, to be wished, that such acts of parliament were confined to laws, and not thrown together in that very strange confusion, which hath now obtained the name of a *hodge-podge* act. Barrington's Observations on the more Ancient Statutes, p. 449. See a remarkable instance of one of these acts in 17 G. 2. c. 40.

(18 *The custom*) Instances have, however, occurred before this time. Barrington's Observations on the more ancient Statutes, p. 449. *notis*.

(C) From what Time a Statute begins to have Effect.

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(1 *Every Statute*) 6 Br. P. C. 553. 4 Term Rep. 660. This doctrine, that where the commencement of an act was not directed to be from any particular time, it should commence from the first day of the session of parliament in which it passed, though often productive of the most provoking injustice, was sanctioned by so many decisions, that the interference of the legislature was necessary to controul it. It is therefore enacted, that the clerk of the parliament, shall indorse (in English) on every act, the time it receives the royal assent; which indorsement shall be taken to be a part of the act, and to be the date of its commencement, where no other time is provided. St. 33 G. 3. c. 13.

(3 *If two statutes*) See now the above statute of 33 G. 3.

(D) How long a Statute continues in Force.

29 G. 3. c. 64. 33 G. 3.

A temporary statute is sometimes made to continue in force after

ded to operate ſubſtantially, for the purpoſe of ſupporting proſecutions c. 66.
ainſt thoſe who have violated it during the term aſſigned for its conti- 34 G. 3.
nance. c. 80. &c &c.

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(5 *This caſe*) In a late caſe, the court of King's Bench held with great clearneſs, that if a
ute expire, and afterwards be revived by another ſtatute, the law derives its force from the
ſt ſtatute; and that therefore the ſtatute of 21 Jac. 1. c. 4. extends to ſtatutes made ſince, which
ive ſtatutes made before it. Shipman v. Henbeſt, 4 Term Rep. 109.

But an act cannot be altered or repealed in the ſame ſeſſion in which it 36 G. 3.
paſſed, unleſs there be a clauſe inſerted expreſsly reſerving a power to c. 20. 21.
ſo. 22.

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(4 *Every*) The ſtatute of 5 G. 1. c. 27. inflicts a fine, not exceeding 100*l.* and three months
priſonment, on ſuch perſons as ſhall be convicted of ſeducing artificers. The 23 G. 2. c. 13.
icts a penalty of 500*l.* and twelve months impriſonment for the ſame offence. Lord Mansfield
d, that the latter ſtatute was in this reſpect a virtual repeal of the former: Rex v. Cator, 4
. 2026. *So, é converſo*, where a latter ſtatute inflicts a milder puniſhment than a preced-
ſtatute for the ſame offence. Rex v. Davis, Leach's Caſes, 228.

But ſubſequent ſtatutes, which add accumulative penalties, and inſtitute Cowp. 297.
r methods of proceeding, do not repeal former penalties and methods 2 Atk. 675.
proceeding ordained by preceding ſtatutes, without negative words.
r hath a latter act of parliament ever been conſtrued to repeal a prior act,
ſs there be a contrariety or repugnancy in them, or at leaſt ſome notice
n in the former law of the preceding one, ſo as to indicate an intention
e law-makers to repeal it. Neither is a bare recital in a ſtatute, with- Doré v.
a clauſe of repeal, ſufficient to repeal the poſitive proviſions of a former Gray,
te. 2 Term Rep. 365.

(F) Of a public or private Statute.

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A ſtatute) The diſtinction between publick and private acts is marked with admirable pre-
in the following note in the printed report from the committee for the promulgation of the
s.—PUBLICK AND PRIVATE ACTS—IN LEGAL LANGUAGE.—1 Acts are deemed to be
l and general acts, which the judges will take notice of without pleading, viz. acts concern-
e king, the queen, and the prince; thoſe concerning all prelates, nobles, and great officers;
concerning the whole ſpiritualty; and thoſe which concern all officers in general, ſuch as all
, &c. Acts concerning trade in general, or any ſpecifick trade; acts concerning all perſons
lly, though it be a ſpecial or particular thing, ſuch as a ſtatute concerning aſſizes, or woods
ſts, chaſes, &c. &c Com. Dig. tit. Parliament (R. 6.) 2. *Private acts* are thoſe which con-
rn a particular ſpecies, thing, or perſon, of which the judges will not take notice without
g them, viz. acts relating to the biſhops only; acts for toleration of diſſenters; acts re-
to any particular place, or to divers particular towns, or to one or divers particular counties,
e colleges only in the univerſities. Com. Dig. tit. Parliament (R. 7.) 3. In a *general act*
ay be *a private* clauſe, *ibid*; and *a private act*, if recognized by *a publick act*, muſt after-
be noticed by the courts as ſuch. 2 Term Rep. 569.—2 IN PARLIAMENTARY LAN-
.—1 The diſtinction between *publick* and *private* bills ſtands upon different grounds as to
All bills whatever, from which private perſons, corporations, &c. derive benefit, are ſub-
the payment of fees, and ſuch bills are in this reſpect denominated *private* bills—Inſtances
within this deſcription are enumerated in the ſecond volume of Mr. Hatſel's Precedents
ceedings in the Houſe of Commons, edit. 1796, p. 267. &c.—2. In parliamentary lan-
another ſort of diſtinction is alſo uſed; and ſome acts are called *publick general acts*, others,
neral acts, viz. church acts, canal acts, &c. To this claſs may alſo be added ſome acts which,
publick, are merely perſonal, viz. acts of attainder, and patent acts, &c. Others are
called

called *private acts*; of which latter class some are local, viz. inclosure acts, &c. and some perso viz. such as relate to names, estates, divorces, &c.*

And that opinion has been since confirmed by the court of King Bench.

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(17 *But the contrary*) Samuel v. Evans, 2 Term Rep. 569.

(19 *In many*) Note, the distinction between *private* acts, and *publick*, was first made in t reign of Richard III. who applied this new invention to the purpose of destroying his enemies parliamentary attainders. Reeves's Hist. Engl. Law, vol. 3. 379. vol. 4. 129, 130.

(G) Of an affirmative or negative Statute.

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(7 *But where*) Rex v. Stubbs, 2 Term Rep. 395. S. P.

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(18 *An affirmative*) In another place Lord Coke lays down the like rule as to an affirma statute not taking away the common law, but with more particularity. For his words are, th *statute made in the affirmative without any negative expressed or implied, does not take away the comm* 2 Inst. 200. This seems to be the justest way of stating the rule both as to common law and toms. Hargr. & Butl. Co. Litt. 115. a. *notis.*

(20 *But it*) *Sed vide* Hargr. & Butl. Co. Lit. 115. a note (9.) *Vide etiam* 2 Hawk. P. C 10. § 8.

(H) Whose Province it is to construe a Statut

(2 *But only*) If the misinterpretation of an act of parliament directory to an inferior co a proceeding confessedly within their jurisdiction, be the subject of *appeal*, and not of *pro* as seems to be pretty generally admitted, the position in the text is stated too broadly. 1 H 536. 4 Term Rep. 398.

(I) Rules to be observed in the Construction o Statute.

1. Words and Phrases, the Meaning of which in a Statute has be certained, are, when used in a subsequent Statute, to be underst the same Sense.

Parker, 233. Hob. 93. 97. Where words in a statute are express, plain, and clear, the words to be understood according to the genuine and natural signification a port, unless by such exposition a contradiction or inconsistency wou in the statute, by reason of some subsequent clause, from whence it be inferred that the intent of the parliament was otherwise. And this with respect to penal as well as other acts.

* It must give additional authority to the extracts which have been made from the Re the Committees for inquiring into the state of the temporary statutes, and the means o promulgating the laws, to mention, that they come from the pen of a gentleman univer lowed to have a very exact knowledge of our laws and constitution, I mean, Mr. Abbot, the representatives for the borough of Helstone in the last and present parliament, and th of the resolutions which formed and gave activity to those most useful committees.

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(11 *It is*) So, the civillians ſay, *Ceſſante legis præmio, ceſſat et ipſa lex.*—But, if the preamble a ſtatute be a key to its conſtruction, it is to be lamented, that it ſo rarely ſtates the al occaſion of the law, and the views of the propoſer of it. The moſt common recital for the troduction of any new regulation, is to ſet forth, *that doubts have ariſen at common law*, which fre-ently never exiſted; and ſuch preambles have, therefore, much weakened the force of the com-n law, in ſeveral inſtances. See Mr. Barrington's Obſervations on the more Ancient Statutes, 394. 411. 477. to which add 32 G. 3. c. 60.

(13 *It was*) But this opinion of Lord Cowper with reſpect to the operation of the preamble, is preſsly diſapproved of by Lord Chief Baron Parker and Lord Hardwicke, in Ryal v. Rowles, Atk. 174. 182. and 1 Vez. 365. 371. For though, in many caſes, the preamble will not reſtrain e general purview, as in Sir W. Jones, 163. Palm. 485. on the conſtruction of the ſtatute of the h Eliz. yet it is a rule, and ſo agreed there, that where the not reſtraining the generality of the cting clauſe will be attended with inconvenience, the preamble ſhall reſtrain it. So, though the eamble cannot controul the enacting part of a ſtatute, which is expreſſed in clear and unam-uous terms, yet, if any doubt ariſe on the words of the enacting part, the preamble may be orted to, to explain it. 4 Term Rep. 793.—However, where enacting words will take in the chief intended to be prevented, they ſhall be extended for that purpoſe, though the preamble s not warrant it; and innumerable inſtances of this kind are in the law books. 3 Atk. 204. wp. 543.

As one chapter in a ſtatute may be both general and particular, becauſe Hob. 226.
chapter may contain divers acts and laws, which may be as ſeveral Parker, 13.
their natures as if they were in ſeveral chapters; ſo, by parity of rea- 14.
, where there are different proviſions for different purpoſes, and penned
fferent words in the ſame chapter, they ought to be ſo conſtrued, to
d inconſiſtency, as if they had been in different chapters.

If divers Statutes relate to the ſame Thing, they ought to be all taken into Conſideration in conſtruing any one of them.

is an eſtabliſhed rule of law, that all acts in *pari materiâ*, are to be Dougl. 30.
n together, as if they were one law.

The common Law ought to be regarded in the Conſtruction of a Statute.

all doubtful matters, and where the expreſſion is in general terms, 11 Mod.
es are to receive ſuch a conſtruction, as may be agreeable to the rules 150.
common law in caſes of that nature; for ſtatutes are not preſumed
ke any alteration in the common law, farther or otherwiſe than the
preſsly declares; therefore, in all general matters the law preſumes
t did not intend to make any alteration; for if the parliament had
at deſign, they would have expreſſed it in the act.

Page 647

(*If a new*) Or, as it ſeems better expreſſed by my Lord *Vaughan*, Hob. 298.
a ſtatute alters the common law, the meaning ſhall not be ſtrained Cart 36.
the words, except in caſes of public utility, when the end of the Vaugh. 173.
ears to be larger than the enacting words.

The Intention of the Makers of a Statute ought to be regarded in the Conſtruction of the Statute.

ere it is manifeſtly the intention of the legiſlature, that a ſubſequent
arliament ſhall not controul the proviſions of a former act, the ſub-
act ſhall not have ſuch operation, even though the words of it,
rictly and grammatically, would repeal the former act.
, in *Bro.* tit. Parliament, 52. "Where a ſtatute is, that the
"merchant

" merchant ſhall import bullion of two marks for every ſack of wool e
" ported, and then another ſtatute was made, that the merchant ſhou
" not be charged except for the ancient cuſtom, this does not repeal t
" firſt ſtatute." *Vide cauſam*, 4 *E.* 4. 12. And the reaſon is, that
clearly was not the intent of the legiſlature that it ſhould have that
fect.

Williams v. Pritchard, 3 Term Rep. 2.

Again, houſes built on lands embanked from the *Thames*, in purſuan
of 7 *G.* 3. *c.* 37. which veſts thoſe lands in the owners free from tax
were holden not to be liable to be aſſeſſed to the general land-tax impo
by 37 *G.* 3. For though (ſtrictly ſpeaking) the land-tax is an ann
ſtatute, and the words of the land-tax act, which was paſſed in the 2
year of *G.* 3. are general and ſufficiently large to ſubject theſe lands
the payment of the tax in queſtion, yet, as the land-tax is one of
ways and means for raiſing the ſupplies every year, and is now beco
part of the conſtant reſources of the country, the legiſlature in paſſing
27 *G.* 3. could not intend to repeal the proviſions of 7 *G.* 3. which
empted theſe lands from the land-tax.

Page 649

(49 *In order*) So the great maſter of Ethicks—ὅταν μὲν λέγῃ μὲν ὁ νόμος καθόλου, συμβῇ δ' ἐπὶ τ
παρὰ τὸ καθόλου, τότε ὀρθῶς ἔχει, ἡ παραλείπει ὁ νομοθέτης, ἡ ἡμαρτεν ἁπλῶς εἰπὼν, ἐπανῶν τὸ ἐ
φθεν, ὃ καν ὁ νομοθέτης αὐτὸς ἂν εἰποι, εἰ παρῆν, καὶ εἰ ἤδει, ἐνομοθέτησεν ἄν. Ariſt. Ethic. ad Nic
lib. 5. c. 10.

(51 *The Equitable*) If the original had been correctly ſtated, the introduction of the
would not have been neceſſary. We tranſcribe the paſſage:—Καὶ ἐστὶν αὕτη ἡ φύσις τοῦ ἐπ
ἐπανόρθωμα τοῦ νόμου, ἡ ἐλλείπει διὰ τὸ καθόλου. Ariſt. Ethic: ad Nicom. lib. 5 c. 10.

(55 *Actions*) Ἔλεγον δὲ ἔοικε καὶ τὸ δι' αἰτίαν πεφάλλειν, τοῦ ἀγωνίζεσθαι ποιεῖν. Ariſt. Ethic. ad Nic
lib. 3. c. 1.

Le Neve v. Le Neve. 1 Vez. 64.

If a deed reſpecting lands ſituate in any of thoſe counties where th
giſlature have required regiſtration, is not regiſtered, and afterward
ſame lands are ſold or mortgaged by a deed properly regiſtered; i
perſon claiming under the ſecond deed has *notice* of the firſt deed, th
ſon claiming under the firſt deed, though it is not regiſtered, ſha
preferred to him; for though the regiſter act veſts the legal eſtate ac
ing to the prior regiſtry, yet it is left open to all equity; and there
danger to the ſubſequent purchaſer, who might refuſe, if he had
of the prior conveyance. And a ſimilar conſtruction has prevailed
the ſtatute of enrolments 27 *H.* 8. *c.* 16. And ſo on the ſtat
frauds, 29 *Car.* 2. *c.* 3. the courts have decided, that as it was
with a deſign to prevent, either in marriage or any other treaties,
tainty, perjury, and contrariety of evidence, the caſes not liable to
inconveniencies are not within it.

1 Eq. Ca. Abr. 19.

Page 650

(63. *If the*) But it is no reaſon, when the words of a law do
extend to an inconvenience ſeldom happening, that they ſhould
tend to it as well as if it happened more frequently, becauſe it h
but ſeldom.

(65 *The ſenſe*) But this rule, that ſtatutes of explanation ſhall always be taken lite
denied by Lord Hobart, in 2 Roll. Rep. 500, 501. Winch, 123. Sir Wm. Jon. 39.; for
law, he ſays, ſhould exclude all equity. And in 3 Co. 75. a. it is ſaid in argument, a
admitted by the court, that ſtatutes of explanation are always interpreted beneficially.

(66 *The crown*) Parker 4. The general rule is, that the king's rights ſhall not be
reſtrained unleſs he be ſpecially named. The inſtances mentioned in the text, which are
as exceptions to it, open a very uncertain latitude. " In ſuch caſes," ſaith a very ſenſibl
" I preſume, he may be precluded of ſuch inferior claims as might belong indifferently to
" or to a ſubject, as to the title to an advowſon or a landed eſtate, but not ſtripped of a
" his ancient prerogative, nor of thoſe rights which are incommunicable, and are appro
" him as eſſential to his regal capacity." 1 Wooddeſ. 31, 2. Parker, 180.

9. A penal Statute ought to be conſtrued ſtrictly.

Even ſtatutes which take away clergy are in ſome caſes to be taken by equity; and if a ſtatute is [illegible] ſuppletory to the common law, and in a ſimilar caſe, and takes away clergy, it muſt be conſtrued liberally. 10 St. Tr. 436. Jenk. Cent. 97.

Page 653

(95 *If a ſtatute*) Parker, 44. 1 Term Rep. 728.

In the conſtruction of ſtatutes according to the intention of the legiſla- ture, there is an eſſential difference between the expounding of modern and ancient acts of parliament. In early times the legiſlature uſed (and it was a wiſe courſe to take) to paſs laws in general and in few terms: they were left to the courts of law to be conſtrued ſo as to reach all the caſes within the miſchief to be remedied. But in modern times great care has been taken to mention the particular caſes in the contemplation of the legiſlature; and therefore the courts are not permitted to take ſame the liberty of conſtruing them, as they did in expounding the ancient ſtatutes. *Per* Buller, J. 5 Term Rep. 291-2.

(K) How a Perſon guilty of Diſobedience to a Statute may be puniſhed.

Page 654

(6 *In a modern*) See too Rex v. Penſax, 1 Barnard. B. R. 127. Rex v. Robinſon, 2 Burr. Rex v. Boyall, *Id.* 834.

Where a new offence is created by a ſtatute, and a penalty annexed to it by a ſeparate and ſubſtantive clauſe, it is not neceſſary for the proſecutor to ſue for the penalty, but he may proceed on the prior clauſe by indictment, on the ground of its being a miſdemeanour. Rex v. Harris, 4 Term Rep. 202.

(L) Of pleading a Statute

Page 656

(1 *But if*) *Vide* Spieres v. Parker, 1 Term Rep. 141. Rex v. Hall, *Id.* 322.

Page 657

(d *In pleading*) Dougl. 97. *notis.* So, where a private ſtatute was deſcribed in the declaration to be made in the fourth year of Philip and Mary, whereas the record, when produced in evidence, appeared to be in the *fourth and fifth* of Philip and Mary, the variance was holden to be fatal, and the plaintiff was nonſuited. Rann v. Green, Cowp. 474.

(e *A miſrecital*) Dougl. 97. Boyce v Whitaker.

(f *Every miſrecital*) But *qu.* if it be ſet out unneceſſarily, for in that caſe the materiality of the recited part ſeems not to be conſiderable; the court will hold the party to half a letter.—Dougl. 97. and vide Mills v. Wilkins, ſupra.

Summons and Severance.

Page 660

(A) Where a Writ abates after Judgment of Severance.

Page 665

(g *Even*) The reaſon here given, does not appear in the books referred to, nor are all the cases applicable even to the ſubject.

Page 667

SUPERSEDEAS.

(B) Who may award a Writ of Supersedeas.

Page 669

(11 *The court*) The junior baron used to carry the writ book of the Exchequer to the co of King's Bench, and shew it to them, and there demand cognizance of the suit, in consequ of which the court surceased. But this practice, which arose from this odd technical reason, t the king cannot command himself, has fallen into disuse, as indeed has the practice of sendi *supersedeas* to the court of Common Pleas; all actions in which the revenue is concerned, being moved as well out of the courts of King's Bench and Common Pleas, as out of every other c having jurisdiction, into the office of pleas of the court of Exchequer, simply by an order of t court, which operates in the nature of an injunction. Anstr. 207, 208.

(C) In what Cases a Writ of Supersedeas m be awarded.

Page 672

(30 *But by the*) For cases upon this act, *vide supra*. vol. 1. 212.

Page 674

(44 *It has*) *Vide acc. supra*, vol. 1. 212

(D) Of certain Writs which are Supersedeases Implication.

Page 676

(5 *As the*) *Vide supra*, Vol. 3. tit. *Habeas Corpus*, (C), in App. 352

(23 *But it is*) *Vide supra*, Vol. 1. tit. *Certiorari* (D), pag. 352.

Page 681

(50 *Upon a rule*) See farther on this Division *supra*, Vol. *Error* (H), pag. 210.

(E) Of certain Requisites, which are necessar the making of a Writ of Error a Supersed by Implication.

1. It must be allowed.

Jaques v. Nixon, 1 Term Rep. 279. Doe v. Bracebridge *Ibid.*

BUT, although it be true, that a writ of error is a *supersede* the allowance; yet, as it is the practice to sue out the writ before judgment is signed, the courts have said, it shall not operat allowance, till the judgment is actually signed, and the party shall lowed four days after the judgment signed to put in bail, for be judgment no bail can justify. As to the service of the allowance, only material to bring the party into contempt, if he proceeds to execution afterwards.

(12 *A writ of Error*) *Vide supra*, Vol. II. tit. *Error* (B). Page 682

(G) What the Effect of a Supersedeas is.

Page 684

(*Upon a rule*) *Sy.* If this case, which was added by the last editor, be not mis-stated, as to the judgment of the court, and whether, from the reasoning of the court, we should not read, that the rule was *discharged*, instead of *made absolute*. And taking it so, it perfectly accords with the doctrine of a late case, that a supersedeas obtained after judgment, cannot be pleaded in bar to an action on that judgment, this being a new action. Topping v. Ryan, 1 Term Rep. 273. Besides the rule that *a prisoner who is once superfedable, always continues so*, only holds so long as he remains *in the same custody, and under the same process.*" Rose v. Christfield, 1 Term Rep. 591.

Surety of the Peace.

Page 686

(D) The Manner of granting Surety of the Peace by the Court of King's Bench.

Page 690

(*In a late*) 2 Burr. 780. S. C.
(*Articles of the*) 2 Burr. 806.
(*Robert Parnel*) 2 Burr. 806. S. C.

Upon a woman's offering to exhibit articles of the peace against two persons, it appeared that the facts charged were done at *Portsmouth*. Upon which the court objected to her, that she ought to have applied to a justice of peace in the neighbourhood. It was answered, that if there should be any particular inconvenience arising therefrom, there might be a *mandamus* to a justice of peace in the county, empowering him to take the security required. The court, however, came to this expedient, *viz.* that on issuing the attachment of the peace, which is of course made out upon the court's reading the articles praying security of the peace, an indorsement should be made at the same time made thereon, authorizing and directing any justice or justices of the peace in the county of *Southampton* to take the security of the peace there; specifying the particular sums, wherein the principals and their sureties should be bound. Margaret Hutt's case. 2 Burr. 1039.

(E) The Manner of granting Surety of the Peace by a Justice of the Peace.

Page 691

(*A justice*) A peer or peeress cannot be bound over in any other place, than the courts of King's Bench or Chancery. 4 Bl. Comm. 253.

(F) In what Cases a Recognizance for keeping the Peace may be discharged.

Page 695

(*This*) See too *ex parte* Sir Richard Grosvenor, 3 P. Wms. 140. Baynum v. Baynum, Bunb. *Ex parte* King, *Id.* 333.

King v. King, 2 Vez. 578. Ambl. 240.

A motion was made on the part of the husband to discharge an order f a *supplicavit* on the part of the wife. It was made on affidavits; a the case was said to be more proper for the interposition of friends, than court of justice. Lord *Hardwicke*—I think so too: but when it does co before a court of justice, the court must go according to its rules. I ver knew a writ of *supplicavit*, or rules for surety of the peace in *B.* discharged, unless it has appeared to be a mere contrivance and falsi

Vide 3 Burr. 1922.

and then in a particular instance, (or two, I believe,) I have known th discharged. The reason is, that they are for prevention: if, therefore, parties conclude, they believe their lives to be in danger, the court will try these facts upon affidavits on both sides. It must therefore be s strong case to shew, that it was a mere contrivance or falsity, that will a ground to discharge a writ of *supplicavit* or rule of surety of the peace. here the facts are not at all denied, and I am to take care of the pe who swears her life is in danger. I cannot discharge this order.

Page 1 Vol. 5

Tender and bringing Money in Court upon the common Rule

(B) What is a good Tender.

Page 4

(2 *It is*) However, the actual production of the money may be dispensed with by the c of the other. 3 Term Rep. 683.

4 *But an actual*) Inst. 208. *Vide* 5 Term Rep. 432.

Clark v. Tyson, 1 Str. 504.

Upon an issue, whether stock were tendered at the day, the p proved, that though the books were not opened to make transfers common form, yet they were ready at the office, and upon leave director, there might have been a transfer, it not being usual to on such occasions; but the defendant, not attending to accept th the plaintiff contented himself with staying there all day, and did tually get leave from a director to have the books opened, if the ant should come. And for this omission Lord Chief Justice *Pra* it not to be a sufficient tender, for there was a possibility that leav not be given, and the plaintiff had not done every thing in his po ought to have so prepared matters, that if the defendant had a there might have been a transfer immediately.

Thornton v. Moulton, *Id.* 533.

At the opening of the books, the two brokers met, and the sel ker told the other, he was ready to transfer; the other alleged usual to indulge the buyer for two or three days, and that h find his principal in that time, which the other not disagreein thing further was done. And for want of having the buyer calle books, the first day of the opening, the Lord Chief Justice *Pra* not a good tender, and the plaintiff was nonsuited.

Bullock v. Noke, *Id.* 579.

In a stock-cause the plaintiff proved a tender on the second d opening, and would have examined into the custom of the Alle was, to allow either party a day or two to tender or accept; but

ustice *Pratt* refuſed to admit ſuch evidence, ſaying, their uſage could ever alter the law, and ſo the plaintiff was called. *N. B.* In *C. B.* Chief ustice *King* left it to the jury upon ſuch an evidence; and they found it a ood tender.

Page 5

(9 *But in*) *Vide* Sapsford v. Fletcher, 4 Term Rep. 511. *ſupra*, 82.

(11 *A Tender*) So it is good, though the money tendered be mixed with other monies. 3 rm Rep. 683.

Page 6

(12 *A tender*) Although it hath never yet been determined, that bank-notes are a legal tender, the court of King's Bench have holden, that if ſuch notes are preſented in payment, and no bjection is made to the receipt on that account, they are in that caſe a good tender. Wright v. ird, 3 Term Rep. 554.

(D) At what Time a Tender muſt be made.

Page 7

(5 *The defendant*) 1 Wilſ. 29. Smith v. Raydon. Semb. S. C.

In the King's Bench, if the defendant has pleaded a tender before the exhibiting of the bill, though the plaintiff may reply a *latitat* previous to the tender, yet the defendant may rejoin, that there was no cauſe of action at the time when the *latitat* iſſued. Wood v. Newton, 1 Wilſ. 141.

Page 8

(10 *A tender*) 5 Term Rep. 433.

(E) To whom a Tender muſt be made.

In *aſſumpſit* for work and labour, there was a plea of tender, upon which iſſue was joined. The evidence for the defendant on the tender was, that being indebted to the plaintiff in the ſum claimed by the action, he had ſent the money by his maid-ſervant to the plaintiff's houſe. She depoſed that ſhe carried it to the plaintiff's houſe, and that ſeeing a ſervant maid, who informed her that her maſter was at home, ſhe delivered the money to that ſervant to be delivered to her maſter; that the ſervant took the money and went into the houſe, as ſhe ſuppoſed, to deliver it to the plaintiff, but returned with an anſwer that he would not receive it, but that ſhe muſt go to his attorney. It was objected, that this was not a legal tender, there being no evidence of its being made to the party himſelf. But Lord *Kenyon* ſaid, that in the common tranſactions of life, this kind of intercourſe by the intervention of ſervants muſt be allowed; and that if the money was ſo brought to the houſe of the plaintiff, and delivered to his ſervant, who retired, and appeared to go to the maſter, it was evidence to be left to the jury, from which they might infer that a tender was made. The defendant had a verdict. Anon. Eſpin. Ni. Pr. Ca. 349.

(F) The Conſequences of a Tender and Refuſal.

Page 13

(1 *And the law*) Dougl. 694. 1 Term Rep. 638. 645.

(H) Of

(H) Of pleading a Tender.

1. In the general.

Douglas v. Patrick, 3TermRep. 683.

If *A.*, *B.*, and *C.* have a joint demand, and *C.* has a ſeparate demand on *D.*, and *D.* offers *A.* to pay him both the debts, which *A.* refuſes without objecting to the form of the tender on account of his being entitled only to the joint demand, *D.* may plead this tender in bar of an action for the joint demand, but ſhould ſtate it as a tender to *A.*, *B.*, and *C.*

Page 15

(15 *But, if a*) But the contrary has been ſince adjudged in the court of King's Bench. Berwick v. Maidman, 1 Burr. 59.

Page 16

(16 *It has*) Or to the whole declaration. Maclellan v Howard, 4 Term Rep. 194. But in both theſe caſes the actions were upon promiſes. In *treſpaſs*, the defendant may plead the general iſſue and tender of amends. Gerring v. Manning, Barnes, 366. Martin v. Kelſerton, 4 Term Rep. 1093.

(M) Of pleading where Money has been brought into Court upon the common Rule.

Page 23

(4 *In an action*) Note, this was, as to *ſome* of the counts only; for after payment of money into court, generally, the defendant cannot plead the ſtatute of limitations. Mead v. Wyat, Bunb. 100.

1 Salk. 596. Wilſ. 75.

So where an action of covenant was brought upon a leaſe for non-payment of rent, and not repairing, *&c.*, the court made a rule, that upon payment of what ſhould appear to be due for rent, the proceedings as to that, ſhould be ſtaid; and as to the other breaches, the plaintiff might proceed, as he ſhould think fit.

Baillie v. Cazelet, 4TermRep. 795.

So, in covenant upon a charter-party, the defendant was allowed to bring money into court, upon two of the breaches only, *viz.* for demurrage and demurrage.

Page 24

(12 *If the*) He is not entitled to the coſts upon all the counts, but only upon thoſe on which the money has been paid. 4 Term Rep. 579.

(N) The Conſequences of bringing Money into Court upon the common Rule.

(2 *A plaintiff*) *Qu.* Whether the plaintiff be not entitled to it in *all* caſes; for being an acknowledgment on record, the defendant can never recover it back again, though it appear that he paid it wrongfully. 2 Term Rep. 645.

Tidd's Pr. 415, 416. (*a*) 5 Burr. 2640. 2 Term Rep. 275. (*b*) 1 Term

Although bringing money into court is an acknowledgment of right of action to the amount of the ſum brought in (*a*); yet beyond amount it is no acknowledgment (*b*); and therefore if the plaintiff proceed to trial (*c*), otherwiſe than for the non-payment of coſts, and not prove more to be due to him than the ſum brought in, ſhe (*d*) producing the rule be nonſuited, or have a verdict againſt her

y coſts to the defendant (*e*). But, if more appear to be due to him, Rep. 464.
e ſhall have a verdict for the overplus, and coſts (*f*). Where the (*e*) 2 Salk.
laintiff proceeds further, without going on to trial, he ſhall have his 597.
oſts to the time of bringing the money into court; and the defendant ſhall 2 Str. 1027.
e allowed his ſubſequent coſts (*g*). Ca. temp. Hardw. 206.
r. Rep. 196, 7. 2 Burr. 1121.. (*d*) 5 Com. Dig. 20. (*e*) 4 Term Rep. 10. 1 Term Rep.
0. *ſemb contra.* (*f*) Ca. temp. Hardw. 260. (*g*) 1 Term Rep. 629. Say. Rep. 196
ers.

If, after the defendant has brought money into court, the plaintiff Stodhart v.
oceed to trial, and a juror be withdrawn by conſent, the plaintiff Johnſon,
not entitled to coſts up to the time of bringing the money into 3 Term
urt. Rep. 657.

(O) In what caſes a Tender may in the general be made, or Money may be brought into Court upon the common Rule.

Page 26

11 *But it has*) Bunb. 44. Knight v. Ducheſs of Hamilton, S. P.

Page 27

14 *But the court*) 2 Bl. Rep. 1052. Stock v. Eagle.

(P) Of tendering and bringing Money into Court, upon the common Rule in particular Actions.

1. In an Action of *Aſſumpſit*.

t, in an action of *aſſumpſit* againſt a carrier, for not delivering Hutton v.
s, the defendant having advertiſed that he would not be anſwer- Bolton, E.
for any goods beyond the value of twenty pounds, unleſs they 22 G. 3.
entered and paid for accordingly, he was allowed to bring the twen- Tidd's Pr.
unds into court. 411.

2. In an Action upon the Caſe.

hough, in an action for general damages, the bringing of money Griffiths v.
court is irregular, yet, if the plaintiff takes it out, he thereby waives Williams,
irregularity, and cannot afterwards have a verdict, unleſs he recover 1 Term Rep.
than the ſum brought in. 710.

Page 29

But in ſome) There is a diſtinction between thoſe actions of debt, wherein the plaintiff cannot
leſs than the ſum demanded; as, on a record, ſpecialty, or ſtatute, giving a ſum certain
of penalty, Cro. Jac. 128. 498. 629. 3 Mod. 41.; and thoſe actions, wherein the plain-
recover leſs, as, in debt for rent, 5 Mod. 212. or on a ſimple contract, 1 H. Bl. 249.
former, the defendant cannot bring money into court, 2 Str. 800. Barnes, 285. though he
me to ſtay the proceedings, on payment of the whole debt and coſts, Ca temp. Hardw.
Burr. 1390: but in the latter, the defendant has been allowed to bring money into court,
356. 2 Salk. 596, 7. becauſe the plaintiff does not recover according to his demand,
rding to the verdict of the jury. Tidd's Pr. 410.

Page 30

Since this caſe) See alſo Bonafous v. Rybot, 3 Burr. 1370. acc.

The

St. 19 G. 2. c. 37. 3 Burr. 1773. The defendant, by act of parliament, may bring money into court, in debt, covenant, or other action, on a policy of assurance.

Page 31

(45 *By the* 24 *G.*) See similar provisions in actions against officers of the Excise, 23G. 3 c. 70. § 30, 31, 32, 33. and Customs, 24 G. 3. Sess. 2. c. 47. § 35.

8. In an Action of Trespass.

Pickeringv. Truste. 7TermRep. 33. Under certain circumstances the court will, in an action of trespass, stay the proceedings upon the defendant's undertaking to bring the goods for which the action is brought, into court, or to pay the full value of them with the costs of the action.

9. In an Action of Trover.

3 Burr. 1364. However, notwithstanding the disposition supposed to be discovered by the court in the last case, the granting or refusing of motions of this kind is entirely in the discretion of the court, governed by the circumstances of the case immediately before them. Where trover is brought for a specifick chattel of an ascertained quantity and quality, and where the case is unattended with any circumstances that can enhance the damages above the real value, but that the real and ascertained value must be the sole measure of the damages, there, the specifick thing demanded may be brought into court. And this is more reasonable, as the action of trover comes in the place of the old action of detinue. But, where there is an uncertainty, either as to the quantity or quality of the thing demanded, or there is any tort accompanying it, that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value, there, it shall not be brought in.

Page 35

TENURE.

(D) Of whom an Estate may be holden, and in what Case an Alteration may be made in the Seigniory by which it is holden.

Page 39

(1 *Every estate*) Though this was a consequence of the feudal system, yet it is said, that allodial property continued among us till the time of Henry the Second; and is, even yet, to be found with in some of the Isles of Scotland. See Watkins's edition of Gilbert's Tenures, note vi. and the following books there referred to, viz. *Mad. Baronia Anglica*, b. 1. c. 2. p. 30. *Stuart's* b. 2. c. 2. p. 106. *Dissert.* p. 3. § 4. p. 178. n. (3). *View*, b. 1. c. 2. § 1. n. (4). p. 2 *Kaims's Ess. Brit. Antiq.* Esl. 1 p. 12. Hargr. n. (1). 10. Co. Litt. 65. a. And see as to allodial property continuance on the Continent, 1 Robins. Cha. 5. § 1. p. 267. &c. 271. n. (H).

If the tenant in tail has the reverſion in himſelf; there, although the two eſtates continue diſtinct, yet, as he cannot hold of himſelf, the nure of the eſtate-tail is ſuſpended; and he is tenant to the lord in e. Watkins's edition of Gilb. Tenures, Note XLII. 2 Co. 92 be.

o. Ten. 84. 107. F. N. B. 143. A. 144. A. Dy. 235. pl. 22. Vin. Abr. tit. Tenure, (H. a.) l. 12.

(E) Of Tenure *in Capite*.

Page 100

(12 *An end was*) *Vide* Raſt. Statutes, 442a. b.

(14 *But it ſeems*) But this notion, that a tenure *ut de honore* is not a tenure *in capite* is controverted Mr. Madox with great cogency of reaſoning. Tenure *in capite*, in its genuine ſenſe, ſignifies a ure of another *fine medio*, that is, immediately and without the interpoſition of any meſne or in-mediate lord, and therefore where an honour or other ſeigniory came into the hands of the own by eſcheat or otherwiſe, its tenants were as much tenants *in chief* to the king, as thoſe who ere ſo by original grant from the crown. In proof of this Mr. Madox ſelects, from ancient re-rds, a great variety of inſtances between the 8th of Richard the Firſt, and the 20th of Henry e Sixth, in which tenures *ut de honore* are expreſsly ſtyled tenures *in capite*; and as he adds no in-ances of a later time than Henry the Eighth and Queen Elizabeth, in which the words *in capite* e omitted, it may be conjectured that the error he complains of originated ſoon after the time of nry the Sixth. Mad. Baron Angl. 181. The deſign of excluding tenures *ut de honore* from the ſcription of tenures *in capite* was to diſtinguiſh thoſe eſtates which were held of the king by a te-ure originally created by the king, from thoſe held of him by a tenure commencing by the ſubin-dation of a ſubject, between which there were many differences in point of incident very eſſential th to the lord and tenant. Mad. Baron. Angl. 12. But it ſhould have been recollected, that e diſtinction aimed at was already marked, with equal ſufficiency, and more correctneſs, by ominating tenures of the firſt ſort tenures *ut de coronâ*, and thoſe of the ſecond, tenures *ut de honore*. e influence of this miſtaken notion of tenure *in capite* is very evident, as well throughout the tute of Charles the Second for taking away the oppreſſive fruits of knight's ſervice and tenure *in pite*, as in thoſe grants from the crown, which in the *tenendum* are expreſſed to be *ut de honore m in capite*. Hargr. Co. Litt. 108. a. note (3).

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(21 *But by the*) See Mad. Baron. Angl. 238, 239. where the learned author obſerves on the curacy of language in the 12 Car. 2. about tenure *in capite*. The title of the act expreſſes that was made for taking away tenure *in capite*; and the firſt enacting clauſe proceeds on the ſame n. But had the act been accurately penned, it would ſimply have diſcharged ſuch tenure of its preſſive fruits and incidents; which would have aſſimilated it to *free and common ſocage*, without appearance of attempting to annihilate the *indelible* diſtinction between holding *immediately* the king, and holding of him through the *medium* of other lords. Hargr. Co. Litt. 108. a. e (5).

(F) Of Tenure in Frank Almoign.

Page 43

(13 *By the* 12 *Car.*) *Qy.* the neceſſity of this ſaving clauſe in the act, how the proviſions of it uld have extended to this ſpecies of tenure? Hargr. Co. Litt. 100. b. note

(G) Of Tenure by Divine Service.

(3 *It is not provided*) Such a proviſion in either caſe ſeems to be unneceſſary.

(I) Of Tenure by Eſcuage.

Page 45

(3 *At every going*) *Qu.* Whether eſcuage, where knight's ſervice was reſerved *generally*, could claimed in all *foreign* expeditions, whether it was confined to expeditions into *particular* coun-s? Hargr. Co. Litt. 74. a. note. (1).

(K) Of

(K) Of Tenure by Grand Serjeantzy.

Page 47 (11 *By the* 12) *Vide* Hargr. Co. Litt. 108. note (1).

(M) Of Tenure by Caſtle Guard.

Page 47 (3 *And it*) See Mr. Hargrave's note upon this paſſage.

TYTHES.

Page 50

FOR where cuſtom only ſubjects to tythe, cuſtom muſt determine proportion.

Tythes, in their proper and original nature, are a ſpiritual and incorpo inheritance: ſpiritual, from the uſes to which they are conſecrated; in poreal, from the mode of their exiſtence.

(*a*) Moor, 530. Hob. 296. (*b*) 2 Co. 43. b. 5 Co. Cawdrie's caſe. (*c*) 1 Leon. 300. (*d*) Day, 5. b. 6. a, (*e*) Cro. Eliz. 293. 814. (*f*) Dav. 6. a. (*g*) 1 Leon. 300.

There is no doubt that tythes were originally a mere eccleſiaſtical (*a*) venue; eccleſiaſtical perſons only having capacity to take them (*b*); eccleſiaſtical courts only having power to take cognizance of them. T were conſidered, not as any ſecular duty (*c*), or as iſſuing out of the l but as collateral to the eſtate of the land, and were paid, not in reſpe the land (*d*), but in reſpect of the perſons of the laity, in return fo benefit they derived from the miniſtry and care of their ſpiritual pa They could not paſs by copy of court-roll (*e*), becauſe things ſpi could not lie in tenure, or be conſidered as parcel of a manor: uni poſſeſſion (*f*) could not extinguiſh them, becauſe the ſpiritual nature c not be merged or extinguiſhed, in other words, could not coaleſce or i porate with that which was material and temporal: nor could a releaſe demands in lands (*g*) operate as a diſcharge of them; for as they not paſs under the denomination of land, neither would they be affect a releaſe of all claims ariſing out of lands.

2 Bl. Comm.

Tythes, again, in their eſſence, have nothing ſubſtantial or perma they conſiſt merely *in jure*, are merely a right. An eſtate in tythes more than a title to a ſhare or portion of the produce after it ſhall been ſeparated from the general maſs: before ſeverance it is wholly u tain what the amount of that ſhare or portion may be; nay more, its exiſtence is precarious; this, like its quantity, depending upon the dents of climate, ſeaſon, ſoil, cultivation, and the will and caprice o ſeveral owners or poſſeſſors. If the ground be not ſown, if the ſam not ſtocked, if the fruits be not gathered, no tythe can poſſibly ariſe. tythe is payable, as we have ſaid before, not in reſpect of the land, the perſon: it is not an eſtate in the land, but a right to a determinat portion of the fruits with all the induſtry and expence that have be ſtowed in bringing them forward and collecting them. Tythe, the itſelf, is not an object of our external ſenſes: it is neither viſible, no gible: its produce, indeed, may be ſeen and felt, but it exiſts itſelf in the mind's eye, and in contemplation o[illegible]w. It follows, ther

it is incorporeal: for the law aſcribes corporeity only to thoſe objects ich are ſubſtantial and permanent. From their incorporeity tythes are d to lie in grant, and not in livery; that is, they could not paſs from one n to another by livery of ſeiſin, the ancient mode of transfer, nor could tual poſſeſſion be given of them; but the property in them could only be nſferred by deed. In conſequence of their incorporeity it was doubted, ether a rent could be reſerved upon them; for being incapable of loca-, there was no place where a diſtreſs could be taken of them. And to viate this doubt a ſtatute was paſſed in the reign of the preſent king, ich empowers eccleſiaſtical perſons to grant leaſes for lives or years of ir incorporeal hereditaments. Of the king's right to reſerve a rent on a miſe of tythes, no doubt indeed was ever entertained; becauſe by the rogative the king had a right to diſtrain upon any lands in the poſſeſſion his leſſee.

But the revolution which took place in our eccleſiaſtical polity in the time *Henry* the Eighth has almoſt entirely changed the nature of this ſpecies property; and there now ſeems to be ſcarcely any difference between an eritance in lands and an inheritance in tythes. When the benefices which regular clergy had appropriated to themſelves fell, upon the diſſolution the monaſteries, into the hands of the king, he was prompted by his ſeneſs, and induced by policy to make grants of them to lay-perſons. in order that the tythes might anſwer the purpoſes of civil life, and ac-modate themſelves to the exigencies of their new proprietors, it be-e neceſſary to ſecularize them, and to endue them with all the qualities real property. For this purpoſe an act of parliament was paſſed; ſo tythes in the hands of a lay-perſon may now be treated like any other of property: they may be put in view in an aſſize: they are demand- in a *præcipe quod reddat*: they are ſubject to dower: fines may be le- and recoveries may be ſuffered of them: ejectments may be brought them: in ſhort, they have all the properties and all the incidents of a ee, except that they lie in grant, and not in livery; a diſtinction which marks no great difference, ſince the ſtatute of frauds allows no inte- of any permanency to paſs even in real property, unleſs the grant be ed by ſome written inſtrument.

32 H. 8. c. 7. § 8. 3 Wilſ. 30.

(A) Of the Diſcharge of payment of Tythes in kind by Modus and compoſition real.

Who are liable to the Payment of a perſonal Tythe.

Page 53.

(a) 2 P. Wms. 463. S. C. cited. *Vide* Dodſon v. Oliver, Bunb. 73.

mill, it is now clearly ſettled, is to be conſidered as a *predial* tythe, as reſpects its locality, and the perſon to whom it is payable; but in ode of payment it is to be treated as a *perſonal* tythe. The conſe- of its being treated as a *perſonal* tythe in the mode of nt, is, that only a tenth part of the clear profits after deducting the and other incidental expences, is due for it. Where no conventionary is paid for it, as, where it is not in leaſe, in that caſe, an annual value muſt be ſet upon it by the officer of the court.

Hall v. Macket, E. 37 G. 3. *in Scac.*

(C) Of

(C) Of what Things a predial Tythe is due.

1. Of Agiſtment.

Scarr v. Trinity College, Anſtr. 761. Ellis v. Saul. *Id* 332. Holbeach v. Whadcock, Hardr. 184. Linw. 194. Degge, 217.

Agiſtment tythe is paid, not for the increaſe or improvement of the a mal agiſted, but for the graſs eaten by it, and is proportioned to the value the graſs, not to the value of the actual improvement. But being the ty of the graſs eaten, it ariſes immediately from the ſoil, and is therefor predial tythe.

Underwood v. Gibbon, Bunb. 3. Fiſher v. Lemen, 9 Vin. Abr. 38. pl. 7.

Where therefore the occupier of land does not agiſt his own cattle, thoſe of ſtrangers, the tythe for the agiſtment of barren cattle is due fr the occupier, as being owner of the graſs for which the tythe is paid: b if the cattle are profitable, the owner of them is accountable for tythes.

Ellis v. Saul, *ubi ſupra.*

Agiſtment tythe being the tythe of the graſs, it follows, that if graſs has before paid tythe of hay, no tythe is due for the agiſtment of aftermath.

Page 54

(11 *But, if)* Boſworth v. Limbrick, 2 Rayn. 809.

Page 55

(13 *But an)* Coach horſes are liable to the payment of an agiſtment tythe: Thorp v. Bendi 3 Burn's E. L. 446.

Filewood v. Burton, Anſtr. 498.

Horſes kept on one farm for its cultivation, and uſed *occaſionally* on a ther farm in a different pariſh, ſhall not pay agiſtment tythe. Sed habitually ſo uſed.

(22 *Tythe is not)* *Vide* 3 Burn's E. L. 448. and Bateman v. Aiſtrup, 2 Rayn. 692.

(23 *Tythe)* *Vide* Bateman v. Aiſtrup, 2 Rayn. *contr.*

Bateman v. Aiſtrup, 2 Rayn. 658. Howes v. Carter, Anſtr. 560,

The doctrine advanced in this caſe has, however, been overrule later caſes, upon this principle, that the tythe of wool being payable in the pariſh where the ſheep are ſhorn, they are not *animalia fructuo* the pariſh wherein they have been only agiſted, and therefore ſhall p agiſtment tythe.

2. Of Corn.

Tennant v. Stubbing Anſtr. 640.

If ſtubble be uſed partly for fodder, and partly for manure, ſo tha whole of it is conſumed in huſbandry, it is not ſubject to the payme tythe: though it would be otherwiſe perhaps if an unuſual quantity were left, in order to make a fraudulent profit of it.

Page 57

(45 *And in)* And the law is ſo clear, that graſs newly cut and eaten by agricultural cattle tytheable, that in a late caſe, the bill, as to this point, was diſmiſſed with coſts. Collyer v. H Anſtr. 481.

Page 59

(72 *A bill being brought)* Ambl. 130.

(78 *In this)* 3 Burn's E. L. 452.

5.

5. Of divers other Things.

So, it hath been holden, that tythes are due for turnips ſowed after corn, Crow v. Stoddart, 3 Burn's E. L. 465.
d eaten by unprofitable cattle.

(D) Of what Things a mixed Tythe is due.

3. Of Wool.

Tythe of the wool of lambs is due, though the perſon may have received Carthew v. Edwards, 3 Burn's E. L. 474.
e tythe of the lambs in their wool.

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y Fiſh taken) This is by no means clear.

(F) To whom parochial Tythes are to be paid.

Page 66

Lit) That a curate may hold tythes was determined in the Exchequer in 1790, in Cham-
ine v. Humphreys.

) how far the Cuſtom of a Pariſh is to be regarded in the ſetting out of Tythes.

A cuſtom of a pariſh to tythe wheat by throwing aſide every tenth ſheaf, Tennant v. Stubbing, Anſtr. 841.
he corn is about to be carried, is bad.

All the hay cut down in a field at any one time muſt be tythed before any Hall v. Macket, E. 37 G. 3. *in Scac.*
t of it can be carried away: but the quantity to be cut at each time is in
diſcretion of the farmer; and the court will not attempt to controul
, unleſs there appears a deſign to defraud or vex the tythe-owner under
pretext of convenience to himſelf.

The caſe of *Collyer* v. *Howſe*, *ſupra*, *tom.* vi. *page* 739. has been re- Tr. 37G. 3.
d by the court of Exchequer, and the former decree has been reverſed.
ppeared from the additional evidence introduced upon the re-hearing,
in the uſual courſe of huſbandry clover does get into the ſhape of cocks,
hat the ground of the former deciſion failed. The court ſaid, that it
like the caſe of ſoft corn, which, it had been decided, was not tyth-
in the ſwathe.

) Of the Time and Manner of ſetting out redial Tythes, where there is no Cuſtom in a Pariſh.

Page 75

But it was) 2 P. Wms. 523. In a note on this caſe by the editor it is ſaid, the tythes
alled the tythes of hay, and not of graſs. 3 Burn. Eccl. Law, 441.

Where

Collyer v. Howes, Anſtr. 481. Where by the uſual mode of huſbandry clover-hay is not made cocks at all, the tythe may be ſet out in the ſwathe.

Page 76
(30 *The ſame*) Knight v. Halſey, 7 Term Rep. 86. S. P.

(O) Of the Time and Manner of ſetting out paying mixed Tythes, where there is no C tom in a Pariſh.

Boſworth v. Limbrick, 2Rayn.825. Hutchins v. Full, 3Rayn. 1010. It is now ſettled, that the mode of ſetting out tythe milk is, tha entire tenth meal of the whole herd of cows ſhould be ſet forth every day, both morning and evening meal, at one and the ſame time.

(Q) In what Caſes the Payment of Tythes m be ſuſpended.

Page 79
(7 *It has*) Stockwell v. Terry, 1 Vez. 115. 2 Rayn. 445.

(R) Of a Modus decimandi.

Ambl. 510. Attorney General and Blair v. Cholmley. An agreement by which the rector had an incloſure and allotment i of his glebe and tythes, was holden to be no bar to the ſucceſſor's cl tythes, though the ordinary was a party to it; and it was ſanctione decree in equity. To this agreement it ſhould be obſerved, that the was not a party, that the decree was by conſent, and nothing was a as a compenſation for tythes upon improvements *in futuro*.

2. Of the Certainty required in a *Modus*.

Ambl. 365. Fenwicke v. Lambe and others. A *modus* to pay a fother of hay in lieu of tythes, is void, for tainty.

Travis v. Oxton, Anſtr. 309, n. A modus of a penny in lieu of tythe of hay of the lands occupie each houſe in the pariſh, is bad.

Bennet v. Read, Anſt. 322, n. A modus of two-pence payable by every houſeholder or inhabitant pariſh for all tythe of fuel, of fruits, of agiſtment, and of w good.

Page 82
(32 *But if*) See Scott v. Allgood, Anſtr. 16.

Anſtr 16. A modus for every ancient orchard is good.

6. Of a *Modus*, which is too rank.

Torriano v Legge, 1 Bl. Rep. 410. 2Rayn. 519. A modus, of 5*s*. an acre for all land ſown with wheat, in lie tythes of wheat, is too rank. So, of 2*s*. 6*d*. an acre for all la with other grain, in lieu of all tythe of ſuch grain. So, of 2*s*. an

meadow mowed, and 1*s.* 4*d.* for upland graſs-ground mowed, in lieu all tythes of graſs and paſture. So, of 2*s.* 6*d.* for every farrow of littered, in lieu of all tythes of them. So, of 8*s.* a ſcore of lambs, ieu of the tythe of lambs. So, of 1*d.* a fleece of all wool ſhorn in parish, in lieu of all tythe wool.

(1) Of a Diſcharge of the Payment of Tythes by Unity of Poſſeſſion.

A leaſe of tythes for ſo long time as the leſſor ſhall continue vicar of *A.* Brewer v. Hill, Anſtr. 414.
wood; and conveys a freehold. But an agreement to accept a reaſonable compoſition for tythes, not exceeding 3*s.* 6*d.* *per* acre, is not a leaſe of tythes, for the uncertainty of the render.

(2) Of the Diſcharge of Payment of Tythes in Kind by Modus and Compoſition real.

A modus payable by the *owners*, not the *tenants* of the land which is charged by it, is good. The common practice, to be ſure, is to make the tenant anſwerable: but, perhaps, the parties may have thought this mode more beneficial in point of ſecurity; and the courts are not nicely to weigh the validity of that judgment. And the land, in reſpect of which the modus is claimed, need not be ſet out by metes and bounds: that it contains of about ſo many acres, parcel of an ancient eſtate called *R.* eſtate, conſiſting of ſo many acres, is a deſcription ſufficiently certain. Ord v. Clarke, Anſtr. 638. See alſo Scarr v. Trinity College, *Id.* 765.

A modus was claimed for hay. The terriers deſcribed the modus to be for all mowing graſs, "except clover and the like." It was objected, that the article excepted was not known beyond time of memory, a modus implying that exception muſt be modern. But the court thought, that the expreſſion in the terrier was not to be taken as an exception to the modus, but merely as a memorandum that the modus covered natural hay only, and did not extend to modern artificial graſſes. Franklyn v. Spilling, Anſtr. 760.

It ſhould ſeem, that a modus of every tenth day's cheeſe, during twenty days from *Holyrood-day*, in lieu of tythe of milk, is good. Wake v. Ruſs, Anſtr. 295.

The court will not decree againſt a farm modus on the ground of *rankneſs*. Atkyns v. Lord Willoughby de Broke, Anſtr. 402.
There is a very material difference between a farm-payment, and one of particular ſpecies of produce. In the former, many reaſons may have operated the tythes from being agreed for at their proper price. The owner may have meant a bounty to the clergyman; or he may have wiſhed for an exemption from tythes for the ſake of improvements. Beſides, it is hardly poſſible to aſcertain the comparative value of the land, or of the produce, in former times: and the court ſhould not be nice in judging of the value or the goodneſs of the bargain, where, by any probable circumſtances, a modus may have been a real agreement between the parties before time of memory. More eſpecially will they be extremely cautious in deciding ſuch a queſtion without the intervention of a jury, if the leaſt doubt ariſe as to the fact of rankneſs.

A *compoſition real* is where an agreement is made with the incumbent of the church, together with the patron and ordinary, under their hands and Deg. p. 2. c. 20.
ſeals,

ſeals, that the lands ſpecified ſhall be exempt from the payment of tythes the conſiderations mentioned in the ſtipulation. Such compoſitions have been allowed to be a good diſcharge of the payment of tythes. But the ſtatute 13 *Eliz. c.* 10. for preventing the alienation of eccleſiaſtical eſtates, no compoſition of this kind can be made; and ſuch as appear to of later date are holden to be of no force. It ſeems, however, that have been decrees made in courts of equity to confirm compoſitions entered into by conſent of the parſon, patron, and ordinary, though ſubſequent the ſtatute; but only where they have appeared to be for the benefit of church. But it ſhould appear from later deciſions (*a*), that even compoſitions confirmed by ſuch decrees are not binding againſt the ſucceeding incumbent.

1. Wilſ. 128.

(*a*) Attorney-General v. Cholmley, 3 Burn's E. L. 416. Ambl. 510.

6 Br. P. C. 332. Mortimer v. Lloyd, 7 Br. P. C. 493. Cartwright v. Knowlton, *Scac.* 24. 1779.

Sawbridge v. Benton, Anſtr. 372.

A compoſition real commencing within time of memory, its commencement muſt be ſhewn: but it is neceſſary to produce the actual deeds by which it took place. Preſumptions are admitted in this as in other caſes, and the exiſtence of ſuch deeds may be inferred from other evidence. It is not neceſſary, that the conſent of all the parties ſhould be by the ſame deed. This may frequently not happen: in the caſe of the king, who conſents by letters patent, it never can take place.

Robertſon v Appleton,

But a compoſition real is not ſupported by evidence of immemorial payment.

Scac. 22 Feb. 1777. cited in Anſtr. 375.

(Y) Of Agreements and Leaſes concerning Tythes.

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(2 *But if*) See Vol. 3 pag. 339.

(10 *And notice*) What ſhall be a ſufficient notice to determine a compoſition of tythes has yet been decided. It has been ſaid, that the notice is analogous to that between landlord and tenant. Biſhop v. Chicheſter, 2 Br. Ch. Rep. 161. Notice is neceſſary, though the parſon inſiſt on a modus. *Id ibid.*

(4 *It is*) *Vide ſupra*, Vol. 3. p. 339.

(B b) Of a Suit in a Court of Equity for Subtraction of Tythe.

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(33 *But the*) So, Abp. of York v. Stapleton, 2 Atk. 136. Bell v. Read, 3 Atk. 592.

See the argument for the appellant in the caſe of Barnard v Garmons, Dom. Proc. June 8, 1797.

The right of a court of equity to decree an account and payment of tythes at the ſuit of a perſon claiming ſuch tythes, muſt be grounded on the unqueſtionable, legal right to tythes in the plaintiff, or in ſome perſon under for him; *the right to the account being merely conſequential to the legal right to the tythes.* The courts of equity have therefore conſtantly made a diſtinction between thoſe caſes, in which the title of the plaintiff to the tythes claimed is not generally diſputed, but it is objected only that the lands from

ey are claimed are exempt or diſcharged from payment of tythes; or, that e tythes claimed are not payable in kind, but are to be ſatisfied in ſome her manner, as by payment of a modus or compoſition real; and thoſe ſes, in which the title to the tythes claimed is denied to the plaintiff, and title is ſet up in another perſon. In the firſt deſcription of caſes, the de- dant claiming the benefit of an exemption, or diſcharge, or of a modus, real compoſition, acknowledges the original title of the plaintiff, as al- ged by him, but qualifies that title, either by an abſolute diſcharge from yment of the tythes demanded, or by a right to ſatisfy that demand, other- ſe than by payment of the tythes in kind. In the ſecond deſcription of ſes, the exiſtence of that title to the tythes in queſtion is abſolutely and ally denied, and it is objected, that the title is in ſome other perſon: and theſe caſes, if the perſon in whom the title is thus ſtated, has had the nancy of the tythes claimed, the bill is in effect an ejectment bill; and ere the legal title of the plaintiff is diſputed on bills, which may be pro- ly called ejectment bills, it is not the ordinary practice of courts of equity, make any decree whatever, except for the purpoſe of aſſiſting the trial law, where ſuch aſſiſtance may be neceſſary. Thus, where a bill was d by Dr. *Scott*, as Rector of *Simonburne*, claiming tythes of corn and againſt the defendants, ſeveral of whom were occupiers of lands within parish, and the *Aireys* were owners of part of the lands, and claimed tythes of corn and hay of their own lands, and of thoſe occupied by other defendants; and it appeared that the *Aireys*, and thoſe under m they claimed, had received the tythes in queſtion, and made them ſubject of ſettlement for above 160 years, although they could ſhew original, lawful title to ſuch tythes; the court of Exchequer diſmiſſed bill, refuſing to give the rector any relief, until he had eſtabliſhed his to the tythes at law. And in *Edwards* v. Lord *Vernon*, *Hil.* 21 *G.* 3. re, to a bill by the ſpiritual rector, the defence ſet up was, a title to the s under family ſettlements, and poſſeſſion for ſeventy-one years, the t of Exchequer followed the authority of *Scott* v. *Airey*, and diſmiſſed ill with coſts.

Scott v. Airey, Tr. 19 G. 3.

See alſo Strutt v. Baker, 2 Vez. jun. 625.

a ſubſequent caſe, where Sir *Joſeph Mawbey*, claimed as impropriate r, tythes of land, of which ſome of the defendants alſo claimed the s; it was objected, that the plaintiff's title was a legal title, and that he firſt demand the tythes at law. The court of Exchequer ſaid, it was a on of title, the evidence of poſſeſſion was doubtful, and a court of would therefore not make any decree till the right had been ſettled , the account prayed being merely conſequential to the right; and uper tribunal for the trial of right, if the poſſeſſion was equivocal and nſtruction of deeds under which parties claimed, was a court of law: though the counſel for the plaintiff preſſed to have an iſſue directed, er to have the right tried at law, with the aſſiſtance of the court, urt refuſed it, and diſmiſſed the bill.

Mawbey v. Edmead, Hil. 24 G 3.

a claim by a vicar of the tythe of hay under an endowment, the ants, the terre-tenants, ſet up a payment to the vicar in lieu of ſuch This was holden by the court of Exchequer to be a bad modus, y thereupon gave judgment for an account of tythes, conſidering the claim as eſtabliſhed by the payments. But upon a writ of error the of Lords directed an iſſue to try the nature of the payments; Lord ld declaring his opinion, that on a vicar's title being diſputed, unleſs rfectly clear, a court of equity ought not to make a decree without the fact aſcertained by a jury.

Travis v. Oxton, Anſtr. 308. 2 Raym. 762.

Carr v. Henton, Anſtr. 313.

Where a vicar ſued for all ſmall tythes under an endowment, w be produced, and alſo gave in evidence a decree in the Exchequer f account of all ſmall tythes in a ſuit by his predeceſſor, in the rei *Charles* the Firſt, yet as the endowment was not ſupported by uſage, the decree was not binding, the patron not being a party, and as it never been acted under, the court of Exchequer thought the caſe n clear as to warrant a decree in favour of the vicar, and directed an to try, whether he was entitled under the endowment or not; and th

Mar. 5, 1788.

ciſion was affirmed in the Houſe of Lords.

See the caſe Garnons v. Barnard, Anſtr. 296. and printed caſe in the Houſe of Lords, June 3, 1797.

The account being conſequential to the legal title, and a rector h *primâ facie* the title to all the tythes in him, it ſhould ſeem to follow, in queſtions between the rector and vicar, a court of equity cannot m decree in derogation of the rector's title, merely as conſequential legal title of the vicar, until that title has been eſtabliſhed by the de of a jury, unleſs it be moſt clearly and ſatisfactorily made out. Pe it may be queſtioned, whether a court of equity can decide between and vicar, that the former has no title, however clear the proofs m againſt it, without the intervention of a jury, if the rector inſiſt up

Bantley v. Walters, 1 Wilſ. 170.

ferring it to that tribunal, any more than they can make a decree w reference to a jury, where the rector demands ſuch a reference, queſtion of modus between the rector and the owner or occupier land. For the *primâ facie* title which gives the rector a right to t cuſſion of the queſtion in a court of law in the one caſe, ſhould ſe give him the like right in the other caſe. A vicar ſhould appear to much bound to make out his title againſt that of his rector by pleadi by evidence, as an occupier is to make out his exemption or qualific they both alike claim in derogation of a common law right.

It has indeed been urged, that a decree in favour of the vicar for count does not bind the right, and therefore it is not neceſſary f court to direct an iſſue. But it may be very much doubted, whethe a decree would not in effect bind the right. For the diſtinction wh been ſet up between decrees binding the right, and decrees not b the right, has been confined to a very different caſe, namely, wher fendant ſets up a defence by way of modus to a bill for tythes, whic an eſtabliſhment of the right, as well as an account; and the de in his anſwer has made ſome miſtake in laying the modus, ſo that th

Collins v. Gough, Dom. Proc. 16 Feb. 1785.

cannot upon thoſe pleadings direct an iſſue. There, the court, u direct an iſſue, for want of ſufficient matter on the record, has decree for an account only, to give the defendant an opportunity o his title upon a future ſuit. And moſt clearly ſuch a decree ca pleaded in bar to a bill for eſtabliſhing the modus. But if th for an account does not in general bind the right, then this a might follow, that the court might from time to time make ſimilar without directing any iſſue to try the fact of title, upon the allega no one of ſuch decrees actually binds the right.

Canons of St. Paul's v. Crickett, 2 Vez jun. 563.

A ſuit may be maintained in a court of equity for an account o in *London*, notwithſtanding the ſtatute and decree of 37 *H.* 8. *c.* an act of parliament creating a ſpecial juriſdiction never ouſts t diction of the courts of *Weſtminſter-hall*. Nor is it true, that if creates a new right, one cannot go beyond it: for if a ſtatute c new right, it creates a new duty: if the performance of that duty the interference of a court of equity, the execution of the ſtatute courſe be with the neceſſary circumſtances.

In laying a modus in an anſwer, very great preciſion is not requi- Atkyns v. Lord Willoughby de Broke, Anſtr. 397.
d: the courts are not over-curious, for this plain reaſon, that the de- Baker v. Athill, *Id.* 493.
dant is obliged to put in his anſwer in a limited time, and perhaps may Ellis v. Saul, *Id* 341.
be ſo far prepared as to be able to ſtate his right diſtinctly. It is
ficient, therefore, if he ſo ſtate it, as to give the plaintiff notice of the
eral nature of his defence. A redundancy of expreſſion will not
iate: unneceſſary words which would make it indefinite have been ex-
ged

Clarke v. Jennings, *Id.* 498.

c) Of a Suit in a Court of Equity to eſtabliſh a *Modus*, or a cuſtomary Manner of ſetting out Tythes.

f an action is brought by the leſſee of tythes for ſubtraction, it is a ſufficient ground for filing a bill to eſtabliſh a modus. Lord Stawell v. Atkyns, Anſtr. 564.

ut a bill to eſtabliſh a modus will not lie where there has been no ſuit tythes in kind. Lord Coventry v. Burſlem,

Anſt. 567. *n.* Woolaſton v. Wright, *Id.* 801

bill to eſtabliſh a farm modus, ſetting forth the abuttals of the farm, averring that the modus had immemorially been paid for the *ſaid* farm, ficient, without expreſsly averring it to be an ancient farm. Lord Stawell v. Atkins, Anſtr. 564.

ut a bill to eſtabliſh a modus for every ancient farm, ſtating the whole to conſiſt of ancient farms, but not ſetting forth the abuttals of each, d. Scott v. Allgood, Anſtr. 16.

) Of an Action upon the Statute againſt Subtraction of Tythes.

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By the) Where the declaration ſtated, that tythes were within 40 years next before the ſta- *right yielded and payable*, and yielded and paid, evidence that the land had always been re- ured to be in paſture, and had never within memory paid any tythe, was not thought ſuffici defeat the action. Mitchell v. Walker, 5 Term Rep. 260. *Secus* where there was no evi- of any payment of tythe, and the declaration only ſtated, that tythe had been yielded and years before the ſtatute. Lord Mansfield v. Clarke, *Id.* 264.

TREASON.

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gainſt whom High Treaſon may be committed.

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igh treaſon) "I am very far from thinking," ſaith Sir M F o ſter, "that the ſolemnity ronation is to be conſidered among us merely as a royal ceremony, or as a bare notifi- of the deſcent of the crown, as authors of high diſtinction have been pleaſed to expreſs

" themſelves. (3 Inſt. 7. 1 Hal. 61. 101.) I admit, that it is, on the part of the nation, " publick ſolemn recognition, that the regal authority, and all the prerogatives of the crown, " veſted in the perſon of the king, antecedently to that ſolemnity. But the ſolemnity of a co " nation with us goeth a great deal further. The coronation oath importeth, on the part of t " king, a publick ſolemn recognition of the fundamental rights of the people; and concludes " with an engagement, under the higheſt of all ſanctions, that he will maintain and defe " thoſe rights; and to the utmoſt of his power make the laws of the realm the rule and meas " of his conduct." Foſt. Cr. L. 189.

(D) Of compaſſing or imagining the Death of cer tain Perſonages.

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(24 *But it ſeems*) This better opinion hath been confirmed by the Judges in the late trials f treaſon. *Vide* Hardy's Trial, by Gurney.

(G) Of adhering to the King's Enemies.

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(15 *In a*) Rex v. Stone, 6 Term Rep. 529. S. P.

(I) Of counterfeiting or diminiſhing the Mone curzent.

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Hugh Lennard was indicted for having in his poſſeſſion one mould of lead."—As the words " mo or pattern" are omitted in the laſt clauſe of this ſection of the act, it was ſubmitted to t opinion of the judges, firſt, Whether " a mould" is compriſed under the general wo "other tool or inſtrument above mentioned?" And, ſecondly, if it be ſo compri Whether it ſhould not be deſcribed in the indictment as " a tool or inſtrument" mentioned the ſtatute?—The Judges were unanimous, firſt, That this mould was a tool or inſtrument m tioned in the former part of the ſtatute, and therefore compriſed under the general words. A ſecondly, That, as it is expreſsly mentioned by name in the firſt clauſe, with reſpect to the m ing or mending, it need not be averred to be a tool or inſtrument ſo mentioned. 2 Bl. Rep. 8 So, alſo in the ſame caſe, whether a mould, having only a reſemblance of the coin inverted, not an inſtrument, which would *make and impreſs* the reſemblance rather than one on which *reſemblance* was made and impreſſed, (which was the way it was laid in this indictment,) the ſ tute ſeeming to diſtinguiſh between ſuch as will make or impreſs the ſimilitude, &c. as a mo die, or mould; and ſuch on which the ſame is made or impreſſed, as a puncheon, &c. A majority of the judges thought the indictment good, becauſe the *ſtamp* of the coin was cre impreſſed on the mould; but they thought it would have been more accurate, had it cha " a mould that would make and impreſs the ſimilitude," &c. And in this opinion, ſ who otherwiſe doubted, acquieſced. 2 Bl. Rep. 822. But an inſtrument which would impreſs the figure of only part of one ſide of the coin, is not within the ſtatute. Ca Hardw. 371.

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(21 *By par.* 4) It has been reſolved upon this clauſe of the ſtatute, that it is immaterial, w ther the colouring be effected immediately by ſome external and ſuperficial application, or latently by extraction from the application of *aqua fortis*, or other chemical power. Rex v. L and Parker, O. B. 6 Dec. 1776. Leach's Hawkins, c. 17.

2 B.Rep. 632 It has been reſolved, that to counterfeit the impreſſion of ha guinea on a piece of gold previouſly hammered, not round, and not p ble in the condition it was, is not high treaſon; for the offence is inc plete.

(P

(P) Of reconciling any perſon, or being reconciled to the See of *Rome*.

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(11 *But to remove*) But ſee ſt. 31 G. 3. c. 32.

(Q) Of receiving Popiſh Orders or Education.

(1 *By the* 27 *Eliz.* See ſt. 31 G. 3. c. 32. § 4.

(Cc) Of the Trial of Treaſon.

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(10 *But by par.* 13) *Vide* Dougl. 590

(Dd) Of the Evidence of Treaſon.

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(9 *In a very late*) MS. Rep. Henſey's caſe, Trin. 1 Burr.

A paper was found in the poſſeſſion of a perſon engaged in the ſame conſpiracy with the priſoner, containing intelligence previouſly proved to have been collected by the priſoner, which paper was in the hand-writing of the priſoner's clerk. This was read in evidence againſt him. But a paper in the ſame hand-writing ſo found, not proved to be connected with the priſoner, was not admitted in evidence. Rex v. Stone, 6 TermRep. 529.

A letter ſent by one of ſeveral conſpirators in purſuance of the common deſign, with a view of reaching the common enemy, is evidence againſt all engaged in the ſame conſpiracy. Rex v. Stone, 6 TermRep. 527.

(Ee) Of the Judgment of Treaſon.

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(4 *But if*) *Vide* 30 G. 3. c. 48 which directs that the judgment againſt women on conviction of high treaſon ſhall no longer be, that they ſhall be burned, but only hanged; and that on conviction of petit treaſon, they ſhall receive the ſame ſentence as perſons convicted of wilful mur-

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(a *In every*) St. 30 G. 3. c. 48. *ſupra* 549.

We cannot diſmiſs this ſubject without taking notice of an act which the legiſlature have lately found it neceſſary to paſs, in order to explain and enlarge ſome of the clauſes of 25 *E.* 3. and to provide, with ſufficient expliciteneſs, againſt the treaſonable attempts of the preſent times. It is enacted by 36 *G.* 3. *c.* 7. "That if any perſon, during the life of his preſent majeſty, and until the end of the next ſeſſion of parliament after a demiſe of the crown, ſhall, within the realm or without, compaſs, imagine, invent, deviſe, or intend death or deſtruction, or any bodily harm tending to death or deſtruction, maim or wounding, impriſonment or reſtraint, of the perſon of the king, his heirs and ſucceſſors; or to deprive or depoſe him or them from the ſtyle, honour, or kingly name of the imperial crown of this realm or of any other of his dominions; or levy war againſt his majeſty, his heirs and ſucceſſors, within this realm, in order, by force or conſtraint, to compel him or them to change his or their meaſures or counſels, or to intimidate, or overawe, both houſes, or either houſe of parliament; or to move or ſtir any foreigner with force to invade this realm or any other of his majeſty's dominions; and ſuch compaſſings, imaginations, &c. ſhall expreſs, utter, or declare, by publiſhing any printing or writing, or by any overt act or deed:" the offender ſhall be deemed a traitor, and puniſhed accordingly. The benefits of the acts of 7 *W.* 3. *c.* 3, and 7 *Ann. c.* 21. are reſerved to the offender.

TRESPASS.

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TRESPASS.

Pickering v. Truſte, 7 Term Rep. 53. Anon P. 37 G. 3. n. Scac.

IN an action of treſpaſs for ſeizing goods, the courts will ſtay the proceedings upon the defendant reſtoring them, or their value with coſts, provided the value be admitted by the parties, and there be no other queſtion between them to try, ſo that it will terminate the ſuit.

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(A) In what Caſes an Action of Treſpaſs in the general lies.

(1 *Wherever an*) The *lawfulneſs* or *unlawfulneſs* of the original act, is not the criterion between an action of *treſpaſs* and an action *on the caſe*, nor is it to be found in Lord Raymond's report of the above caſe; it is argumentatively denied by Forteſcue, J in the inſtances put by him in Strange's report, and expreſsly controverted by Blackſtone, J in Scott v. Shepherd, 2 Bl. Rep. 894. 3 Wilſ. 499. and by De Grey, C. J. S. C. 2 Bl Rep. 899. 3 Wilſ. 411. in which laſt caſe ſeveral inſtances are put, where *treſpaſs* will lie for the conſequences of an act *lawful* in its commencement, and *caſe* for thoſe where the original act was unlawful. The true and ſolid diſtinction is between *direct and immediate* injuries on the one hand, and *mediate or conſequential* on the other; and treſpaſs never lay for the latter. Shapcott v. Mugford, 1 Ld. Raym. 187. Howard v. Bankes, 2 Burr. 1114. Hawker v. Birbeck, 3 Burr. 1556. Gates v. Bayley, 2 Wilſ. 313. Scott v. Shepherd, *ubi ſupra*. Morgan v. Hughes, 2 Term Rep. 225, Day v. Edwards, 5 Term Rep. 648. Savignac v. Roome, 6 Term Rep. 125. But, when we ſay that treſpaſs never lay for *conſequential injuries*, we thereby mean ſuch acts as conſequentially only become injurious; not that conſequential damages can only be redreſſed in an action on the caſe. For where the act done is a direct invaſion of the plaintiff's property in poſſeſſion, conſequential or remote, as well as immediate, damage may well be ſet forth in the declaration in treſpaſs *vi et armis*: as, that the defendant entered into the plaintiff's ground, and deſtroyed his fences, *by means whereof the cattle of divers ſtrangers eſcaped thither and conſumed the graſs*. 3 Wooddeſ. 253.

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(8 *It is ſaid*) So *è converſo*, Savignac v. Roome, 6 Term Rep. 125.

Haward v. Bankes, 2 Burr. 1114.

An action on the caſe was brought for damaging a colliery of the plaintiff who obtained a verdict, and had an entire judgment on the three counts in the declaration. It was objected, that two of the counts deſcribed a treſpaſs *vi et armis*; for in them it was alleged, that the defendant cauſed great quantities of water to be conveyed through divers other collieries into that of the plaintiff; and that a count in treſpaſs cannot be joined in the ſame declaration with a count in an action on the caſe. The court over ruled the objection, ſaying, "that the plaintiff in his declaration de-"ſcribed a fact, which might, at the trial, be proved to be either proper "for an action of treſpaſs, or on the caſe, according to the evidence. "And it appears, that it was here proved at the trial to be the latter. If "it had been proved to be treſpaſs *vi et armis*, the plaintiff muſt in that "event have been nonſuited. Before the trial it ſtood indifferent, whether it would come out to be the one or the other. However, in the "nature of the thing, it muſt be a conſequential damage; as the act com-"plained of was done on the defendant's own ſoil."

Scott v. Shepherd, 2 Bl. Rep. 892. 3 Wilſ. 429.

A. threw a lighted ſquib into a market-houſe, where a large concourſe of people were aſſembled: the ſquib fell upon the ſtanding of *B.*, who to prevent injury to himſelf and his wares, threw it acroſs the market-houſe when it fell upon the ſtanding of *C.* *C.* took it up, threw it among the crowd, when it burſt, and put out the eye of *D.* The court of C. B. *Blackſtone*, J. diſſent., held, that treſpaſs lay againſt *A.* at the ſuit of *D.* the new direction and the new force given it by *B.* and *C.* not being a new treſpaſs, but merely a continuation of the original force impreſſed upon it by *A.*

(14 *An action*) Whether the action for an exceſſive diſtreſs ſhall be upon the ſtatute, or an action of treſpaſs, does not depend merely upon the right to diſtrain. If the things diſtrained are of a

nown, determinate value, ſo that the diſtreſs appears upon the face of the pleadings to be exceſ-ive, there, notwithſtanding the diſtrainer had a clear right to diſtrain, treſpaſs may be brought. on the other hand, they are of arbitrary and uncertain value, the action muſt be upon the ſta-te. 1 Burr. 591.

If a man put cattle, which he has diſtrained *damage-feaſant*, into a pound which happens to be in another county; this does not make him a treſpaſſer, but only ſubjects him to the penalty in the ſtatute of 1 & 2 *P. & M. c.* 12. Gimbart v. Pelah, 2 Str. 1272.

A treſpaſs muſt be certain, and an injury to the party, or not ſo, at the time the act is done. Treſpaſs therefore will not lie, except perhaps in certain caſes, for the arreſt of privileged perſons; becauſe the allowing or diſallowing of privilege is diſcretionary in the court, and it would be to make the nature of the act depend upon their ſubſequent judgment. So, the original taking of a ſhip as prize is not a treſpaſs at common law; and therefore a ſentence of the Admiralty, pronouncing a ſhip not to be prize, cannot alter the nature of the original taking, ſo as to entitle the captured to main tain treſpaſs in the common law courts. 2 Bl. Rep. 1193. Dougl 594.

(B) In what Caſes an action of Treſpaſs lies for an Act which, although it was in the firſt Inſtance lawful, becomes afterwards a Treſpaſs *ab Initio*.

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(1 *It has been*) *Sed vide ſupra.*

(4 *If y. S.*) Dye v. Leatherdale, 3 Wilſ. 20.

If goods are attached under proceſs of an inferior court, the officer can not legally continue in poſſeſſion of the defendant's houſe, or keep the goods therein for a long or unreaſonable time; but muſt remove them to a place of ſafe cuſtody; elſe he is a treſpaſſer *ab initio*. Reed v. Harriſon, 2 Bl. Rep. 1218.

(C) By whom an Action of Treſpaſs may be brought.

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(3 *If a daughter*) In Bennett v. Alcott, 2 Term Rep. 166. it is ſaid, that an action merely for debauching a man's daughter, by which he loſes her ſervice, is an action on the caſe; but that, according to Lord C. J. Holt's opinion, where the offence is accompanied with an illegal entry of the father's houſe, he has his election to bring either treſpaſs or caſe. However, in Ld. Raymond 932. (the authority referred to,) the diſtinctions taken ſeem to be, not between treſpaſs and caſe, but different forms of treſpaſs and aſſault In Tullidge v. Wade, 3 Wilſ. 18, 19. the action was treſpaſs, and no entry of the houſe. 3 Wooddeſ. 245. note.

Treſpaſs lies at the ſuit of a maſter for enticing away a ſervant from his actual ſervice. Hart v. Aldridge, Cowp. 54.

A huſband may maintain treſpaſs for an adulterous intercourſe with his wife, force and violence being ſuppoſed in law to accompany this atrocious injury. 7 Mod. 81. 2 Salk. 552.

2. Where the injury was done to Perſonal Property.

To entitle a man to bring treſpaſs, he muſt, *at the time* when the act was done which conſtitutes the treſpaſs, either have the *actual poſſeſſion* in him of the thing, which is the object of the treſpaſs, or he muſt have a *conſtructive poſſeſſion*, in reſpect of the right being veſted in him. Therefore the lord may, before ſeizure, maintain treſpaſs for an eſtray or wreck, taken by a ſtranger. For the *right* is in the lord, and a *conſtructive poſſeſſion* in reſpect of the thing being within the manor of which he is lord. So, the executor has the *right* immediately on the death of the teſtator, and 1 Term Rep. 480. *Per* Aſhhurſt, J.

and the right draws after it a *conſtructive poſſeſſion*. The probate is a mere ceremony; for, when paſſed, the executor does not derive his right under the probate, but under the will; the probate is only evidence of his right and is neceſſary to enable him to ſue; but he may releaſe, &c. before probate. But there ſeems to be no inſtance where a man, who has a new right given to him, which, from reaſons of policy, is ſo far made to relate back as to avoid all meſne incumbrances, ſhall be taken to have ſuch a poſſeſſion as to bring treſpaſs for an act done before ſuch right was given to him. Hence treſpaſs will not lie by the aſſignees of a bankrupt againſt a ſheriff for taking the goods of the bankrupt in execution after an act of bankruptcy, and before the iſſuing of the commiſſion, notwithſtanding he ſell them after the iſſuing of the commiſſion, and after a proviſional aſſignment and notice from the proviſional aſſignee not to ſell them.

Smith v. Milles, *ubi ſupra.*

Where the vendor ſold goods by ſample to be delivered to the vendee within a month, and took earneſt, and within that time ſent the goods by his ſervant to the vendee's houſe, where part being unloaded, the reſt were diſtrained for toll, the delivery was complete, ſo as to entitle the vendee to bring treſpaſs for the ſeizure. For here was an actual, not a conſtructive, poſſeſſion; though, had part not been lodged in the vendee's houſe, yet the delivery was complete as to all honeſt purpoſes, in reſpect of third perſons, the moment the vendor had delivered the goods to his ſervant to carry them to the vendee.

Blakey v. Dinſdale, Cowp. 661.

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(53 *If the*) In a late caſe it was holden, that this action is maintainable by the perſon who is only in the enjoyment of the veſture of land, or other right, as that of digging and carrying away turf and peat, provided it be a ſeparate and excluſive intereſt. Wilſon v. Macreth, 3 Burr. 1824.

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(58 *It has*) The true reaſon is, that *J. S.* has not the excluſive poſſeſſion; the poſſeſſion of the church being in the parſon: 1 Term Rep. 420. But, the poſſeſſion being in the parſon, it ſeems to follow, that this is the proper kind of action, where the parſon determines to ſue one who has preached in his church without his leave: for ſuch intruder, Lord Holt ſays, is a treſpaſſer. 12 Mod. 420. 453.

(D) For what Injuries to the Perſon an Action of Treſpaſs lies.

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(21 *It is in one*) *Vide ſupra* 93.

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(29 *This diſtinction*) This caſe of Truſcott v. Carpenter, upon which the compiler of this part of the work ſo confidently relies, ſeems ſcarcely reconcileable with later reſolutions. It ſhould appear to be now ſettled, that where an inferior court aſſumes a juriſdiction, an action of treſpaſs lies againſt the officer who executes the proceſs, becauſe the whole proceeding is *coram non judice*, and a mere nullity. Perkin v. Proctor, 2 Wilſ. 382. and the caſes there cited. Hill v. Bateman, 2, Str. 711. Shergold v. Holloway, *Id* 1002.

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(50 *But if*) Not if *A.* be a peace-officer; for a peace officer may, upon a reaſonable charge of felony, arreſt a party without a warrant; nor will he be liable to an action, though it ſhould afterwards appear that no felony has been committed. Samuel v. Payne, Dougl. 359. But treſpaſs is the proper form of action in ſuch caſe againſt the party in conſequence of whoſe ſuſpicions the arreſt was made. Stonehouſe v. Elliott. 6 Term Rep. 315.

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(68 *But a juſtice*) 2 Hawk. P. C. c. 13 § 11. *Qu.* of ſuch a warrant.

It

It is enacted by 27 G. 2. c. 20. that in all cases where any justice of the peace is required or empowered by any statute to issue a warrant of distress for the levying of any penalty by any act of parliament now in force, or hereafter to be made, or sum of money thereby directed to be paid, the officer executing such warrant, if required, shall shew the same to the person whose goods and chattels are distrained, and shall suffer a copy thereof to be taken.[32]

(E) For what Injuries to Personal property an Action of Trespass lies.

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(5 has still) *Vide* Mr. Hargrave's argument in the case of Sommerset, a negro.

(10 An action) 3 Term Rep. 37. See also stat. 10. G 3. c. 18. 36 G. 3. c. 124.

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(33 If goods) But in the court of Exchequer, Lord C. B. Bury, Montague, and Page, against Eyre, held, that where an officer has made a seizure, and there is an information upon it, &c. which goes in favour of the party, who afterwards brings trespass, the shewing these proceedings sufficient to excuse the officer: it is competent to make out a probable cause for his doing the same. Vin. Abr. tit. Evidence, (P. b. 6.)—In actions of trespass against custom-house officers for taking goods, the *onus probandi* of non-payment of the duties lies upon the defendants. Solomon v. Gordon, 2 Bl. Rep. 813. Henshaw v, Pleasance, *Id.* 1174.

(34 If the) Ackworth v. Kempe, Dougl. 40. S. P.

It is not competent to a person to try an objection to a rate in an action of trespass against the officers who may distrain for the non-payment of the rate; the proper mode of proceeding in such case is by appeal. Durrant v. Boys, 6 Term Rep. 580.

(F) For what Injuries to Real Property an Action of Trespass lies.

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(13 An action) 1 Wilf. 107. S. C.

So, it lies for placing tables, stools, &c. in a market-place for sale without the leave of the owner of the soil. Mayor, &c. of Norwich v. Swann, 2 Bl. Rep. 1116.

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(26 If a man) The doctrine here advanced cannot be supported as a general proposition: there is no common law right of towing upon navigable rivers: it can be supported only by usage. Bail v. Herbert, 3 Term Rep. 253.

(29 But if) Gundry v. Feltham, 1 Term Rep. 334. S. P.

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(31 But Holt Ch. J.) In the case of Upton v. Dawkins, 3 Mod 97. Comb. 11. and Pecke v. Redmayne, cited in Carth. 286. in marg. it was holden, that trespass would not lie for fishing in a several fishery. However, in the case of the Mayor of Orford v. Richardson, 4 Term Rep. 439. 2 Bl. 182. where the declaration was in trespass, there were counts for fishing in the free fishery, and no objection taken. *Ideo quære*

(32 An action) But a man may have, and may in an action of trespass reply to a general declaration of this kind, an exclusive and appropriate privilege of fishing even in arms of the sea. Such privilege indeed is not to be presumed, but the contrary. It may however be established by prescription, usage. 4 Burr. 2162. 4 Term Rep. 439. *Vide etiam* Hale *De Jure Maris*,

The

Millen v. Faudrye, Poph. 161. The defendant with a little dog chaſed the plaintiff's ſheep out of his ground, where they were treſpaſſing, and drove them off his own ground. They went into another man's ground, which had no hedge to divide it from the defendant's grounds, which were contiguous. The dog purſued them into the other man's land, ſo next adjoining. The defendant, as ſoon as the ſheep were out of his own land, called in his dog, and chid him. The owner of the ſheep brought an action of treſpaſs for *chaſing* his ſheep. The court gave judgment, "*quod querens nil capiat* "*per billam*;" being of opinion, that treſpaſs lay not in that caſe; for they held it to be an *involuntary* treſpaſs; whereas a treſpaſs that may not be juſtified ought to be done *voluntarily*. They thought he might lawfully drive the ſheep out of his own land with his dog; and he did his beſt endeavour to recall the dog, when they were driven out of it; but the nature of the animal is ſuch, that he cannot be recalled and withdrawn ſuddenly and in an inſtant. Therefore treſpaſs did not lie againſt him for what he had done.

Beckwith v. Shordike, 2 Burr. 2092. But, where a defendant entered into a cloſe belonging to the plaintiff, where there was no footpath, and adjoining to his paddock, with guns and dogs; and one of the dogs ran into the paddock, and killed a deer; this was conſidered as an intentional treſpaſs, and not as a mere involuntary accident.

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(72 *If a ſheriff*) And the law is the ſame in caſe of *meſne proceſs*. Lee v. Ganſel, Cowp. 1.

(G) Againſt whom an Action of Treſpaſs may be brought.

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(23 *But in a*) The diſtinction ſeems to be this—if the action in ſuch caſe be brought by the party againſt whom the writ iſſued, it is ſufficient for the officer to give in evidence the writ of *fieri facias* without ſhewing a copy of the judgment: but, if the plaintiff be not the party againſt whom the writ iſſued, but claim the goods by a prior execution or ſale that was fraudulent, there, the officer muſt produce, not only the writ, but a copy of the judgment. For, in the firſt caſe, by proving that he took the goods in obedience to a writ iſſued againſt the plaintiff, he has proved himſelf guilty of no treſpaſs: but, in the other caſe, they are not the goods of the party againſt whom the writ iſſued, and therefore the officer is not juſtified by the writ in taking them, unleſs he can bring the caſe within the 13 Eliz. for which purpoſe it is neceſſary to ſhew a judgment. Bull. N. P. 234. 91. 5 Burr. 2531. Doug. 41. 2 Bl. Rep. 1104.

(I) Of the pleadings in an Action of Treſpaſs

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(12 *If a writ*) Rex v. Lookup, 3 Burr. 1901. 6. Br. P. C. 138.

(15 *The plaintiff*) 5 Term Rep. 649.

(16 *But if*) Hob. 199.

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(21 *It has been*) Douglas v. Hall. 1 Wilſ. 99. Barnes, 452. S. C.

(22 *It ſeems however*) Qu. the authority in Barnes.

ndr. 28. C. (23 *But, whatever*) And this, even on a ſpecial demurrer.

eeman v. Fowler, 1 Barnard, B. R. 423. White v. Shaw, 2 Wilſ. 203.

The

The plaintiff declared in treſpaſs with a *quod cum*, and then went on to another treſpaſs, which was introduced with a *necnon de eo quod*, &c. The verdict was *pro quer.* as to the laſt part, and *pro def.* as to the treſpaſs under the *quod cum*. It was moved in arreſt of judgment, that the whole was but recital. *Sed per cur.*—We muſt not extend that exception, which has gone far enough already: the latter part is by way of poſitive charge, and the finding of the jury has cured it as to the firſt. The plaintiff muſt have judgment. Dobs v. Edmonds, 2 Str. 681.

(27 *The omiſſion*) Note; this act applies only to thoſe caſes that appear on the very face of the declaration to have been evidently intended to be actions of *treſpaſs*; not to thoſe caſes, where the frame of the declaration, and the memorandum is *of an action of treſpaſs on the caſe*, Savignac v. Roome, 6 Term Rep. 125.

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(47 *The Quality*) 2 Ld. Raym. 1007. 4 Burr. 2455. The true reaſon is, that the defendant may be enabled to juſtify. He cannot juſtify taking *divers* goods, not particularized. 4 Burr. 2455.

Upon the authority of the preceding caſes, it was adjudged on a ſpecial demurrer in treſpaſs for breaking and entering a houſe, damaging the goods and chattels, wrenching and forcing open the doors, *&c.*, that it was not neceſſary to ſpecify the goods and chattels, or to ſtate the number of doors forced open. The eſſential matter of the action was the breaking and entering of the houſe; every thing elſe was merely matter of aggravation, and therefore need not be ſpecified. Chamberlain v Greenfield, 3 Wilſ. 292.

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(57 *But if*) In an action of treſpaſs *vi et armis*, (and that is the action we are now conſidering,) it can in no caſe be neceſſary to ſet forth a title in the declaration; nor does the caſe referred to warrant ſuch a poſition. The point determined there was, that if the defendant plead *liberum tenementum*, it is not ſufficient for the plaintiff in his replication barely to traverſe the defendant's title; he muſt ſhew his own title. The author has confounded actions of treſpaſs *vi et armis* with actions of treſpaſs *on the caſe*. The doctrine advanced in the text, and the clauſe immediately preceding and ſubſequent to it, will be found to be applicable only to the latter ſpecies of action; and a careful examination of the caſes will ſatisfy us, that the court had in view that ſpecies of action only.

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(83 *For the*) See upon this point, Bull. N. P. 86.

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(124 *If two*) Smith v. Bouchier, 2 Str. 993 Ca. temp. Hardw. 62. S. C. Middleton v. Price 2 Str. 1184. 1 Wilſ. 17. S. C. Parſons v. Lloyd, 2 Bl. Rep. 845. Perkins v. Proctor, 2 Wilſ. 382. all S. P. Cole v. Hindſon, 6 Term Rep. 234.

If, in treſpaſs for taking the goods of *A. B.*, an officer juſtify, that he took them under a *diſtringas* againſt *C. B.* (meaning the ſaid *A. B.*) to compel an appearance, averring that *A. B.* and *C. B.* are the ſame perſon, the plea is bad; for it does not ſtate that *A. B.* appeared in the action, and omitted to plead the miſnomer in abatement. Cole v. Hyndſon, 6 Term Rep. 234.

So, if a defendant juſtify under a *capias* out of a baſe court, in an action of debt, and ſhew, that the plaint was levied, *et taliter proceſſum fuit*, that the *capias* iſſued; it is ſufficient, without ſhewing that a ſummons iſſued before the *capias*. Adams v. Freeman, 2 Wilſ. 5.

If *J. S.* juſtify under a right to enter a common to dig for and carry away ſand and gravel for the repairs of a houſe, he muſt allege, that the houſe was out of repair, that he entered for the purpoſe of digging for and carrying away ſand and gravel for the neceſſary repairs of that houſe, and that the materials were uſed for that purpoſe. Peppin v. Shakeſpear, 6 Term Rep. 748.

In

Gates v. Bayley, 2 Will. 313.

In treſpaſs for taking cattle, and keeping them ſo cloſely in pound, that one of them died, the defendant pleaded firſt the general iſſue to the whole; and then juſtified the taking and impounding them damage-feaſant; the plaintiff replied *de injuriâ propriâ*, and thereupon iſſue was joined. The jury found for the plaintiff on the firſt iſſue, and for the defendant on the juſtification. But it was ruled, that judgment ſhould be entered up for the defendant; for the juſtification was an anſwer to the whole treſpaſs, *viz.* the taking and impounding; the dying of the beaſt being merely matter of aggravation: and if the plaintiff would have inſiſted upon the abuſe of the diſtreſs, he ought to have ſtated it in his replication.

Fiſherwood v. Concahen Hil. 5 G. 3 C. B. cited in 3 Term Rep. 297. Eye v. Leatherdale, 3 Will. 22. S. P.

In treſpaſs for taking and carrying away the plaintiff's halter and converting the ſame to the defendant's uſe, the defendant pleaded the general iſſue, and juſtified under a preſcriptive right to diſtrain for toll, which was found for him; but on the general iſſue the plaintiff had a verdict. A motion was made to enter up judgment for the plaintiff, notwithſtanding the defendant had proved his juſtification, becauſe it did not cover the whole treſpaſs, namely, the converſion. But the court held, that as the defendant's plea had fully anſwered the giſt of the action, which was the taking, the converſion being only aggravation, it became neceſſary for the plaintiff to reply, that the defendant afterwards converted, *&c.*, and thereby became a treſpaſſer *ab initio*.

Taylor v. Cole, 3 Term Rep. 292.

So, in treſpaſs for breaking and entering the plaintiff's houſe, and expelling him therefrom, the defendant need only juſtify the breaking and entering; if the plaintiff would take advantage of the expulſion, he muſt new aſſign it.

Riley v. Parkhurſt, Tr. 22 G. 2. Bull. N P. 90.

In treſpaſs for taking and detaining the plaintiff's cattle at *Teddington*, the defendant juſtified taking them *damage-feaſant* at *Kingſton*, and that he drove them to *Teddington*, and impounded them there. It was objected on demurrer, that the juſtification was local, and therefore the defendant ought to have traverſed the place in the declaration. *Sed non allocatur*; —for when the defendant ſays, he drove them to *Teddington*, and impounded them there, they agree in the place; for if the defendant had not a right to take them, he was a treſpaſſer at *Teddington*.

4. Of the Replication,

1, *In the General.*

Cockerel v. Armſtrong, E. 11 G. 2, C. B. Bull. N. P. 93.

If in treſpaſs for taking a gelding (or other chattel) the defendant plead, that the place where is 100 acres, and that *J. S.* is ſeiſed thereof in fee, and that he as his ſervant, and by his expreſs orders, took the gelding (or other chattel) damage-feaſant, the plaintiff cannot reply *de injuriâ ſuâ propriâ abſque tali cauſâ*, for that would put in iſſue three or four things; but he muſt traverſe one thing in particular.

2, *Of making a new Aſſignment.*

Bull. N. P. 17. 1 Term Rep. 479.

In order to avoid a new aſſignment, it is the practice to inſert two counts in the declaration. The firſt charges an injury done to the land, and taking the goods there; that is in its nature local, and muſt be proved where laid. Then the reaſon, and almoſt the only one, for adding the ſecond count, is, to avoid the locality; it is for taking goods

generally

generally. That is of a tranſitory kind, and may be ſupported, though the taking be proved to be elſewhere. There cannot be a new aſſignment, but where there is a ſpecial plea. And if the caſe be ſuch that, on a ſpecial plea, the plaintiff may be driven to a new aſſignment, he may give the matter in evidence under the ſecond count on not guilty.

(K) Of the Evidence in an Action of Treſpaſs.

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(15 *If an action*) *Vide ſupra*, Vol. 2. pag. 181 & 2.

(17 *An action of treſpaſs*) S. C. 2 Burr. 665.

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(35 *A licence cannot*) 2 Term Rep. 168.

(40 *And without*) See alſo Dougl. 283. 2 Bl. Rep. 1254.

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(45 *If an action*) But the huſband's conſent goes not in mitigation of damages, but in bar of the action. *Volenti non fit injuria.*

TRIAL.

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THE right of the courts to grant a new trial in queſtions of tort on account of exceſſive damages, that is, to protect a defendant from the injuſtice of a jury, has been aſſerted in a late caſe by the court of Exchequer. Goldſmith v. Lord Sefton, Anſtr. 808.

(A) Of a Trial by the Court.

2. Upon Inſpection.

Trial by inſpection, or examination, is, when for the greater expedition of a cauſe, in ſome point or iſſue, being either the principal queſtion, or ariſing collaterally out of it, but being evidently the object of ſenſe, the judges of the court, upon the teſtimony of their own ſenſes, ſhall decide the point in diſpute. For, where the affirmative or negative of a queſtion is matter of ſuch obvious determination, it is not thought neceſſary to ſummon a jury to decide it, who are properly called in to inform the conſcience of the court in reſpect of *dubious* facts; and therefore when the fact, from its nature, muſt be evident to the court, either from ocular demonſtration or other irrefragable proof, there, the law departs from its uſual reſort, the verdict of twelve men, and relies on the judgment of the court alone. 3 Bl. Comm. 331.

If a man be found by a jury an idiot *a nativitate*, he may come in perſon into the Chancery before the chancellour, or be brought there by his friends, to be inſpected and examined, whether idiot or not: and if, upon ſuch view and enquiry, it appears he is not ſo, the verdict of the jury, and all the proceedings thereon, are utterly void, and inſtantly of no effect. 9 Rep. 31.

Upon

Cro. Eliz. 227. Upon a writ of error from an inferior court, that of *Lynn*, the error assigned was, that the judgment was given on a *Sunday*, it appearing to be on 26th *February*, 26 *Eliz.* and upon inſpection of the almanacks of that year it was found, that the 26th of *February* in that year actually fell on a *Sunday*: this was held to be a ſufficient trial, and that a trial by jury was not neceſſary, although it was an error in fact; and ſo the judgment was reverſed.

(B) Of a Trial by a Record.

6 Rep. 53. 3 Bl. Comm. 331. In caſe of an alien, whether alien friend, or enemy, ſhall be tried by the league or treaty between his ſovereign and our's, for every league or treaty is of record.

9 Rep. 31. So, whether a manor be held in ancient demeſne or not, ſhall be tried by the record of *domeſday* in the king's Exchequer.

(C) Of a Trial by a Certificate.

3 Bl. Comm. 333. THE trial by certificate is allowed in ſuch caſes, where the evidence of the perſon certifying is the only proper criterion of the point in diſpute. For, when the fact in queſtion lies out of the province of the court, the judges muſt rely on the ſolemn averment or information of perſons in ſuch a ſtation, as affords them the moſt clear and competent knowledge of the truth. As therefore ſuch evidence (if given to a jury) muſt have been concluſive, the law, to ſave trouble and circuity, permits the fact to be determined upon ſuch certificate merely.

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(13 *If a queſtion*) Beſides, it would be highly improper to refer the trial of a queſtion of ſpecial baſtardy to the ordinary; who, whether the child be born before or after marriage, will be ſure to certify him legitimate.

3 Bl. Comm. 336. 2 Inſt. 632 Show. P. C. 88. 2 Roll. Abr. 583. &c. Dy. 229. *Ability* of a clerk preſented, *admiſſion*, *inſtitution*, *and deprivation*, of a clerk, ſhall be tried by certificate from the ordinary or metropolitan, because of theſe he is the moſt competent judge. but *induction* ſhall be tried by a jury, becauſe it is a matter of publick notoriety, and is likewiſe the corporal inveſtiture of the temporal profits. *Reſignation* of a benefice may be tried in either way; but it ſeems moſt properly to fall within the biſhop's cognizance.

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(19 *If a queſtion*) 4 Burr. 22. 48.

Co. Litt. 74. a. 3 Bl. Comm. 334-5. In ſome caſes, the certificate of the ſheriffs of *London* ſhall be a final trial: as, if the iſſue be, whether the defendant be a citizen of *London*, or a foreigner, in caſe of privilege pleaded to be ſued only in the city courts. Of a nature ſomewhat ſimilar to which is the trial of privilege of the univerſity, when the chancellour claims cognizance of the cauſe, becauſe one of the parties is a privileged perſon. In this caſe, the charters, confirmed by act of parliament, direct the trial of the queſtion, whether a privileged perſon or no, to be determined by the certificate and notification of the chancellour under ſeal; to which it hath alſo been uſual to add an *affidavit* of the fact: but, if the parties be at iſſue between themſelves, whether *A.* is a member of the univerſity or no, on a plea of privi-

leges,

lege, the trial ſhall be then by jury, and not by the chancellour's certificate: becauſe the charters direct only that the privilege be allowed on the chancellour's certificate, when the claim of cognizance is made by him, and not where the defendant himſelf pleads the privilege: ſo that this muſt be left to the ordinary courſe of determination.

If, in order to avoid an outlawry, or the like, it was alleged, that the defendant was in priſon, *ultra mare*, at *Bourdeaux*, or, in the ſervice of the mayor of *Bourdeaux*, this ſhould have been tried by the certificate of the mayor; and the like of the captain of *Calais*. But, when this was law, thoſe towns were under the dominion of the crown of *England*. And, therefore, by a parity of reaſon, it ſhould now hold, that in ſimilar caſes, ariſing at *Jamaica* or *Barbadoes*, the trial ſhould be by certificate from the governor of thoſe iſlands. 9 Rep. 31. Co. Litt. 74. a. 3 Bl. Comm. 334.

The certificate of the queen's meſſenger, ſent to ſummon home a peereſs of the realm, was formerly held a ſufficient trial of the contempt in refuſing to obey ſuch ſummons. Dy. 176-7.

If there be any queſtion reſpecting the practice of the courts in *Wales*, it ſhall be determined by certificate from the judges there. Broughton v. Randall. Cro. Eliz. 503.

So, the courts will inform themſelves whether a highway (indicted) is in repair, by certificate from the juſtices of the peace. Rex v. Mawbey. 6 Term. Rep. 619.

(E) Of a Trial at Bar.

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(5 *But it is*) 1 Term Rep. 363.

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(15 *If the venue*) The court may order it in this caſe, if the jurors conſent to waive their privilege as citizens, 2 Wilſ. 136, or the parties conſent to have the cauſe tried by a Middleſex jury. Dougl. 438.

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(30 *A trial*) *Vide* Doug. 437. 8. acc.

(33 *A motion*) 2 Salk. 649.

(34 *It is a general*) 1 H. Bl. 206.

(G) Of Notice of Trial.

Although the venue be laid in *London*, and the defendant be arreſted there, yet, if his reſidence be above forty miles from town, the notice required by the ſtatute and the practice of the court muſt be given. Brind v. Torris, 2 Bl. Rep. 1205. Dougl. v. Ray, 4 Term Rep. 552.

But, if one of ſeveral defendants reſide within forty miles of *London*, ſo long a notice is not neceſſary. *Per* Aſhurſt, J. 4 Term Rep. 519-20.

Where iſſue is joined early enough in a term, notice of trial muſt be given in the ſame term. Frampton v. Payne, 7 H. Bl. 65.

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(10 *It has*) Hayley v. Riley, Dougl. 71-2.

(13 *Notice*) 2 Str. 1119. Green v. Giffard. S. P.

(16 *It is ſaid*) Tidd's Pr. 492.

Although

Iſield v. Weeks. 1 H. Bl. 222.

Although the plaintiff has undertaken peremptorily to proceed to tri at the next aſſizes, yet the defendant is not bound to attend and be pre pared with witneſſes, *&c.* without having had notice of trial. Nor wi he be allowed the coſts of ſuch attendance and preparation, though he ob tain judgment as in caſe of a nonſuit, on account of the plaintiff's no proceeding to trial.

(19 *Notice of*) Goodright v. Hoblin. Tidd's Pr. 491.

Reg. gen. 3 Term Rep. 660. Tidd's Pr. 490.

Where *ſhort* notice of trial is to be accepted in country cauſes, it is th rule of the court of King's Bench, that ſuch notice ſhall be given at leaſ four days before the commiſſion-day, one day excluſive, and the other da incluſive. But in town cauſes, two days notice ſeems ſufficient in ſuc caſe; but it is uſual to give as much more as the time will admit. An *Sunday* is to be accounted a day in theſe notices, unleſs it be the day o which the notice is given.

(H) Of putting off a Trial.

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(*It is a general*) Imp. K. B. 313.

Tidd's Pr. 500. 3 Burr. 1514. 1 Bl. Rep. 436.

Where there is no cauſe of ſuſpicion, the affidavit to put off the trial o account of the abſence of a material witneſs is ſufficient in the common form namely, that the perſon abſent is a material witneſs, without whoſe teſti mony the defendant cannot ſafely proceed to trial; that he has endeavoured without effect, to get him *ſubpœna'd*, but that he is in hopes of procurin his future attendance. But, if there be any cauſe of ſuſpicion, the cour ſhould be ſatisfied from circumſtances, firſt, that the perſon abſent is a material witneſs; ſecondly, that the party applying has not been guilty o any laches or neglect; and thirdly, that he is in reaſonable expectation o being able to procure his attendance at ſome future time.

Say. Rep. 63. 1 Burr. 512. 4 Term Rep. 285.

The illneſs of the defendant's attorney, and the publication of a pape with intent to influence the jury, have been admitted as cauſes for puttin off the trial.

(L) Of granting a new Trial.

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(3 *It is ſaid*) In 11 Mod. 119. it is ſaid that Lord Holt cited a caſe in Edward 3d.'s time, whe a new trial was granted, becauſe a great lord concerned in the cauſe ſat upon the bench at th trial.

Vez. 28-9.

If an iſſue be directed by a court of equity, the motion for a new tri muſt be made before that juriſdiction. But in that caſe, it is not, as a law, to ſet aſide the verdict; for a court of equity frequently grants a new trial without ſetting aſide the verdict; which is of great conſequence t the parties; for then it may be given in evidence, though not concluſive either party being at liberty to ſhew on what grounds it was obtained.

(5 *The proper*) This rule holds in criminal, as well as civil, caſes: though in either, if it ap pear to the court at any time before judgment, that injuſtice has been done by the verdict, the will interpoſe, and grant a new trial. Rex v. Holt, 5 Term Rep. 436. Rex v. Gough, Doug 797. Birt v. Barlow, *Id.* 171.

(10 *An*

(10 *And if*) Regularly, the motion for a new trial ſhould precede the motion in arreſt of judgment, 1 Burr. 334.; but the diſcuſſion of the latter motion may precede that of the former, for the reaſon aſſigned in the text. 6 Term Rep. 627.

(12 *If due*) 4 Term Rep. 552.

(15 *But a motion*) 4 Burr. 1985.

(19 *But if the*) Rex v. Holt, 5 Term Rep. 438.

(20 *The Report*) Ca. Temp. Hardw. 23.

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(23 *If two*) Collier v. Morris, M. 1735. Bull. N. P. 326. Cap. Crabb's caſe, 23 G. 2. *ibid.* S. P. Ferne's caſe, Hil. 27 and 28 Car. 2. *ibid. contra.* So, in an action of treſpaſs and falſe imprisonment brought in the King's Bench againſt Mr. Leroux, a magiſtrate, and two others, who were conſtables; the two latter were acquitted, and there was a verdict againſt Leroux for 20*l.* which the court ſet aſide, and they granted a new trial as to him; and upon the ſecond trial there was a verdict in his favour, 6 Term Rep. 625. So, in an indictment for a miſdemeanour, where ſome of the defendants are acquitted, and ſome convicted, a new trial may be granted as to thoſe convicted. Rex v. Mawbey, 6 Term Rep. 619.

Where a new trial is granted, and nothing is ſaid in the rule concerning the coſts of the firſt, although the ſame party ſucceed on the ſecond trial, he ſhall not have the coſts of the firſt. Maſon v. Skurray, Dougl. 43S. S. P. Schulbred v. Nutt, B. R. M 23 G 3; and Hankey v. Smith, 3 Term Rep. 507.

(27 *It being*) Rex v. Lord Fitzwater, 2 Lev. 139. 1 Freem. 414 S. C. Foſter v. Hawden, 2 Lev. 205 Fry v. Hardy, Sir T. Jon. 83. Philips v. Fowler, Barnes, 441. Com. Rep. 525. Pr. Reg. 409. Andr. 383. S. C. S. P. In Parr v. Seames, Barnes, 438., the court would have admitted affidavits of the jurors themſelves to ſubſtantiate the fact. But in Vaſſie v. Delaval, 1 Term Rep. 11., the court refuſed to receive them. *Et vide* Pryor v. Powers, 1 Keb. 811.

(28 *At the*) Rice v. Shute, 2 Bl. Rep. 698. S. P.

(29 *Two bills*) 2 Burr. 1216. 1 Bl. Rep. 216. S. C. Tindal v. Brown, 1 Term Rep. 167. S. P.

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(33 *But upon*) The court will grant any number of trials in the ſame action, if the verdicts be againſt law. Tindal v. Brown, 1 Term Rep. 171.

(35 *A new*) But he may ſet a verdict aſide for irregularity. Rex v. Peters, 1 Burr. 572. Jewel v. Hill, 1 Str. 499.

(37 *But it*) 1 Burr. 395.

(38 *And it is*) 1 Vez. 28.

A new trial will rarely, if ever, be granted after a trial at bar in a writ of right: the law has made this concluſive: and as the practice of granting new trials has been chiefly taken up ſince the diſuſe of attaints, and it is pretty clear, that no attaint lay in ſuch caſe, this has been argued as an additional objection. Tyſſen v. Clarke, 2 Bl. Rep. 941.

3. On account of a Defect or Miſtake of the Judge before whom the Cauſe was tried.

If the ſuppoſed miſdirection be a technical objection in point of law, and ſubſtantial juſtice be done, or, generally, if the merits have been fairly and fully tried, a new trial will not be granted; for the application is to the diſcretion of the court. Edmonſon v. Machell. 2 Term Rep. 4.

4. On account of a Defect, Miſtake, or Fault of the Jury by whom the Cauſe was tried.

Per Lord Hardwicke, Ca. Temp. Hardw. 26.

It is a general rule, that if the judge of *niſi prius* directs a jury on t point of law, and they think fit obſtinately to find a verdict contra to his direction, that is ſufficient ground for granting a new trial; and wh the judge, upon a doubt of law, directs the jury to bring in the matt ſpecially, and they find a general verdict, that alſo is a ſufficient foundati for a new trial. But to thoſe general rules there are ſome limitations clear as the rules themſelves: one is, that if the judge ſhould direct t jury plainly and certainly wrong in point of law, and the jury ſhould fi contrary to his opinion, and it ſhould appear to the ſuperior court, und whoſe direction all trials at *niſi prius* are (*Salk.* 643.) that the judge w undoubtedly miſtaken; the court would not grant a new trial, becauſe would be putting the parties to trouble to no purpoſe; and if the ne judge ſhould direct the jury in like manner, and they find accordingly, the muſt be a new trial for miſdirection. Another limitation is, that if it a pear upon the record before the court, that it is impoſſible that the defen ant ſhould have judgment by reaſon of his bad plea, though the verdi were found for him, the court would not grant a new trial. But then the things muſt appear very clearly, and it muſt be where every thing appea on the record that can poſſibly ariſe upon the trial; for if all the matter not appear, and the verdict may poſſibly prejudice the defendant in point law, the court ought in juſtice to grant a new trial.

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(61 *If there*) In a late caſe Groſe, J. ſaid, he remembered a caſe tried ſome years ago at Br tol, where a new trial was granted as to one iſſue out of ſeveral which had been found againſt t evidence. 6 Term Rep. 626.

(65 *In an action*) In a late caſe where the jury found a verdict for the plaintiff upon a pr ſumption contrary to evidence, the court refuſed to grant a new trial, becauſe the plaintiff w entitled to recover in conſcience and equity. Wilkinſon v. Payne, 4 Term Rep. 468.

(68 *A new*) 1 Burr. 11. S. C.

(69 *Upon a motion*) 2 Burr. 664. S. C Marſh v. Bower, 2 Bl. Rep. 851. S. P.

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(73 *In another*) 1 Burr. 390. S. C.

(76 *In another*) Anon. 1 Wilſ. 22. Hankey v. Trotman, 1 Bl. Rep. 1 S. P and Smith v Parkhurſt, 2 Str. 1105. It is well obſerved by the late judicious editor of Sir John Strange' Reports, that as the diſtinction between a verdict againſt evidence and againſt very weak evidenc muſt in many inſtances appear ſcarcely perceptible, and the granting of new trials is entire diſcretionary in the courts, it rather ſeems, as if the ſeveral caſes upon the ſubject warrant th concluſion, that the courts will grant a new trial where the verdict is *manifeſtly* againſt the weig of evidence, although ſome proof has been adduced on the other ſide; provided injuſtice ſeem to have been done by the verdict, and the cauſe is of ſufficient value. *Vide* Berks v. Maſon, Say 264. Norris v. Freeman, 3 Wilſ. 39.

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(80 *In an action*) Maurice v. Brecknock, Doug. 509. S. P.

(85 *Upon the*) Markham v. Middleton, 2 Str. 1259 S. P.

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(88 *In an action*) *Vide* 2 Wilſ. 249.

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(91 *In an*) 1 Burr. 609. S. C. In a late caſe of this kind, the court of King's Bench, diſſen Buller, J. refuſed to grant a new trial on account of the exceſſiveneſs of the damages, though th conduct of the huſband appeared in the moſt unfavourable light. Duberley v. Gunning, 4 Term Rep. 651. However, in a ſubſequent caſe, in which the caſe of Duberley v. Gunning was preſſe upon the court as eſtabliſhing the poſition alluded to in the text, and certainly advanced by th judges who refuſed the new trial in the caſe of Duberley v. Gunning, namely, that in caſes o *tort*, where there is no certain rule by which the damages can be aſcertained, the court will no grant

grant a new trial on the ground of exceſſive damages—Lord Kenyon is reported to ſay, "It "muſt be remembered, that although the caſe of Duberley v. Gunning was decided after a very "full diſcuſſion of the ſubject, the court were *not unanimous* in the determination. But, *whether* "*rightly or not decided*, that is a caſe *ſui generis*, and cannot govern the preſent" The then preſent caſe was an action for an aſſault and battery, in which the court granted a new trial on account of the largeneſs of the damages. Jones v. Sparrow, 5 Term Rep. 257. In a caſe of the ſame nature with that of Jones v. Sparrow, Lord Mansfield ſaid, "There is no doubt but the "court have the power of taking the opinion of a ſecond jury where the damages are exceſſive. "But all theſe queſtions depend upon their own circumſtances, on which the court will exerciſe "their diſcretion." Ducker v. Wood, 1 Term Rep. 277. In that caſe the new trial was refuſed, and ſo it was by the ſame court in Benſon v. Frederick, 3 Burr. 1845.; and by the court of Common Pleas in Leith v. Pope, 2 Bl. Rep. 184.; but in both thoſe caſes the courts ſaid, they had the power of granting a new trial where the damages given appeared to be greatly diſproportionate to the injury received. And in the caſe of Hurry v. Watſon, Tr. 27 G. 3. C. B. where 3000l. had been given in an action for a malicious proſecution, the court (on a motion to ſet aſide the verdict for exceſſive damages) ſaid, they had the power of granting a new trial; and they would have exerciſed it in that caſe, if the plaintiff had not agreed to accept 1500l. In a caſe where the court of Common Pleas refuſed to grant a new trial on this account, though the Chief Juſtice ſaid, "there was not one ſingle caſe (that was law) in all the books to be found "where the court had granted a new trial for exceſſive damages in actions for *torts*;" he added, "We deſire to be underſtood, that this court does not ſay, or lay down any rule that there can "never happen a caſe of ſuch exceſſive damages in *tort*, where the court may not grant a new trial: "but in that caſe the damages muſt be monſtrous and enormous indeed, and ſuch as all mankind "muſt be ready to exclaim againſt at firſt bluſh." Beardmore v. Carrington, 2 Wilſ. 244. The conceſſion here made is indeed guarded and confined to extreme caſes: but when we recollect at what time, upon what occaſion, and by whom it was made, it leaves little room to doubt of the power of the courts to interpoſe in correcting the extravagance of juries. The learned judge, ſeemingly provoked to feel himſelf obliged to acknowledge the neceſſity, and therefore the legality of ſuch a power, (for he ſeems to reſt the legality upon the neceſſity,) anxiouſly endeavours, by way of revenge, to reſtrain and cramp the exerciſe of it. The damages muſt be enormous, more than exceſſive, to warrant the interpoſition of the court: and this muſt be apparent, not to the judges, but to all mankind. The judgment of the court muſt be authorized by the cry of the multitude! judicial diſcretion muſt be guided by popular opinion! The law upon this point ſeems rather more diſtinctly as well as more temperately ſtated by De Grey, Ch. J. in the caſe of Sharpe v. Brice—"It has never been laid down," ſays he, "that the court will not grant a "new trial for exceſſive damages in any caſe of *tort*. It was held, ſo long ago as in Comb. 357. "that the jury have not a deſpotick power in ſuch actions. The utmoſt that can be ſaid is, and "very truly, that the ſame rule does not prevail upon queſtions of *tort*, as of contract. In con"tract, the meaſure of damages is generally matter of account, and the damages given may be "demonſtrated to be right or wrong. But in *torts*, a greater latitude is allowed to the jury; and "the damages muſt be exceſſive and outrageous to require or warrant a new trial." 2 Bl. Rep. 942. We cannot help taking notice, that in ſeveral caſes where the judges have admitted that a new trial may be granted for *exceſſive* damages, they have added words of amplification: this we conceive, in propriety of language, to be unneceſſary; for, as far as we recollect, *exceſſive* is never predicated of any ſubject, but to denote its extraordinary intenſeneſs. Thus Milton—"Dark with *exceſſive* bright."

(92 *In an*) 2 Wilſ. 160. S. C. See Huckle v. Money, 2 Wilſ. 205. Redſhaw v. Brooke, *Id.* 405: Grey v. Grant, *Id.* 252. Bruce v. Rawlins, 3 Wilſ. 61. where a new trial was refuſed, on the ground that the damages were not exceſſive.

A new trial being moved for upon an affidavit by the defendant's attorney, of a confeſſion of a juryman to him, that the jury drew lots which ſix of them ſhould determine the verdict, it was refuſed; and the court ſaid, that there being no affidavit by the jurymen, or any other that was conſtant of the tranſaction, this was too looſe and ſlight a ſuggeſtion. However, in a late caſe (*a*), the court refuſed to receive the affidavit of the jurymen themſelves to ſubſtantiate ſuch a fact.

Aylet v. Jewel, 2 Bl. Rep. 1229. (*a*) Vaſſie v. Delaval, 1 Term Rep. 11. *& vide* Pryor v. Powers, 1 Keb. 811.

A new trial has been refuſed upon a ſubſequent declaration by the jury, where the verdict given has been according to the real merits of the caſe.

Clark v. Stevenſon, 2 Bl. Rep. 803.

Aubert v. Hardcaſtle, C. B. Trin. 27 G. 3.

In an action for the non-performance of a contract in not deliverin 100 caſks of good *Ruſſia* tallow, which was tried before Lord *Loughborou* at the ſittings after laſt term at *Guildhall*, a verdict was given for the de fendants. *Adair*, Serj. moved for a rule to ſhew cauſe why there ſhoul not be a new trial. The ground upon which he moved it was, that converſation had paſſed after the judge had ſummed up the evidence, be tween one of the jury and one *Cartwright* the laſt witneſs, in which material piece of evidence had been diſcloſed: that this converſation wa not heard by the plaintiffs, and therefore they had not an opportunity t controvert what the witneſs ſaid: that if they had, they could have di rectly contradicted it. He then offered affidavits to induce the court t believe that the jury had founded their verdict upon this evidence. Th circumſtances of the caſe were theſe: the plaintiffs had contracted wi the defendants for 100 caſks of good *Ruſſia* tallow; fifty of theſe had bee delivered and accepted, but the plaintiffs refuſed to accept the reſt, a leging that it was of an inferior quality. Before the action was com menced, a propoſal for an accommodation was made, by the defendan paying to the plantiffs 3*s. per cwt.*, which was the difference between th price tallow then ſold for, and the price for which the plaintiffs had co tracted. But this propoſal was not acceded to, and it was reſpecting th that the converſation paſſed upon which this motion was grounded. O of the jury aſked the witneſs *Cartwright*, why it was not agreed to. H anſwer was, becauſe the plaintiffs wanted to ſettle the matter in diſpute b caſks of 4 *cwt.* inſtead of 7 *cwt.* Lord *L.*, after reporting the evidenc ſaid, that this was a new ground for an application, and ſuch an one as h much doubted whether the court ought to encourage. From the ſituatio of the witneſſes at *Guildhall*, converſations muſt frequently paſs betwe them and the jury, and it was impoſſible but ſuch converſations m ſometimes eſcape the court: that if new trials were to be granted up ſuggeſtions of this kind, cauſes would never be finally ſettled: that th queſtion here put was, he thought, an idle one, and that no inferen could be drawn from it to affect the deciſion of the jury. The queſti which he left to the jury was, whether this was good merchantable t low, or not: no fraud was pretended on either ſide: both parties wiſh to act right: the ſcale of evidence was nearly equal, different opinio having been given on each ſide of the ſamples of tallow, which the d fendants had produced. This queſtion, why the parties did not ſet the matter, could not poſſibly apply to that. Beſides, the jury had the courſe of the trial calculated that the caſks were above 7 *cwt.*, ſo th this anſwer could not poſſibly have any influence with them.

Page 251 (106 *At the*) v. Hankey, That a miſtake in conducting a cauſe, is no ground for a new trial, ſee Vern 2 Term Rep. 110. Spong v. Hog. 2 Bl. Rep, 801.

Broadhead v. Marſhall, 2 Bl. Rep. 955.

But the diſcovery of new evidence by an attorney of an executor fendant then abſent from *England*, though in the actual cuſtody of the torney himſelf, but not known by him ſo to be, hath been admitted ſufficient ground for a new trial.

Turner v. Pearte, 2 TermRep. 717.

Although an objection to the competency of a witneſs diſcovered the trial, is not, of itſelf, a ſufficient ground for granting a new tr yet it may have ſome weight with the court where the party applying pears to have merits.

If it appear that the witneſſes, upon whoſe teſtimony the former verdict was given, were ſuborned, the court will grant a new trial. Fabrilius v. Cock, 3 Burr. 1771. Page 252

(114 *It is*) Giſt v. Maſon, 1 Term Rep. 84. Page 253

(117 *And in*) 1 Bl. Rep. 345. S. C.

8. In a Penal Action.

But a new trial will be granted in a penal action even after a verdict for the defendant, if ſuch verdict has proceeded upon the miſtake of the judge. Wilſon v. Raſtall, 4 Term Rep. 753. Calcraft v. Gibbs, 5 Term Rep. 19. Page 255

(136 *A new*) *Sed vide contra* Rex v. Francis, 2 Term Rep. 484.

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As the plaintiff in this action does not complain of the taking, but of the converſion; as he admits that the defendant *may* have come *lawfully* by the goods in queſtion, it is immaterial by what means he alleges that poſſeſſion to have been acquired. No doubt, from the name of the action, the ſurmiſe in the declaration moſt uſually was, as it ſtill is, that the defendant obtained the poſſeſſion by *finding*. The giſt of this action is the converſion of a chattel, the property of the plaintiff, of which he had, or at leaſt was entitled to, the poſſeſſion, at the time it came to the hands of the defendant. As the plaintiff inſiſts upon his right of property in the thing in queſtion, he muſt complain of the defendant's act as *tortious*; but if he complains of a *tort*, he muſt ſhew a poſſeſſory right in himſelf at the time that *tort* was committed; for no one can complain of a *tort*, who has no title to the poſſeſſion. It is obvious, therefore, that a reverſionary or expectant intereſt will not ſupport the action, though either a general or a ſpecial property will be ſufficient: for, if the intereſt be future or expectant, there can be no immediate right to the poſſeſſion; but a ſpecial property ariſeth merely from the actual poſſeſſion, being in ſuch nothing more than a preſumption of property which the law raiſeth for the purpoſe of defending that poſſeſſion, and which it will not ſuffer a wrong-doer to controvert; and where the poſſeſſion is only parted with for a time, and in ſubſerviency to the purpoſes of the perſon in whom the general or abſolute property is veſted, the right to the poſſeſſion muſt neceſſarily remain in ſuch perſon; or rather, the poſſeſſion of the ſervant, if ſo we may conſider the ſpecial proprietor, is in law the poſſeſſion of the maſter or real owner. The action then being founded upon a conjunct right of property and poſſeſſion, any act of a defendant which negatives, or is inconſiſtent with ſuch right, amounts in law to a converſion. It is not neceſſary to a converſion that there ſhould be a manual taking of the thing in queſtion

queſtion by the defendant; it is not neceſſary that it ſhould be ſhewn that he has applied it to his own uſe, though ſuch be the allegation in the declaration. Does he exerciſe a dominion over it in excluſion or in defiance of the plaintiff's right? If he does, that is in law a converſion, be it for his own or another perſon's uſe. Hence a re-delivery of the thing will not protect him from the action. Hence nothing can be pleaded in bar of it, but matter *dehors* or unconnected with the tranſaction; ſuch as a releaſe, former recovery, and perhaps the ſtatute of limitations.

(A) Of an Action of Trover in the general.

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(4 *Where*) The converſe of this propoſition would be nearer the truth, namely, that trover lies where detinue will lie. In detinue the ſpecifick chattel muſt be accurately deſcribed and traced; in trover this certainty in the deſcription is not requiſite: it is obvious, therefore, that trover may be brought where detinue could not be ſupported. The authority referred to, we may add, by no means eſtabliſhes the author's propoſition. See also 7 Term Rep. 12, 13.

(5 *There*) It is not true that in detinue the plaintiff can only recover the goods in ſpecie: the judgment may be for the *value* of the ſpecifick goods. Co. Entr. tit. Detinue.

(6 *If the*) Andr. 18. S. C. Kelw. 58. b. S. P. *per* Frowicke

(B) Of a Converſion.

(13 *If the*) Bull. N. P. 46.

Per Buller J. 4 Term Rep. 264. If one man, who is entruſted with the goods of another, puts them into the hands of a third perſon contrary to orders, it is a converſion.

Ibid. If a perſon take my horſe to ride, and leave him at an inn, that is a converſion; for though I may have the horſe on ſending for him, and paying for the keeping of him, yet it brings a charge upon me.

Syeds v. Hay, 4 Term Rep. 260. Where the owner of goods on board a veſſel directed the captain not to land them on a particular wharf, to which the latter agreed at the time, but afterwards diſobeyed the orders, and delivered the goods into the poſſeſſion of the wharfinger, under an idea of the wharfinger's having a lien thereon for wharfage fees, this was adjudged a converſion, for by putting theſe goods on the wharf he brought a charge upon the owner.

(C) Who may bring an Action of Trover.

2 Term Rep. 756. 2 Term Rep. 12. IN order to maintain an action of trover, the plaintiff muſt prove that the goods in queſtion were his property, and that *while they were* they came into the defendant's poſſeſſion, who converted them to his own uſe. He muſt alſo ſhew, that he had at the time the actual poſſeſſion, or at leaſt a virtual poſſeſſion of them; for if he had a right to the poſſeſſion it is implied by law.

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Hence trover will not lie at the ſuit of the owner of ſtolen goods, which are *bonâ fide* ſold in market overt before the conviction of the felon; for the property is thereby changed; and though conviction reveſts the original ownerſhip, yet cannot the owner even then maintain this action againſt one who was not in poſſeſſion of them at the time of the conviction, notwithſtanding he parted with the poſſeſſion after notice from the owner of the felony. Horwood v. Smith, 2 TermRep. 750.

Hence alſo this action will not lie for a horſe which has been given in exchange for one that has turned out unſound. Power v. Wells, Cowp. 818.

From the want of the right of poſſeſſion it was holden, that where goods leaſed as furniture with a houſe, had been wrongfully taken in execution by the ſheriff, this action could not be maintained by the landlord againſt the ſheriff, pending the leaſe. Gordon v. Harper, 7 TermRep. 9.

Neither will it lie for goods ſold without any earneſt, delivery, or agreement in writing; the ſtatute of frauds in ſuch caſe preventing the property from veſting. Alexander, v. Comber 1 H. Bl. 20.

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(12 *A ſeiſed*) Cro. Eliz. 819. S. C. 3 Wilſ. 336, 7, 8. S. C. cited and approved.

Trover is not maintainable by a tenant in tail, expectant on the determination of an eſtate for life, without impeachment of waſte, for timber which grew upon, and had been ſevered from the eſtate; for the tenant for life without impeachment of waſte has a right to the trees the moment they are cut down. Pyncv. Dor, 1 TermRep. 55.

(D) For what Injuries an action of Trover lies.

(5 *An action*) 2 Bl. Rep. 1117.

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(28 *It is*) The doctrine which is here delivered in an unqualified manner was merely the opinion of the Lord Chief Baron Bury at niſi prius: though it muſt be acknowledged, that in the diſcuſſion of the next caſe, namely, Iſrael's caſe, which ſeems indeed to be the ſame with this, the reſt of the court concurred in that opinion. However, theſe caſes were both fully conſidered, and over-ruled in Tinkler v. Poole, 5 Burr. 2657. where it was holden, that trover would lie againſt a cuſtom-houſe officer for ſeizing goods not liable to ſeizure. So, recognizing this caſe of Tinkler v. Poole, Lord Kenyon held, where it appeared that a diſtreſs for rent made under the aſſignee of a bankrupt was not legally made, becauſe he was not the legal aſſignee, the petitioning creditor's debt not having accrued till after the bankruptcy, that trover might be maintained againſt the perſon who illegally made the diſtreſs, 6 Term Rep. 298. Such was the judgment of the court, as reported in that caſe. But there is manifeſtly a little inaccuracy in the report, as from the ſtate of the caſe, the aſſignee himſelf was the defendant; whereas the noble judge conſiders the officer who made the diſtreſs under the aſſignee as the defendant; and the point in the caſe of Tinkler v. Poole, upon which caſe his Lordſhip relies, was, whether trover was maintainable againſt the officer.

(34 *The reaſon*) However, as the owner, after conviction of the felon, has a right to reſtitution of the goods in ſpecie, it ſhould ſeem, that he would be entitled to recover damages in trover againſt any perſon, who is fixed with the goods at that time and refuſes to deliver them; for then the goods are converted to the prejudice of the owner. Horwood v. Smith, 2 Term Rep. 756.

Where goods were obtained from a perſon by fraud, and afterwards pawned to another without notice, and the owner proſecuted the offender to conviction, and got poſſeſſion of his goods, it was holden, that the pawnee might maintain trover for them. The court ſaid, that this was diſtinguiſh- Parker v. Patrick. 5 TermRep. 175.

able

able from the caſe of felony; for there by a poſitive ſtatute, the owner, if he proſecutes the offender to conviction, is entitled to reſtitution; but that does not extend to this caſe, where the goods were obtained by fraud.

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(38 *A who*) 1 Burr. 452. S. C.

(E) Againſt whom an Action of Trover may be brought.

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(8 *But it*) 1 Wilſ. 328.

(12 *It has*) 1 Burr. 20. S. C. The ſheriff was not liable to an action of *treſpaſs* for ſeizing the goods. Smith v. Miller, 1 Term Rep. 475.

(13 *If S. the*) Bull. N. P. 41.

Stevens v. Evans, 2 Burr. 1152.

An action of trover will lie againſt perſons diſtraining goods for a poor's rate, in the hands of the repreſentatives of the perſon liable to pay it, if no previous demand has been made upon the repreſentatives.

Wilſon v. Poulter, 2 Str. 859. 1 Barnard. 77. 118. 136. 142. 284. S. C. In the latter book, the court are ſaid to have doubted, whether the purchaſe of the bonds was a converſion under the circumſtances of this caſe.

But, where a bankrupt's wife brought money of the bankrupt to the defendant, who purchaſed *India* and *South Sea* bonds with it, ſome of which the aſſignee ſeized, and accepted as part of the bankrupt's eſtate; it was adjudged, that the aſſignee could not maintain trover for the money paid for the others, ſince he could not avow the act of purchaſing as to part and diſavow it as to the reſt; aſſent to the act at one moment, and complain of it as tortious at another.

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(37 *It was*) 1 Burr 494. S. C.

(38 *Another*) 1 Burr. 494. S. C.

Ex parte Deeze, 1 Atk. 228. *Ex parte* Dumas, *Id.* 234.

So, in the caſe of packers, there being evidence, that it was uſual for them to lend money to clothiers, and the cloths to be a pledge, not only for the work done in packing, but for the loan of money likewiſe; Lord *Hardwicke* held, that according to this uſage, *packers* were in the nature of *factors*, and as ſuch entitled to a lien upon the goods, not only for incidental charges, but as an item of *mutual account* for the general balance due to them,

Ex parte Ockenden. 1 Atk. 235. Green v. Farmer, 4 Burr. 2214. 1 Bl. Rep. 651. S. C.

But it is otherwiſe, where goods are delivered to a tradeſman or manufacturer for a particular purpoſe; as corn to a miller, to be ground, or cloth to a dyer to be dyed; for theſe have only a ſpecifick lien upon the goods for the price of grinding and dying.

Nicholſon v. Chapman, 2 H Bl. 254.

But, where a quantity of timber, placed in a dock on the bank of a navigable river, was accidentally looſened, and carried by the tide to a conſiderable diſtance, and left at low water upon a towing path, where *A* finding it, voluntarily conveyed it to a place of ſafety, beyond the reach of the tide at high water; it was determined, that the owner of the timber might maintain trover for it againſt *A*. without tendering any thing to him

by way of compenſation for the trouble and expence to which he had been put in the ſalvage.

(*The lord*) Bull N. P. 45. S. C.

(41 *It was*) It is now ſettled, that an attorney has a lien upon his client's papers, &c. *Vide ſupra*, tom. 1 pag. 303.

(42 *The plaintiff*) Upon the argument of Green v. Farmer, 4 Burr. 2218. Lord Mansfield declared that this caſe was not law.

Trover is not maintainable againſt an executor for a converſion by his teſtator: the form of the plea is a deciſive objection to it. Hambly v. Trott, Cowp. 371.

(F) Of the Pleadings in an Action of Trover.

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(30 *The*) 2 Str. 809. S. C.

2. Of the Plea.

The ſtatute of limitations may be pleaded to an action of trover. Cro. Car. 245. 1 Lutw. 99.

The bankruptcy of the defendant is no bar to an action of trover, though the converſion happened before the bankruptcy. Parker v. Norton, 6 Term Rep. 695.

(G) Of Evidence in an Action of Trover.

In an action of trover for ruſhes, the plaintiff proved that he was an inhabitant of *T.*, and there was a cuſtom for every one inhabiting *there* to cut and take ruſhes on the place in queſtion; that he (by his ſervant) having cut down five or ſix loads of ruſhes, the defendants took and carried them away. The defendants called no witneſs. By the court—This is ſuch evidence of property in the plaintiff, and converſion in the defendants, that they appear to be wrong-doers; for they have neither by evidence nor pleading ſhewn any right or title to theſe ruſhes, and appear to us to be mere ſtrangers. Rackham v. Jeſun, 3 Will. 332.

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(11 *Every thing*) *Vide* Bull, N. P. 48.

(13 *If one*) Cowp, 450. S. C. cited.

In ſome caſes it is allowed in this action to bring the thing into court for which the action is brought. But herein this diſtinction is to be obſerved: if trover is brought for a ſpecific chattel of an aſcertained quantity and quality, and unattended with any circumſtances that may enhance the damages beyond the real value, but that its real and aſcertained value muſt be the ſole meaſure of the damages, then, the ſpecific thing demanded may be brought into court. But, where there is an uncertainty either as to the quantity or quality of the thing demanded, or there is any tort accompanying it, that may enhance the damage above the real value of the thing, and there is no rule whereby to eſtimate the additional value, there, it ſhall not be brought into court. 3 Burr. 1364.

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Whittendv. Fuller, 2 Bl. Rep. 902. In trover for a bond, though the caſe ſeemed a very favourable one for the defendant, the court ſaid they could ſtay the proceedings upon the delivery up of the bond, as the plaintiff inſiſted upon going for ſpecial damages.

Cook v. Ho'gate, C. B. Tr. 10 G. 2. Where goods are cumbrous, the court will grant a rule to ſhew cauſe, why on the delivery of the goods to the plaintiff, and paying coſts, proceedings ſhould not be ſtayed.

Watts v. Phipps, B. R. Eaſt. 7 G. 3 Bull. N. P. 49.

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VERDICT.

Jacobs v. Miniconi, 7 TermRep. 31. THE death of the defendant between the commiſſion day and day of trial will not affect the validity of the verdict, and of courſe is no ground for ſetting it aſide: for the verdict, though given on a ſubſequent day, refers to the commiſſion day: the whole time is in law but one day: it is therefore within the 17 *Car.* 2. *c.* 8.

(B) Of a Privy Verdict.

3 Bl. Com. 377. If the judge hath adjourned the court to his own lodgings, and there receives the verdict, it is a *publick* and not a *privy* verdict.

(D) Of a Special Verdict.

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(25 *In an action*) As to the amending of ſpecial verdicts *vide ſupra*, Vol. 1. pag. 100, 160.

(H) In what Caſes a Verdict is bad, on account of Miſbehaviour in one or more of the Jurors.

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(18 *Iſ the*) In the late trials for treaſon the jurors were permitted to eat, drink, and retire to reſt, attended by proper officers, without requiring the formal conſent of the parties. The irregularity was ſufficiently juſtified by the neceſſity of the caſe.

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(27 *Another*) *Vide ſupra*, Vol. 5. page 242.

(L) Of a Verdict upon an Iſſue, Part of which is inſenſible or inſufficient.

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(2 *In an action*) This inconvenient and ill-founded rule, that where there are ſeveral counts, entire damages, and one count is bad, and the others are not, this ſhall be fatal, upon the ſcholaſtic reaſoning delivered in the text, is now fully ſettled in civil caſes; though it does not hold in the caſe of criminal proſecutions; for, when there is a general verdict of *guilty* in an indictment conſiſting of ſeveral counts, if any one of them is good, that is held to be ſufficient. Grant v. Aſtle, Dougl. 730. However, though this diſtinction has been made in civil caſes, yet if there was only evidence at the trial upon ſuch of the counts as were good and conſiſtent, a general verdict may be altered from the notes of the judge, and entered only on thoſe counts; but, if there is any evidence, which applied to the other bad or inconſiſtent counts, (as, for inſtance, in an action for words, where ſome actionable words are laid, and others not actionable, and evidence given of both

…n of words, and a general verdict,) there, the *poſtea* cannot be amended, becauſe it would be impoſſible for the judge to ſay on which of the counts the jury had found the damages, or how they had apportioned them. In ſuch a caſe, the only remedy is by awarding a *venire de novo* Bowes v. Hopkins, Dougl. 377.

(O) Of a Verdict which varies from the Iſſue.

(4 *The plaintiff*) *Vide* Dougl. 653. n. *ſupra* Vol. 3. pag, 518. Page 300

(35 *The plaintiff*) 1 Burr. 326. S. C. Page 304

(47 *In aſſait*) 1 Term Rep. 427. Brock v. Richardſon, S. P. Page 306

(X) What Omiſſion in the Pleadings is cured by a Verdict.

(5 *If a*) So, if the plaintiff wholly omits to ſtate his title; for in that caſe there is no room for preſumption. Dougl. 683. Page 317

In an action againſt an unqualified perſon for uſing a gun, the declaration ſtated, that the defendant uſed a gun, *being an engine for the deſtruction of game*. In arreſt of judgment it was objected, that it was not averred, that the defendant *uſed* the gun for the deſtruction of game, but the court overruled the objection. Lord *Mansfield* obſerved, that, according to one way of pointing, the offence was ſufficiently charged, and that ſuch an ambiguity, though it might be a good cauſe of ſpecial demurrer, or an objection to a conviction, was cured by verdict. Avery v. Hoole, Cowp. 825.

In an action on a bill of exchange againſt the *indorſor*, the plaintiff did not allege notice to the defendant of the refuſal by the acceptor, or indeed demand and refuſal by the *acceptor* on the day when the bill was payable. It was inſiſted, that this was cured by the verdict; that it muſt be preſumed, that thoſe facts were proved at the trial. But by the court—It was not requiſite for the plaintiff to prove, either the demand on the acceptor, or notice to the defendant; becauſe they are neither laid in the declaration, nor are they circumſtances neceſſary to any of the facts charged. If they were to be preſumed to have been proved, no proof at the trial can make good a declaration, which contains no ground of action on the face of it. The promiſe alleged to have been made by the defendant is an inference of law, and the declaration does not contain premiſes from which ſuch an inference can be drawn. Ruſhton v. Aſpinall, Dougl. 679.

In an action of debt on 19 *G.* 2. *c.* 30. for the penalty of 50*l*, for impreſſing a mariner in the *Weſt India* trade, it was not averred in the declaration, that he had not deſerted from *any* of his majeſty's ſhips of war. A verdict was had for the plaintiff, and upon motion in arreſt of judgment for this omiſſion, it was contended by his counſel, that it muſt be preſumed, after verdict, that this was proved at the trial, But by the court—Nothing is to be preſumed after verdict, but what is expreſsly ſtated in the declaration, or what is neceſſarily implied from thoſe facts which are ſtated. At the trial it is only neceſſary to prove what is alleged in the declaration: and here it was only alleged that the mariner had not deſerted from a particular ſhip: therefore we cannot preſume, that Spieres v. Parker, 1 Term Rep. 141.

that in this case it was proved he had not deserted from *any* of his majesty's ships.

(Z) Of divers Things, which did not fall properly under any of the foregoing Heads.

Spencer v. Goter, 1H. Bl. 78.

It hath been laid down, that the court will not alter a general verdict, unless it clearly appear upon the face of it, that the alteration will be agreeable to the intention of the jury; the proper remedy in such case being a new trial.

Cogan v. Ebden, 1Burr. 383.

But where it appeared from the affidavit of eight of the jurors, that the foreman had made a mistake in the delivery of the verdict, and had reported both issues to be found for the defendant, whereas they had agreed to find one of them for the plaintiff, the court intimated a disposition to grant a rule to shew cause, (but the case was not afterwards moved,) why the verdict should not be amended and set right according to the truth of the finding.

Jackson v. Williamson, 2TermRep. 281.

When a considerable time has elapsed after the trial, *the court will not amend the* postea *by increasing the damages* given by the jury, although all the jurors join in an affidavit, stating their intention to have been to give the plaintiff such increased sum, and that they conceived the verdict they had given was calculated to give him such increased sum. The proper time for such an explanation is at the trial.

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Visne or Venue.

(B) In what Cases Venue is necessary.

Emery v. Fell, 2Term Rep 30.

In debt for goods sold and delivered, the plaintiff declared that the defendant *at* Westminster *in the county of* Middlesex, *was indebted to him* in a certain sum for goods sold and delivered, but alleged no express contract, or place where the contract was made. On a special demurrer for these causes, the court held, the contract and *venue* well laid.

Ilderton v. Ilderton, Hol 2H.Bl.

In a replication to a plea of *ne unques accouple* in a writ of dower, alleging a marriage in *Scotland*, it is not necessary to state by way of *venue* that the marriage was had at any place in *England*. In point of substance, the question on the marriage in *Scotland* arising incidentally in a suit in dower, of which the court have original jurisdiction, is for the purpose of the cause within their jurisdiction without the assistance of a fiction, and the *venue* for the mere purpose of trial, being necessarily the *venue* laid in the declaration, the inserting it in the replication would be nugatory, and the want of it therefore cannot be taken advantage of even on a special demurrer.

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In a plea of abatement that another perſon ought to have been ſued with the defendant, it is not neceſſary to lay a venue. And ſuch plea being good without a venue, of courſe the laying the facts in a foreign country will not vitiate it. Neale v. De Garay, 7TermRep. 243.

(D) What deemed a proper Laying of the Venue.

In debt upon bond by an adminiſtrator, the declaration alleged, that adminiſtration was granted by the biſhop of *Lichfield* and *Coventry*, and the venue in the margin was laid in *London*, but the bond was ſtated to be made at *Derby*, which is within the dioceſe. The plaintiff demurred generally. The court held it well enough on a general demurrer, though there poſſibly might have been ſome doubt on a ſpecial demurrer. The venue being laid at *Derby* in the body of the declaration, the addition of *London* in the margin did not vitiate it. Mellor v. Barber, 3TermRep. 387.

Where the proper *venue* is ſtated in the margin of a declaration, and the venue in the body of the declaration is laid at *D.*, without ſhewing in what county *D.* is, or, at *D.* in the *county aforeſaid*, when the next antecedent county is *S.*, in either of theſe caſes the reference ſhall be to the venue in the margin. Sutton v. Fenn, 3Wilſ. 339. Shirley v. Sackville, Cro. Eliz. 465. Quarles v. Searle, Cro. Ja. 26.

The 9 *G.* 2. *c.* 35. § 26. which enacts, that proſecutions for aſſaults on revenue officers may be tried in any county, is confined to aſſaults on them merely as officers, and whilſt they are officiating as *ſuch*. And therefore where a defendant had been acquitted on all the counts in the indictment, which charged him with aſſaulting the proſecutor, a revenue officer, in the exerciſe of his office, and found guilty only on that which charged him with a common aſſault, judgment was arreſted, though the proſecutor in that count was deſcribed to be an exciſe officer, the offence being laid in *Surry*, and the *venue* in *Middleſex*. 4TermRep. 400. Rex v. Cartwright.

If an act of parliament directs, that officers ſhall be ſued for any act they may do under *that* act in the county where the fact is committed, and a ſubſequent act gives thoſe officers ſeveral of the privileges conferred by the preceding act, but does not require, as the preceding act does, that the action ſhall be brought in the county where the fact was committed; this privilege will not attach upon the ſubſequent act, unleſs there be a reference from the one act to the other, ſo as to incorporate them. Bazing v. Skelton, 5TermRep. 16.

The venue of an information on the 24 *G.* 3. *c.* 19. for exerciſing the trade and myſtery both of a tanner and a ſhoemaker, need not be laid in the county where the offence was committed. For though this was originally prohibited by the 1 *Ja.* 1. *c.* 22., and by the 21 *Ja.* 1. *c.* 4., all offences againſt prior penal ſtatutes muſt be laid in their proper counties; and the 9 *Ann. c.* 11. and the 24 *G.* 3. *c.* 19., re-enact the proviſions of the 1 *Ja.* 1. *c.* 22., ſo that the action ſhould in truth ſeem to be brought upon that ſtatute; yet the different views of the ſtatutes of 9 *Ann.* and 24 *G.* 3. their extended operation, difference of expreſſion, and new penalties, negative the idea of theſe latter ſtatutes being merely referable to the former, or merely a continuance of it, eſpecially too in a ſuit ſeeking the penalty under the laſt ſtatute. Attorney-General v. Ferres, *Scac.* Hil. 37G. 3.

(E) From

(E) From whence the Venue shall come.

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(5 *In trespass*) 2 Term Rep. 238. S. P.

(F) In what Cases the Venue may be changed.

Vol. 1. p. 35.

1. When the Motion for changing the Venue must be made.

Cowp. 511. Barnes, 493. 1 Wilf. 245. contr.

The *venue* may be changed, after an order for time to plead, thou upon the terms of pleading issuably; but not after an order for time plead, where the terms are to plead issuably and take short notice of t at the first sittings in *London* or *Middlesex*, because there a trial would lost.

Cowp. 409. Bruckshaw v. Hopkins.

The plaintiff was allowed to bring back the *venue* to the county wh it was originally laid, upon the usual undertaking, though the cause h gone down to trial, and been a remanet for want of jurors.

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(6 *With respect*) 3 Term Rep. 495.

Cameron v. Gray, 6 Term Rep. 363.

In an action for infringing a patent, the *venue* cannot be chan from *Middlesex* to another county, because it is impossible for t party applying to make the necessary affidavit, that the cause of act arose wholly in such other county, and not elsewhere, it being m nifest that the substratum of the action, namely, the patent, is at *W minster*.

Calland v. Champion, 7 Term Rep. 205.

If the venue be changed from *A.* to *B.* on the usual affidavit that t cause of action arose wholly in *B.*, when in fact part of the cause of act arose in another county, the court will order the venue to be brou back to *A.*

Matthews v. Griffiths, Peake's Ni. Pri. Cas. 200.

A. residing at *Portsmouth*, drew a bill for 600*l.* on *S.* in *London*. T bill was payable to the defendants, who were bankers in *Portsmouth*, order, thirty days after date, and immediately after it was drawn, was taken to the defendants, who gave their note for 600*l.* payable th days after sight at a house in *London*. For this the defendants recei a discount of 5*l. per cent.* calculating on the thirty days the bill had run, but making no deduction on account of the three days the note h to run after sight, or of the three days grace which the bankers to thereon. Lord *Kenyon* said, he was clearly of opinion, that this w a usurious contract, whether the person discounting the bill chos receive a note or money. If *A.* chose to have a note payable in tw the defendants should not have taken interest for the time that n had to run, but should have computed their interest from the time it w payable.

UNIVERSITIE

UNIVERSITIES.

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(A) Univerſities, what.

It is indeed from their being inveſted with ſuch privileges, or rather, from their being incorporated, (for they would not otherwiſe be capable of receiving them,) that they were called *Umiverſities*, *Univerſitas* being the proper *Latin* word for a corporation. Conſidered as corporations, theſe learned bodies are merely the creatures of the crown. The power of granting degrees flows from that ſource; for if the crown erects an univerſity, the power of conferring degrees is incident to the grant; and in point of fact, they never affected to confer degrees till they were incorporated. They were formerly conſidered as *eccleſiaſtical*, or at leaſt, as *clerical*, corporations; for they were compoſed chiefly of eccleſiaſticks, and *denominatio ſumenda a majori*; and, they had as eccleſiaſtical bodies, *ab initio* eccleſiaſtical juriſdiction. Hence the claim of the Archbiſhop of Canterbury to viſit them *jure metropolitico*, which was allowed in the reigns of *R.* 2. *H.* 4. and *Car.* 1. and eſtabliſhed by parliament in the reign of *H.* 4. It is now ſettled, however, that they are merely *lay* corporations, and as ſuch, ſubject to no viſitation, properly ſo called; the appeal, if any one feels himſelf aggrieved, being to the court of King's Bench; which court, as its judgments are reviſable by the Lords in parliament, ſeems to want that definitiveneſs of ſentence which is eſſential to viſitatorial power. The Univerſities being bodies corporate by preſcription it follows, that it is not competent to the crown, of itſelf, and without their conſent, to make any innovations in their conſtitution, or to abridge any of thoſe rights which they enjoy either by preſcriptive uſage or under their charters; and that they may, like other civil corporations under theſe circumſtances, accept a new charter, in part, and upon ſuch terms as they may think proper.

See Sir P. Yorke's argument, 1 Burn's E. L. 420.

See alſo 8 Mod. 163, 3 Burr. 1656, 1 Bl. Rep. 547.

1 Bl. Com. 381.

(B) Of their Courts and Privileges of Juriſdiction.

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(a) *Theſe courts*) The trial of treaſon, felony, and mayhem, is committed in both Univerſities the univerſity juriſdiction in another court, namely, the court of the *Lord High Steward* of the univerſity. The cognizance of offences of this nature has not been claimed by this court in either univerſity for many years, though inſtances have unhappily occurred in which the claim might have been made.

(b) *If there*) According to Sir Wm. Blackſtone, the appeal in the firſt inſtance is to delegates named by the congregation; thence to other delegates of the houſe of convocation; and if they all three concur in the ſame ſentence it is final, at leaſt by the ſtatutes of the Univerſity, according to the rule of the civil law. But if there be any diſcordance or variation in any of the three ſentences, an appeal lies in the laſt reſort to judges delegates appointed by the crown under the great ſeal of Chancery. 3 Bl. Comm. 85. The appeal from the Vice-Chancellour's court in Cambridge lies to certain delegates appointed by the ſenate; but the editor is informed, that from the ſentence of theſe delegates there is no appellate Univerſity juriſdiction,

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(10 *But*) Actual reſidence muſt be certified by the Chancellour, Hayes v. Long, 2 Wilſ. 3[illegible] and his certificate muſt be ſupported by affidavit. Paternoſter v. Graham. 2 Str. 810. 1 L[illegible] Raym. 428. S. C. Boot v. Graham. 1 Barnardiſt. K. B. 49. 65.

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(12 *Neither*) That a townſman ſo circumſtanced was not entitled to the privileges of the U[illegible] verſity, this caſe did not determine; for the deciſion turned upon the matriculation having be[illegible] colluſive, merely for the purpoſe of procuring an exemption from a corporate office. And it h[illegible] been lately adjudged, that a college barber at Oxford, though he reſides in the city out of the c[illegible] lege, is entitled to the privileges of the Univerſity. Rex v. Rowledge, Dougl. 531.

Per Lord Camden, 2 Wilſ. 311.

Although the charter of the Univerſity extends to actions ariſing in a[illegible] part of *England*, yet it cannot intend that ſcholars, as plaintiffs, ſhall ha[illegible] the liberty of ſuing in the Univerſity in cauſes of action ariſing in any p[illegible] of *England*; but, when they are defendants, this privilege extends [illegible] over *England*.

Ruſh v. Chancellour, &c. of Oxford, Salk. 343.

On a motion for a prohibition to a ſuit in the vice-chancellour's co[illegible] againſt certain brewers, for ſelling ill beer and falſe meaſure, the particul[illegible] exceſs of juriſdiction alleged was, the exacting of juratory caution; a[illegible] it was inſiſted, that though they have the aſſize of bread and beer by ch[illegible] ter, yet a power to puniſh by fine, and proceed according to the civil la[illegible] cannot be by charter. *Holt*, Ch. J.—Before the 14 *H.* 8. the Univerſ[illegible] had the juriſdiction of a leet, and exerciſed it in the vice-chancellou[illegible] court; but the charter grants them the power of treſpaſſes, and that ov[illegible] all perſons whomſoever, if a ſcholar be party. *Adjournatur.*

That both the Univerſities have the juriſdiction of a leet, has been acknowledged in ſubſequent caſes, 3 Burr. 1647. 1 Bl. Rep 547. Dougl. 537. but, whether a trad[illegible] man of Oxford, entitled to the privileges of the Univerſity as a college ſervant, but reſidi[illegible] without the walls of the college in the city, be therefore exempt from ſerving the office of co[illegible] ſtable for the city, is a queſtion which has been moved, but not abſolutely determined. Rex Routledge, Dougl. 530. It ſhould ſeem, however, from the language of the court, and t[illegible] ſubſequent conduct of the proſecutors in that caſe, that there can be little doubt that the law in favour of the exemption.

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(24 *But*) The charter, the act of parliament which confirms it, and all the proceedings ſo[illegible] as they have gone, muſt be entered on the roll, and therefore where the charter and ſtatute w[illegible] ſhortly but not fully ſet forth, and the declaration which had been delivered in the cauſe w[illegible] wholly omitted, the claim was diſallowed as not made in due form. Leaſingby v. Smith, 2 W[illegible] 406. See the caſe of Woodcock v. Brooke, Ca. temp. Hardw. 241. an inſtance of a claim a[illegible] lowed.

(25 *In equity*) Mitf. Ch. Pl. 231. acc.

3. At what Time it may be demanded.

3 Bl. Cm. 298. 2 Wilſ. 406. 5 Burr. 2823.

On the return of the writ, if the cauſe of action appears thereon; not, then upon the firſt day given upon the declaration. After full [illegible] fence made or imparlance prayed, it is too late.

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(29 *In an*) See the caſes of Leaſingby v. Smith, 2 Wilſ. 436. and Rex v. Agar, 5 Burr. 2[illegible] where claims of conuſance were diſallowed as not made in due time.

(C)

(C) Of their Privileges with regard to their Right of Preſentation to the Livings of Papiſts.

3. How their Right of Preſentation may be prevented.

It was determined by Lord *Hardwicke*, on the ſtatute of *Anne* hereafter mentioned, that that ſtatute doth not make the whole truſt void, but only the turn upon an avoidance, ſo that if the party conforms before any avoidance happens, nothing can veſt in the Univerſities. Cottington v. Fletcher 2 Atk. 155.

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(16 § 4 *Univerſities*) A bill founded upon this ſtatute can only be for diſcovery, not for relief. So determined by Lord Talbot, *ſupra*, vol. 5. p. 272.

Void and Voidable.

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(A) The Diſtinction between void and voidable.

(1 *A thing*) The doctrine in the text as to voidable acts is far from being univerſally juſt. It does not hold in the caſe of infants. An infant when he comes of age may himſelf avoid a voidable act done by him in his infancy.

(B) What Acts are abſolutely void.

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(2 *Bond*) A warrant of attorney given by an infant is merely void. Saunderſon v. Marr, 1 H. Bl. 75.

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(13 *Alſo if*) A bill of exchange or promiſſory note for money loſt at play is void in the hands of an indorſee, though without notice, and for a valuable conſideration. 1 Salk 344. 2 Burr. 1077 The like law, where it is given on an uſurious contract. Dougl. 736. A leaſe of a rectory by a rector is void by his non-reſidence for eighty days, 2 Term Rep. 749. An annuity granted not enrolled purſuant to the directions of the 17 G. 3. c. 26. is abſolutely void. *Id.* 803.

(C) What Acts are voidable only.

(1 *If a leaſe*) Though a leaſe by the huſband of a feme covert's eſtate (even not within 32 H. 8. c. 28.) is only *voidable*, yet a mortgage of a feme covert's eſtate, though in form of a leaſe, is void, Dougl. 53, 54.

(E) How they may be avoided.

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(2 *Where*) The reaſon why the defendant in this caſe muſt plead ſpecially, and not merely on the *plea of non eſt factum*, is, not becauſe the inſtrument is in *form* a deed, but becauſe it

it has an operation from the *delivery*. For the delivery of a deed cannot be void, but is only voi able; ſo that deeds which *take effect by delivery* can be only *voidable*; whilſt thoſe which do no *take effect* are abſolutely *void*, 3 Burr. 1804. 1 H. Bl. 75. But it is not becauſe the deed may avoided by ſpecial pleading, that it is therefore voidable, but being only voidable, the par is bound to diſcloſe that matter in his plea which ſhall avoid it; for *primâ facie* it good; it paſſeth an intereſt; it is capable of confirmation; its validity therefore ſhall n be queſtioned without giving the other party an opportunity of ſupporting it in his replic tion.

Uſes and Truſts.

(E) Of the ſeveral Sorts of conveyances to Uſe

1. *Who may declare Uſes.*

3 R. Wms. 210. note B. If the remainder-man ſeals, and is party to a deed, wherein the tena for life *alone* covenants to ſuffer a recovery, &c. to certain uſes, this do not bind the remainder-man, though he in the remainder after join in ſu fering the recovery, &c.

Roe v. Popham, Dougl. 25. If tenant for life, remainder-man in tail, and reverſioner in fee levy fine, a declaration of uſes by the tenant for life and remainder-man do not bind the reverſioner, without his privity.

Bac. Uſes, 66. Sand. Uſes, 208. The king may declare uſes upon his letters patent, though indeed th patent of itſelf implies a uſe. But, if the king gives lands to *J. S.* an his heirs by letters patent, to the uſe of *J. S.* for life; here, *J. S.* h only an eſtate for *life*, and the king has the inheritance without any off found; for implication out of matter of record ever amounts to matter record.

Id. Ibid. The queen may alſo declare uſes.

3. *In what Manner they may be declared.*

Stapilton v. Stapilton, 1 Atk. 2. See Durnford v. Lane, 1 Br. Ch. Rep. 106. But ſuch other indenture muſt be by the conſent of *all* the parties i tereſted, elſe it cannot controul the firſt indenture. Thus, *A.* was tena for ninety-nine years, if he ſo long lived, remainder to truſtees to ſuppo contingent remainders, remainder to the firſt and other ſons of *A.* in ta remainder to *A.* in fee. *A.* having two ſons, *B.* and *C.*, they all join in a leaſe and releaſe of the eſtate to certain uſes, and there was a cove ance to ſuffer a recovery within twelve months to thoſe uſes: afterwa they, with the heir of the ſurviving truſtee, joined in a leaſe and releaſe make a tenant to the *præcipe*, in order to ſuffer a recovery to the uſes the firſt indenture; but before any recovery was ſuffered, *B.* the eld ſon died, and after the death of *B.*, and before the recovery was ſuffe purſuant to the above deeds, *A.* and *C.* by another deed covenanted ſuffer a recovery to certain other uſes, and before the expiration of twelve months ſpecified in the firſt deed, a recovery was ſuffered. T queſ

uestion was, Whether the firſt deed, declaring the uſes of the recovery, and made by *A. B.*, and *C.*, ſhould ſtand, in preference to that made by *A.* and *C.* alone? Lord *Hardwicke* clearly held, that the firſt deed by *A., B.*, and *C* was a good deed to lead the uſes of the recovery: that when *A., B.*, and *C.*, and the heir of the ſurviving truſtee, made a tenant to the *præcipe*, they paſſed a defeaſible eſtate to ſerve the uſes of the firſt deed; and that the recovery ſuffered within the twelve months rendered that defeaſible eſtate indefeaſible, though one of the parties was dead before the recovery ſuffered: that the laſt deed was not ſufficient to alter the uſes declared by the firſt deed, becauſe not made by the *agreement* of all the parties.

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(50 *The king*) The king cannot be ſeiſed to a uſe; no, not where he taketh in his natural body, and to ſome purpoſe as a common perſon; and therefore if land be given to the king, and *D. pour tenir de leur vies*, this uſe is void for a moiety. Bac. Uſes, 56. Like law is, if the king be ſeiſed of land in the right of his duchy of Lancaſter, and covenant by his letters patent under the duchy ſeal to ſtand ſeiſed to the uſe of his ſon, nothing paſſeth. *Id.* 57. Like law, if king Richard the Third, who was feoffee to divers uſes before he took upon him the crown, had, after he was king, by his letters patent granted the land over, the uſes had not been renewed. *Id.* 58. The king ſhall not ſtand ſeiſed to a uſe, for all the lands he is ſeiſed of, he is ſeiſed *in jure coronæ* for the maintenance and ſupport of his crown and dignity, and the well-government of the commonwealth, which is a uſe the law deſigned him *primitus*, and, conſequently, it is excluſive of all other uſes. Neither can it be imagined that the king ſhould in point of honour ſtand ſeiſed of lands only to the benefit and advantage of another, and ſo be a ſort of bailiff to him. Gilb. Uſes, 170. pl. 1.

(51 *Bodies*) But bodies politick may be truſtees, and in ſuch caſe are conſidered in a court of equity as individuals. Mayor, &c. of Coventry v. the Attorney General, 2 Br. P. C. 236. 2 Ves. junr. 46.

(50 *Tenant*) Whether tenant in tail can ſtand ſeiſed to a uſe, has been *vexata quæſtio*, and indeed does not appear to be quite ſettled even at this time. On the one hand, Lord Coke, (Co. Litt. 19. b. 2 Co. 78. a.) Sir G. Croke; (Cro. Ja. 400. 401.) Bulſtrode, (3 Bulſtr. 186.) Sir J. Moore, (Moore, 848.) and Rolle, (1 Ro. Rep. 384. 2 Ro. Abr. 780.) expreſsly tell us, that it was ſettled in the caſe of Cooper and Franklyn, that a tenant in tail neither *before* nor *ſince* the ſtatute could ſtand ſeiſed to the uſe of another perſon, expreſsly or impliedly. Whilſt on the other hand, Godbolt directly aſſerts, that the caſe of Cooper and Franklyn was determined quite the contrary, viz. that a tenant in tail could ſtand ſeiſed to an *expreſs uſe*, though not to an *implied* one. (Godb 269.) And Lord Bacon, in his Reading on the Statute of Uſes, gives it as his decided opinion, that a tenant in tail may ſtand ſeiſed to an *expreſs uſe ſince* the ſtatute: for the ſtatute, ſays he, does not take the right of tenant in tail; and the reaſon why a contrary conſtruction was held before the ſtatute, was, becauſe the right of tenant in tail was expreſsly ſaved by 1 R. 3. c. 1. (Bac. Uſes, 57.) Of this opinion ſeem alſo Perkins, (Perk. § 534. 537.) Manwood in Walſingham's caſe, (Plowd. 555.) and Dyer, (Dy. 311. b. 312. a.) and Mr Sanders inclines to the ſame opinion, in his Eſſay on the Nature and Laws of Uſes and Truſts, (Sand. 144. 145. &c.)

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(59 *But if*) Stapilton v. Stapilton, 1 Atk. 8 S. P. Goodright v. Mead, 3 Burr. 1705. P.

What Conſideration is neceſſary to a Covenant to ſtand ſeiſed, and how far it extends.

Where there is a feoffment by deed to a relation and his heirs, but nothing can paſs by the feoffment for want of livery of ſeiſin; yet as there is an agreement by deed, and the parties are relations, the law holds that a conſideration for raiſing a uſe, and conſtrues it a covenant to ſtand ſeiſed to the uſe of the perſon ſpecified in fee; and the eſtate paſſes, not by feoffment, as the deed ſays, but by virtue of the ſtatute of uſes; and *res magis valeat*, &c. that inſtrument called a feoffment ſhall operate as a covenant to ſtand ſeiſed. *Per* Wilſon, J. 2 Wez. jun. 226.

(G) Of the ſeveral Kinds of Uſes executed by the Statute, which in their more general Diviſion are Twofold, *viz.*

It remains laſtly to conſider of the manner of *revocation*.

Powell on Powers, 281. But, where a revoker limits new uſes, not being expreſsly warranted by his power ſo to do, or, if warranted, then not exactly purſuant to the terms of the power. ſuch uſes cannot enure upon the original conveyance, but muſt take effect out of his intereſt; they muſt, conſequently, be limited on a *new grant*, or by *covenant* upon a conſideration expreſſed: the conſideration of the original uſes not extending to the new uſes limited upon the revocation.

Ward v. Lenthal, 1 Sid. 343. *R. B.* having iſſue only one daughter married to *E.*, levied a fine, and by indenture declared the uſes to *R. B.* and his heirs males, remainder to ſeveral of his brothers, and his heirs males of their bodies, remainder to the ſaid daughter, *&c.* In the indenture there was a *power* of revocation of thoſe uſes, and alſo a power to declare new uſes. An indenture was made accordingly, revoking the firſt uſes, in which alſo there was a power of revocation, but no power to limit new uſes. Then another indenture of revocation, and alſo declaring new uſes, was made; which indenture contained a clauſe, that all other fines afterwards to be levied ſhould enure to thoſe uſes. Upon this caſe it was argued, and alſo agreed by the court, that if an indenture declared the uſes of a fine, and further that it ſhould be lawful to revoke, *&c.*, and alſo to limit new uſes, *&c.*, the party might, by ſuch deed, revoke and limit new uſes as often as he pleaſed, and all the eſtates ſhould ariſe out of the fine. But, if upon any ſuch indenture, wherein he declared new uſes and reſerved power of revocation, he omitted *expreſsly* to reſerve a power to limit new uſes: he could then only revoke, and could not limit new uſes by virtue of the eſtate raiſed by the firſt fine. And thereupon the counſel, in ſupport of the laſt indenture, ſhewed another fine levied the term after the date thereof, by which it was agreed, that the eſtates limited by the laſt indenture were well raiſed.

Anon. 1 Str. 584. *A.* ſuffered a recovery to the uſe of himſelf for life, remainder to *B.* in tail, remainder to *C.* in tail, remainder to *D.* in tail, remainder to *A.* in fee, with power to revoke the three remainders in tail by any writing under his hand and ſeal. He revoked them within the terms of the power, and by the ſame deed, declared new uſes in favour of the plaintiff without any words of conveyance, covenant to ſtand ſeiſed, or conſideration expreſſed. The queſtion was, Whether this new declaration of uſes was good or not? It was inſiſted in ſupport of it, that *A.*, having revoked the intermediate remainders, had the whole fee in himſelf, and might diſpoſe of it as he pleaſed: and whether it was by the ſame deed or a different deed was not material. But it was anſwered, and reſolved by the court, that true it was, he might, by will or any new conveyance, have made ſuch new diſpoſition, and even this deed would have been ſufficient for ſuch purpoſe, if there had been a *new grant*, or a *new covenant* on conſideration expreſſed: but, here, he had declared new uſes as under the recovery; whereas the uſes of the recovery were full before, and the power was only to revoke and not to declare new uſes.

He

He may revoke too conditionally. Thus, where *A.* ſeiſed in fee made a ſettlement of the eſtates in queſtion, with power of revocation; and ſeven years afterwards mortgaged the ſame in fee to one of the remaindermen in the ſettlement, and the condition of the redemption was, that, if the mortgagor or his heirs paid the money at the day, he ſhould have the lands in his former eſtate; the queſtion was, Whether this mortgage was a total revocation, or only *pro tanto?* The Lord Keeper declared, that it was a revocation *pro tanto* only, the mortgagor being to have the lands on payment, as in his former eſtate; and it was decreed accordingly. Thorne v. Thorne, 1 Vern. 141. 183. Perkins v. Walker, *Id.* 97.

But, Sir *Joſeph Jekyll*, in giving his opinion in the caſe of *Fitzgerald* and Lord *Fauconberge*, ſaid, that he knew of no caſe but that of a mortgage, wherein equity controuled a power of revocation; and the reaſon of that caſe was, becauſe the mortgagor in *equity* continued to be ſtill owner of the eſtate, it being conſidered there but as a pledge for the money. And the deciſion in that caſe ſeems to go a great way in ſupport of the opinion. Powell on Pow. 265.

There, *F.*, being unmarried and having no child, and being ſeiſed of eſtates of large annual value, did by leaſe and releaſe, dated the 2d and 3d of *July* 1712, as well for ſettling the ſaid premiſes in his name and blood, to the ſeveral uſes, truſts, and purpoſes, and in ſuch manner as thereinafter limited, "with liberty nevertheleſs, to and for him the "ſaid *F.*, freely and clearly at his will and pleaſure, to diſpoſe of, charge, "or alienate the ſaid premiſes, or any part thereof, for any eſtate or eſtates "whatſoever, as he ſhould think fit; and to revoke, recall, and make "void all and every the uſe and uſes, truſts, limitations, and appoint"ments thereby raiſed, limited, and appointed, mentioned, and declared "concerning the ſame, as alſo in conſideration of 5*s.*, convey to truſ"tees and their heirs all the eſtates, to the uſe of himſelf for life, with "remainders over." There was alſo a term created, among other things, by ſale, mortgage, or demiſe thereof, for the term, or any part thereof, to raiſe all ſuch ſums as *F.* ſhould owe at his deceaſe, and alſo all ſuch ſums as he, by his laſt will, or any other deed or writing executed under his hand and ſeal, in the preſence of two or more witneſſes, ſhould give and appoint to be paid, or charge the premiſes with, to any perſon or perſons whatſoever: but, if the perſon next in remainder expectant on the term ſhould pay all the ſaid debts, annuities, and monies ſo to be deviſed or appointed, then the term was to ceaſe. Then followed theſe proviſoes: firſt, "A proviſo or power for the ſaid *F.*, from time to time "by any deed or writing under his hand and ſeal, to be ſigned and duly "ſealed and delivered in the preſence of two or more witneſſes, to demiſe, "leaſe, limit, or appoint the ſaid premiſes or any of them, to any perſon "or perſons whatſoever for any term or terms whatſoever, for ſo much "yearly rent as the ſaid *F.* ſhould think fit, and with ſuch other conditions "and agreements as the ſaid *F.* ſhould pleaſe." Secondly, "A proviſo, "that if any female, who, according to the limitations, ought to inherit "the premiſes, ſhould marry any perſon without the conſent of the truſ"tees, or ſhould marry any perſon that ſhould be a proteſtant, and not of "the communion of the church of *Rome*; that then, and immediately "after ſuch marriage, all the eſtates before created and appointed for the "benefit of ſuch perſon ſo marrying ſhould ceaſe and be void." Thirdly, proviſo, "That it ſhould and might be lawful to and for the ſaid *F.*, at "any time or times during his natural life, at his will and pleaſure, to Fitzgerald *et al.* v. *al.* 3 Brown's Lord Fauconberge *et* Parl. Ca. 543. S. C. Fitzgib 207.

"grant,

" grant, ſell, or demiſe, the thereby granted premiſes, or any part there-
" of; or by any deed or writing under his hand and ſeal, or by his laſt will
" and teſtament in writing, ſigned, ſealed, delivered, and publiſhed, in
" the preſence of three or more credible witneſſes, to revoke, repeal, and
" make void, all, every, or any of the uſe and uſes, eſtate and eſtates,
" truſts, and limitations before raiſed, created, limited, or appointed;
" and to declare and limit the ſame, or ſuch other new uſes as ſhould ſeem
" moſt meet and convenient to the ſaid *F.*; and then and from thenceforth
" the eſtates and uſes before limited and appointed, and ſo revoked and
" repealed, to ceaſe and determine and be utterly void, as if the ſame
" had never been made, limited, and appointed; and that the ſaid *F.*
" ſhould and might diſpoſe of the ſaid premiſes, and every part and
" parcel thereof, to ſuch other perſon and perſons, uſe and uſes, as he
" ſhould think fit, any thing before mentioned to the contrary in anywiſe
" notwithſtanding."

By other indentures of leaſe and releaſe, dated the 25th and 26th of *September* 1715, made between *F.* of the one part, and *T.* and *W.* of the other, reciting, that *F.* ſtood indebted to ſeveral perſons named in a ſchedule thereunto annexed in the ſeveral ſums therein mentioned; he, as well for ſecuring the ſaid debts, and more ſpeedy payment thereof, and in conſideration of 5*s.* as alſo for other good cauſes, conveyed to T. *and* W. *and their heirs, the premiſes*, upon truſt that they or the ſurvivor of them, &c., ſhould, *out of the rents and profits of the premiſes or by mortgage*, &c., *raiſe ſo much money as ſhould be ſufficient to pay all the debts mentioned in the* ſaid ſchedule, with intereſt, *over and above the ſeveral annuities, rents, and rent-charges in the ſaid ſchedule mentioned*, wherewith the ſame premiſes ſtood charged, and pay the ſame in full diſcharge of the ſaid debts and intereſt; and, after payment thereof and their own charges being ſatisfied, that " they ſhould pay the overplus thereof (if any), *and* " *reconvey ſuch part of the premiſes as ſhould remain unſold*, to the ſaid *F.*, " or to ſuch perſon and perſons, and to ſuch uſe and uſes, eſtate and eſ-
" tates, as the ſaid *F.* ſhould, by any deed or writing under his hand and
" ſeal, atteſted by two or more credible witneſſes, limit, direct, and
" appoint the ſame." This indenture was atteſted only by two witneſſes, and remained in the cuſtody of *W.*, the truſtee, till his death.

Then, by indenture dated the 26th of *September* 1715, executed by all the ſaid three parties, reciting the leaſe and releaſe of the 25th and 26th of *September* 1715, it was declared, that it ſhould and might be lawful for the ſaid *F.*, at any time or times thereafter during his life, at his will and pleaſure, by any deed or writing under his hand and ſeal, atteſted by two or more witneſſes, or by his laſt will in writing, atteſted by three or more witneſſes, to revoke, repeal, and make void, all or any of the truſts and eſtates in the ſaid indenture of releaſe of the 26th of *September* 1715, raiſed, created, limited, and appointed of the ſaid premiſes, and every part thereof; and to declare, limit, and appoint the ſame to ſuch other uſe and uſes as ſhould ſeem moſt meet and convenient to him: and that, from thenceforth, the truſts and eſtates ſo revoked and repealed, ſhould ceaſe and be void, as if the ſame had never been created, limited, or appointed; and that it ſhould and might be lawful for the ſaid *F.* to diſpoſe of the ſame premiſes, or any part thereof, to ſuch other perſon and perſons, uſe and uſes, as he ſhould think fit.

F. died

F. died on the 24th of *January* 1716, having made no appointment or diſpoſition of the eſtate after the execution of the *deeds* of 1715.

And upon theſe ſeveral inſtruments, a queſtion aroſe between the heir at law of *F.* and the claimants under the ſettlement of 1712, whether the deed of *September* 1715, for ſecuring the creditors of *F.* was not a revocation of the ſettlement of 1712, purſuant to *ſome* or *one* of the proviſoes therein contained. It was contended on the part of the claimants under the ſettlement of 1712, that if theſe deeds of 1715 were deemed to be a revocation of that ſettlement, (which upon other grounds it was argued they could not be,) yet they could not be a total revocation; becauſe it was admitted that thoſe deeds operated *only* as an implied revocation, by reaſon of their inconſiſtency with the ſettlement of 1712; and, therefore, were no further a revocation than ſuch inconſiſtency extended: then, the releaſe having conveyed the premiſes in truſt to raiſe money for paying the debts mentioned in a ſchedule thereunto annexed, and afterwards to reconvey to *F.*, or ſuch perſons or uſes as he ſhould appoint, without ſaying to *F.* or his heirs, or limiting the eſtate in default of appointment, which was the caſe that had happened, it was apprehended that the releaſe of 1715 was no further inconſiſtent with the ſettlement of 1712, than as to the particular uſes ſpecified in that deed, and, conſequently, as to the reſt of the eſtate, did not revoke the ſettlement of 1712; and that, under thoſe circumſtances, a court of equity ought to reſtrain it from operating any further than to ſatisfy the particular purpoſe. It was argued on the other ſide as to this point, that *F.*, having, by the deeds of 1715, conveyed the fee and inheritance of the whole eſtate to *T.* and *W.* upon truſts and for uſes utterly inconſiſtent with thoſe of the ſettlement of 1712, this latter conveyance muſt, conſequently, be a *complete* revocation of the former; the legal eſtate being veſted in new truſtees, who could be ſeiſed thereof upon no other truſts than the new ones, and *F.* having made no ſubſequent appointment of ſuch part as ſhould remain unſold, after the particular purpoſes were anſwered, a truſt muſt therefore neceſſarily reſult for the benefit of him and his heirs, according to the eſtabliſhed rules both of law and equity; conſequently, there could be no foundation for a court of equity to controul or abridge the operation of the deeds of 1715, by confirming them to be only a revocation *pro tanto*, merely to diſinherit one of the coheirs at law; and of this opinion was Lord Chancellour *King*, aſſiſted by Sir *Joſeph Jekyll*, and Lord Chief Baron *Reynolds*; and it was decreed accordingly. And on appeal to the Houſe of Lords, the judges having delivered their opinions *ſeriatim* upon the queſtion, Whether the deed of 1715 were a revocation of the deed of 1712; and if ſo, whether the ſaid deed of 1715 were a total revocation or a revocation *pro tanto*? It was ordered, that the appeal ſhould be diſmiſſed, and the decree affirmed.

Where a power of appointment is given, a power of revocation is likewiſe given, although no expreſs power of revocation be reſerved in the deed creating the power of appointment. And where there is a power of revocation, the law alſo gives a power to limit new uſes (*a*), though no power of new limitation be expreſſed in the deed; for he who has power to revoke has alſo power to limit.

Adams v. Adams, Cowp. 651.

(a) Colſton v. Gardner, 2 Ch. Caſ. 46. Lady Haſtings's caſe, 3 Keb. 7.

(H) Of the Cases out of the Statute.

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(8 *The original*) The reason of this was, that the terms do not determine, unless there be a special proviso, by the performance of the trusts for which they were created. In these cases the legal interest, during the continuance of the term, is in the trustee, but the owner of the estate is entitled to the equitable and beneficial interest. As courts of common law had determined, that the possession of the lessee for years was the possession of the owner of the freehold, courts of equity determined, that where the tenant for years was but a trustee for the owner of the inheritance, he should not oust his *cestui que trust*, or obstruct him in any act of ownership, or in making any assurances of his estate. In these respects, therefore, the term is consolidated with the inheritance; it follows the descent of the heir and all the alienations made of the inheritance, or of any particular estate or interest carved out of it, by deed, will, or act in law. Whitchurch v. Whitchurch, 2 P. Wms. 236. Gilb. Rep. 168. 9 Mod. 124. Charlton v. Low. 3 P Wms 330. Villiers v. Villiers, 2 Atk. 72. Willoughby v. Willoughby, Ambl. 282. but more fully reported 1 Term Rep. 763. Goodright v. Sales, 2 Wilf. 329. Scott v. Fenhoulet, 1 Bro. Ch. Rep 69. But, though the trust or benefit of the term is annexed to the inheritance, the legal interest of the term remains distinct and separate from it at law; and the whole benefit and advantage of the term arises from this separation, by affording the means of protecting *bonâ fide* purchasers of real estates, and also of enabling courts of equity to keep real estates in the right channel; courts of equity considering such terms as creatures of equity. See Mr. Butler's note, Co. Litt. 293.; and Willoughby v. Willoughby, *ubi supra*; and Nourse v. Yarworth, Finch's Rep 160. And though it seems to be now settled at law, that a plaintiff in ejectment ought not to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, yet to effect this, the jury must presume in either of these cases the term to be surrendered; for without a surrender, the estate of the trustee must prevail at law. Goodtitle v. Knott, Cowp. 46 Doe v. Pott, Dougl. 721. Lade v. Holford, Bull. N. P. 110 Doe v. Pegge, 1 Term Rep 758. Doe v. Staple, 2 Term Rep. 698. Doe v. Sybourn, 7 Term Rep. 3. Goodtitle v. Jones, *Id* 47. At law, every term standing out is a term in gross. The difference in equity is produced by affecting the person holding the term with a trust to attend the inheritance, which may be either by express declaration, or by implication of law. If it be by express declaration, it is immaterial whether the term, if in the same hand with the inheritance, would or would not merge, or whether it be subject to some ulterior limitation, to which the inheritance is not subject; for the express declaration is sufficient to make it attendant upon the inheritance. If it is to be made attendant upon the inheritance by implication of law, then it is necessary that it should not be subject to anyother limitation, and that the owner of the inheritance should be entitled to the whole interest in the trust of the term; so that according to the rule laid down in Best v. Stamford, Pr. Ch. 25. 2 Freem. 288. if the term and inheritance had been in the same hand, the term would have merged. The intent to purchase the whole interest will not, it seems, be sufficient to make the term attendant on the inheritance by implication of law. Scott v. Fenhoulet, 1 Bro. Ch. Rep. 69. But any limitation, though void in law, which shews an intention to sever the term from the inheritance, will be sufficient for that purpose. Hayter v. Rod, 1 P Wms 359. And therefore a term, though limited in trust for *A.* and his heirs, will devolve on the personal representative of *A.* Hunt v. Baker, 2 Freem. 62. Attorney General v. Sandys, *Id.* 131. And though a term raised for a particular purpose, will, when such purpose is answered, vest in the heir; yet he must take it as a term, and it will go in a course of administration, and not in a course of descent. Levit v. Needham, 2 Vern. 138.

(12 *It will*) A term to attend the inheritance is real assets in the hands of the heir; for the statute of frauds having made a trust in fee assets in the hands of the heir, the term which follows the inheritance, and which is subject to all charges which affect the inheritance, must be so also. Attorney-General v. Sir G. Sandys, Hardr. 489.. Willoughby v. Willoughby, 1 Term Rep. 766.

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(56 *Likewise*) 3 Br. P C. 458. S. C.

Shapland v. Smith, 1 B Ch. Rep. 75.

A testator devised lands to trustees upon trust, that they, their heirs and assigns, should yearly, by equal quarterly payments, by and out of the rents and profits of the premises, after deducting rates, taxes, repairs, and expences, pay such clear sum as should then remain to his brother *C. S.* and his assigns during his natural life, and after his decease to the use and behoof of the heirs male of the body of the said *C. S.* lawfully to be begotten, as they should be in priority of birth; and in default of such issue, remainder over. *Eyre*, B., and Master *Holford*, thought that the estate for life

ſe was executed in *C. S.*; but Maſter *Hett* differed. And upon a rehear-
g Lord Chancellour *Thurlowe* expreſſed his opinion, that the truſtees
eing to pay the taxes and repairs, they muſt have an intereſt in the premi-
es; and therefore that the *legal* eſtate for the life of *C. S.* was in them;
nd that *C. S.* had only an *equitable* eſtate for life, and the ſubſequent
ſtate being executed could not unite; and of courſe that a recovery ſuf-
ered by *C. S.* was void.

Again, lands were deviſed to truſtees and their heirs, upon truſt to and ſeiſed thereof during the natural life of teſtator's ſon *J. S.*, to ſuch ſe and behoof as after mentioned, *viz.* that the truſtees ſhould yearly and very year, during the natural life of the ſaid *J. S.*, take and receive the ents, iſſues, and yearly profits of the premiſes; and the teſtator ordered, at ſuch rents, iſſues, and yearly profits ſhould be applied for the ſubſiſt-ce and maintenance of the ſaid *J. S.* during his natural life; and imme-iately from and after his deceaſe he deviſed the ſame premiſes unto the irs of the ſaid *J. S.* lawfully to be begotten, and for default of ſuch iſ-e, then to his own right heirs. The court held, that the uſe was not ecuted in the teſtator's ſon, but in the truſtees *during his life*, from the ture of the truſt to *receive and pay over the profits*, and the *application* di-ſted for the ſubſiſtence and maintenance of the ſon, by which the teſta-r ſeemed to inveſt the truſtees with ſome degree of *diſcretionary* power that reſpect. And there being nothing in the nature of the truſt to event the limitation to the heir of his body from being a *uſe executed*, ey held the two limitations did not unite ſo as to give *J. S.* an eſtate-il. Silveſter v. Wilſon, 2 Term Rep. 444.

(l) Of reſulting Uſes, or Uſes by Implication.

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(6 *In like manner*) But there is a difference between a fine or recovery as to the operation on deſcent If tenant in tail by *deſcent ex parte maternâ* ſuffer a recovery, in that caſe, it is true eſtate will continue notwithſtanding the recovery in the ſame line, and deſcend to the heirs *ex e maternâ*: but, if tenant in tail by *purchaſe*, with a reverſion in fee by deſcent, both *ex parte rnâ*, ſuffer a recovery, he muſt take the reſulting fee as a *purchaſer*. For the eſtate that paſſes the recovery is the eſtate-tail, the old eſtate-tail, now conſidered as a fee; the party comes in ontinuance of that eſtate-tail, which being by purchaſe muſt of courſe deſcend to the heir at . But it is otherwiſe, where tenant in tail, with remainder to himſelf in fee, levies a fine; the fine extinguiſhes the eſtate-tail, and paſſes a baſe or qualified fee; and that fee becomes ged in the other fee; and the reverſion being ſo let in, the eſtate continues in the ſame line. rin v. Tregonwell, 2 Str. 1179. 1 Wilſ. 2. 66. S. C. 4 Br. P. C. 486. S. C. 5 Term Rep.. S. C. Roe v. Baldwere, 5 Term Rep. 104. Symonds v. Cudmore, 1 Salk. 338. Garth. S. C. Skin. 339. S. C. 1 Show. 370. 4 Mod. 1 S. C.

Where a perſon ſeiſed in fee makes a feoffment in fee without valuable ſideration to divers particular uſes, ſo much of the uſes as he diſpoſes of is in him as his ancient uſe in point of reverter. Therefore where ſeiſed in fee, covenanted to ſtand ſeiſed to the uſe of *his heirs male be-m or to be begotten on the* body of his ſecond wife, it was upon this prin-e holden by *Hale*, C. J., and two other judges, that *A.* took an eſtate his own life by implication. Co. Litt. 23. a. Pibus v. Mitford, 1 Vent. 372.

o, where the immediate uſe is limited away for *years only*, and no uſe ed of the freehold till the grantor's death, the uſe of the freehold ſhall hat caſe reſult to the grantor, and he ſhall take an eſtate for life by im-ation. As, where an eſtate was conveyed by *A.* to the uſe of truſtees 70 years, if *A.* ſhould ſo long live, remainder to truſtees for 3000 s, and from and after the death of *A.* to *B.* his ſon for life; it was objected, Penhay v. Hurrell, 2 Vern. 370.

objected, that the limitation to *B.* together with the remainders over were void, being an eſtate of freehold to commence *in futuro*; for the firſt freehold eſtate was limited to *B.*, which was not to ariſe until the death of *A.*, and no eſtate for life was limited to *A.* unleſs an eſtate for life ſhould be ſuppoſed to reſult to him. After ſolemn argument upon the point, and a caſe ſtated to the judges, it was decreed, that an eſtate for life reſulted to *A.*, which ſupported the limitation over.

Adams v. Savage, 2 Salk. 679. And vide Dyer, 111. in margin:

In a ſubſequent caſe, where the uſe was limited to the grantor himſelf for 99 years, remainder to the uſe of the truſtees for 25 years, remainder to (the uſe of) *the heirs male of his own body*, remainder to his own right heirs; the court held the limitation to the *heirs male* of the body to be void, becauſe there was no preceding freehold limited to ſupport it, and that it ſhould not be implied *contrary to the intent* of the conveyance; that there the eſtate took effect by tranſmutation of poſſeſſion out of the ſeiſin of the truſtees, and not like *Fenwick* (ſhould be *Pibus*) and *Mitford*'s caſe, where the owner *covenanted to ſtand ſeiſed* to the uſe of the heirs of his body; and *Powel*, Juſtice, held that even in that caſe, if there had been an *expreſs eſtate limited to the covenantor*, it had been different.

Rawley v. Holland, Vin. v. 22. p. 189. c. 11. 2 Eq. Abr. 753.

And ſo where *A.* by marriage ſettlement conveyed certain lands to the uſe of himſelf for 99 years, if he ſo long lived, and after to the uſe of truſtees for 200 years, remainder to the uſe of the *heirs male of his own body*, remainder to his own right heirs; upon a caſe referred to the judges of *C. B.* from the court of Chancery, they held the limitation to the *heirs male of the body of A.* void, no freehold being limited to any perſon precedent to that eſtate; and that no eſtate of freehold could *reſult to A.* for his life *by implication*, becauſe another eſtate, *viz.* for 99 years if, &c. was expreſsly limited to him, which would be inconſiſtent with a freehold *by implication*.

Tippin v. Coſin, Carth. 272. 4 Mod. 380.

And where the uſe was expreſsly limited away *during the life* of the grantor inſtead of for years only, it has been held, that the freehold could not reſult to him, ſo as to unite with the ſubſequent limitation to the heirs of his body.

Thus, *E. C.*, on his intended marriage, ſettled lands by deed and fine to the uſe of himſelf and his heirs till the marriage, and afterwards to the uſe of his wife for life, remainder to the uſe of the cognizees in the fine and their heirs, *during the life of E. C.*, upon truſt to permit him to receive the rents and profits, remainder to the ſons of the marriage ſucceſſively in tail male, and for want of ſuch iſſue to the *heirs of the body* of the ſaid *E. C.*, and for want of ſuch iſſue to the ſaid *E. C.* and his heirs. It was agreed that the caſe differed from that of *Fenwick* v. *Mitford*, for there no uſe at all was limited *for the life* of the feoffor, which left a vacancy that law would ſupply by implication; but in the principal caſe there being an expreſs eſtate limited to the cognizees *during the life of E. C.*, there was no room left for any implication. Beſides that in *Mitford*'s caſe, it was held to be no other than the *old reverſion* ſubſiſting in the feoffor; but the limitation in the principal caſe being of a new eſtate, *viz. an eſtate-tail*, could not be any part of the old eſtate, which was a fee-ſimple. And though it was contended, that the law would imply an eſtate for life in *E. C.*, intermediate between the eſtate of the cognizees and that to the firſt ſon of the marriage, becauſe it was poſſible that the cognizees might forfeit or ſurrender; yet the whole court was clearly of opinion, that the limitation to the heirs of the body of *E. C.* was a *contingent remainder*, and ſuch that the heir would take by *purchaſe*, and not by deſcent; and that the caſe differed

ffered from that of *Fenwick* v. *Mitford* for the reaſons before given, nd judgment was given accordingly.

So, where *A.* made a ſettlement to the uſe of himſelf for 99 years, if e ſhould ſo long live, remainder to the truſtees and their heirs *during* *life*, &c. remainder to the uſe of the *heirs of his body*; remainder to imſelf in fee; Lord Chancellour *Cowper* held this limitation to the irs of the body to be plainly a contingent remainder. 1 P.W. 387. Elvef. Oſborne.

And in a caſe where *A.*, having two ſons *C.* and *D.* covenanted to ſtand ſed to the uſe of *C.* and the heirs male of his body on *M.* his wife to e begotten, and for want of ſuch iſſue to *the heirs male of his* (*A.*'s) *own* dy, and for want of ſuch iſſue to his own right heirs for ever; *C.* the el- ſt ſon died, leaving iſſue one ſon and ſeveral daughters, *A.* died, and en the ſon of *C.* died without iſſue; the court held the limitation to the irs of the body of *A.* to be words of *purchaſe*, and to veſt in the ſon of upon the death of *A.* as *heir male* of his body by *purchaſe*; and that on death of *C.*'s ſon it deſcended to his uncle *D.* as heir male of the body *A per formam doni*; and not by *purchaſe* as heir male of the body of *A.*, not being heir, as his nieces were living. They allowed no eſtate for in *A.* by implication, and ſeemed to doubt the doctrine in the caſe of ius and *Mitford*. But this difference is obſervable between the two caſes; that of *Pibus* and *Mitford*, the covenantor had not limited any uſe at all *ring his own life*; whereas, in *Southcot* v. *Stowell*, the covenantor had ited a *preſent uſe* to his ſon *C.* in tail. Southcot v. Stowell, 1 Mod. 226. 237. 2 Mod. 207. 211. Vide Mandevile's caſe Co. Lit. 26. b. Fearne's C. R.

Archdale Palmer and his ſon *John Palmer*, upon the marriage of the ſon th *A.*, ſettled certain lands to the uſe of *Archdale* and his heirs until the rriage; and afterwards, as to part of the lands to the uſe of *John Palmer* life, and after intermediate remainders, (to the uſe of his wife for life d of his ſons by her or any other woman ſucceſſively in tail male,) *to the of the heirs male of the body of the ſaid* Archdale Palmer, remainder to uſe of the heirs of the body of *John Palmer*, remainder to the uſe of hn *Palmer* his heirs and aſſigns; and as to the reſidue of the lands to uſe of *Archdale* for life, and after ſeveral intermediate limitations, (to uſe of *John* for life and to his wife, in part, for life, and of the ſons the marriage ſucceſſively in tail male,) to the uſe of *John* and the heirs le of his body, remainder to the uſe of *Archdale*, his heirs and aſſigns. n died without iſſue male in the lifetime of his father, leaving *A.* his low and one daughter by her, named *Ann*. *Archdale* afterwards by will, noticing that by the death of his eldeſt ſon *John* without iſſue e, that part of his eſtate then in poſſeſſion was, by the ſaid marriage lement, veſted in him in fee-ſimple, deviſed the ſaid eſtate to his ſon liam *Palmer* for life, with remainder to his ſons ſucceſſively in -male, and for want of ſuch iſſue, to the *heirs male* of his (teſtator's) y begotten, and for want of ſuch iſſue to his own right heirs for ever. Wills et al'. v. Palmer, 5 Bur. 2615. 2 Black. 687.

Archdale died, leaving his ſaid grand-daughter *Ann* his heir at law, and ſon *William Palmer* who (as well as *John* his deceaſed brother) was the ator's iſſue by a firſt wife, and alſo leaving *Henry*, an eldeſt ſon, and ſe- al other children by his ſecond wife. Afterwards *William Palmer*, who is father's death was *heir male of his body*, died, leaving a ſon, who leaving a ſon *Henry John*, who died an infant without iſſue; and no very was ſuffered by *William* or his ſon. Upon the death of *Henry* e, *Henry*, the then eldeſt ſon and heir male of the body of *Archdale* his ſecond wife, entered upon that part of the eſtate which was by dale's will deviſed to the *heirs male* of his body. And afterwards,

upon

upon the death of *Ann* the widow of *John*, *Henry* took poſſeſſion, as *heir male of the body of* Archdale, of the lands which ſhe had held for her life under the ſettlement. Upon a bill filed by *Ann* the daughter of John and heir general of *Archdale* and her huſband, claiming in her right, as *heir at law and heir of the body of* John Palmer, to be entitled, on failure of iſſue male of the whole blood, to that part of the eſtate which was limited by the ſettlement to *John Palmer* in fee; and alſo claiming in her right, *as heir at law of* Archdale, to be entitled to the eſtates of which the reverſion in fee was limited to him by the ſettlement, as not deviſed by his will; a caſe was made for the opinion of the judges of the King's Bench, upon the queſtion, Whether any and what eſtate paſſed by the ſettlement to the defendant *Henry Palmer*, as *heir male* of the body of *Archdale Palmer* the *grantor?* And whether any, and what eſtate paſſed to the ſaid defendant *Henry Palmer* as *heir male* of the body of the ſaid *Archdale Palmer*, by his will? Upon which the judges certified they were of opinion, that the defendant *Henry Palmer*, by the ſettlement, took *by deſcent* as *heir male of the body* of *Archdale Palmer* the *grantor*. That in caſe a *third perſon* had been the *grantor*, they ſhould have thought that *Henry Palmer* would have taken an eſtate in tail male *by purchaſe*, under the deſcription of *heir male* of *Archdale Palmer*. And that they were of opinion, that an eſtate in tail male paſſed to the defendant *Henry Palmer* as *heir male of the body of* Archdale Palmer *by his will*.

2 Salk. 675. Davies v. Speed, Show. Caſ. Parl. 104.

No eſtate for life can ariſe by implication, or by way of reſulting uſe to a perſon who was not the owner of the eſtate granted. As, where huſband and wife levied a fine of the wife's land to the uſe of the *heirs of the body of the huſband on the wife begotten, and for default of ſuch iſſue to the uſe of the right heirs of the huſband;* they had iſſue; the wife died, then the iſſue died, and then the huſband died; and the queſtion was, Whether the heir of the huſband or the heir of the wife ſhould have the land. And the court held, that no eſtate for life could ariſe to the huſband by implication, becauſe the eſtate was the wife's, to which he was a ſtranger; therefore the limitation to the heirs of the huſband, *&c.* was void, for want of a preceding freehold to ſupport it. An implied eſtate in the wife for her life would not do as ſhe died before her huſband, and, conſequently, before the remainder to his heir could commence.

Vide 1 P.W. 359. Sir T. Tippin's caſe there cited, and vide Jenk. Cent. 248. c. 18.

So, where a marrriage ſettlement was made by a *third perſon* to the uſe of *A.* the huſband for 99 years, remainder to truſtees *during his life* to ſupport contingent remainders, remainder to the wife for life, remainder to the firſt, *&c.* ſon of the marriage, remainder to the *heirs of the body* of *A.*, remainder to his *right heirs;* here the freehold *during* A.'s *life* being limited to truſtees, and he taking only a term of years, and the eſtate not moving from him, (for if it had, the limitation to his *right heirs* would have been the old reverſion) the remainder to his *heirs* was a *contingent remainder*.

Harris v. Barnes, 4 Burr. 2157.

And where lands were deviſed to *C.* for the term of 90 years if he ſhould ſo long live, and afterwards to the heirs of *C.*'s body, it was held that it veſted in the heir by purchaſe.

Hayes v. Foorde, 2 Black. Rep. 628.

Indeed in a caſe where the teſtator deviſed in remainder (after limitations to his brother *W* and his heirs males) to the *heirs males* of his brother *N*'s ſons, (who then had two ſons living,) without any antecedent deviſe to thoſe *ſons themſelves*, and by a ſchedule annexed to the will and referred to in it, (which the ſpecial verdict found to be part of the will,) purporting to be an account how the teſtator had diſpoſed of his eſtates by his will, it was ſaid, and for want of his brother *W*'s having ſons, then *to his brother N*'s ſons

N's *ſons*, and for want of ſons, then over: Upon the queſtion, Whether ne of the ſons of *N.* took an eſtate for life or in tail? the court of King's Bench in *Ireland* held he took only for life. But on an appeal to the King's Bench in *England*, Lord *Mansfield*, in delivering the opinion of he court, obſerved, that the only doubt was, whether by the words of he will the *ſons of* N. took any eſtate by implication; that ſuch doubt was emoved by the ſchedule, which expreſsly *gave an eſtate to the ſons of* N.; nd therefore the ſon of *N.* took an eſtate for life by implication *thus ex-lained*, which being conjoined with the eſtate expreſsly given to his *heirs ales*, by the will, would by the known rule of law give him an eſtate in ail male.—But this caſe turned on the operation of the ſchedule.

It has been doubted, Whether there can be a reſulting uſe on the con- Sand. on veyance by leaſe and releaſe; that is to ſay, if a bargain and ſale in conſi- Uſes, 480. deration of money is made to *J. S.* for a year, and then a releaſe is made to him in fee without any further conſideration or declaration of the uſe, Shortridge whether in this caſe the uſe will reſult to the releaſor?—Thus, where *A.* v. Lam-brought covenant as aſſignee of a reverſion, and ſhewed, that the leſſor, plugh, for conſideration of five ſhillings, bargained and ſold to *B.* for a year, and 2 Salk. 678. afterwards releaſed to him and his heirs, *virtute quorundam indentur' bar-* 7 Mod. 71. *gie venditionis et relaxationis, necnon vigore ſtatuti de uſibus*, &c. he was 2 Ld. Raym. ſeiſed in fee; it was objected, that the uſe muſt be intended to the releaſ- 798. 1 Lutw. ee and his heirs, becauſe no conſideration of the releaſe, nor expreſs uſe, appeared by the pleadings. It was argued in this caſe, that there could be no reſulting uſe on a leaſe and releaſe: that nothing paſſes to the leſſee in poſſeſſion, but by way of enlargement of the eſtate of ſuch leſſee: for it does not operate to give a new eſtate of the reverſion, but to increaſe the eſtate in poſſeſſion, according to the words of it: ſo it does not work by *merger* of the firſt intereſt, but by *enlarging* it: that if the releaſe enure only to enlarge the eſtate, the intereſt enlarged muſt be to the uſe of the leſſee, for it cannot be ſaid to be an increaſe of it: that if the practice had not prevailed to the contrary, it were odd to limit the uſe of a releaſe to any but the leſſee; for which reaſon it is, that we find it expreſſed in the uſe in the leaſe, on which the leſſor intends to build his releaſe, that the intent of the leaſe was to paſs an eſtate by releaſe upon it, for the uſe of a third perſon: that it would be abſurd to ſay, that my conveyance ſhould have no other operation but to extinguiſh or merge the eſtate, which the grantee has already, in order to have it brought back to me; and what uſe could there be of ſuch a way? if the party had any ſuch intent, it might ſoon be done by a ſurrender: that if it had been expreſſed in the uſe of releaſe, that he had already made him a leaſe for *years*, and that for the enlargement of that eſtate he made the releaſe, there could be no doubt but that it would be to the uſe of the releaſee; and there is no difference between the caſes, ſince this releaſe, in its own nature, enures by way of enlargement; beſides, here is alſo a valuable conſideration; for the leaſe and releaſe being but *one* conveyance, the five ſhillings, expreſſed to be the conſideration of the leaſe, ſhall extend to the releaſe; and alſo the acceptance of the releaſe is in its own nature a conſideration, for it implies an alteration of the eſtate of the leſſee, the conſent to which is a conſideration moving from the leſſee; and the only motive of the leſſee's parting with the old eſtate was to get a new one. On the other ſide it was ſaid, that before the ſtatute of 27 *H.* 8. *c.* 10. if *A.* made a feoffment, and a fine, or ſuffered a recovery without a uſe declared, and without conſideration, the feoffee, co[illegible]

lands to the use of *A.*: that since the statute the law as to this matter is not altered; for the statute only intended to execute the use to the possession, and by that means to destroy the use, but it did not intend to make any other thing pass by the conveyance than that which passed before: that there was the same reason the use should not pass in a release without consideration or express declaration, as in a feoffment, fine, and recovery; because the *use* and *estate* are distinct, and though the estate passes, yet the use does not, without a consideration or express limitation of it; and they are as much distinct things in a *release* as in any other conveyance: and the precedents are, that when a release is pleaded, there, always mention is made of a consideration or express use. 2 *Saund.* 11. 277. 2 *Vent.* 120. *Co. Entr.* 264. 220. 474. To the objection that this release enures by way of enlargement of the lease for a year, and therefore would participate of the consideration of it, and that the lease and release made but *one* conveyance, it was answered, that though the lease and release made but one conveyance as to the passing of the fee, yet they were in truth *distinct* conveyances, and had different operations, the one by the statute of uses, and the other by the common law: that as to what was said, that the release enures by way of enlargement of the estate of the lessee, it is true, that it gives him a greater estate than he had before, but that notwithstanding it destroyed the estate for years by merger, and it cannot participate of the consideration which is contained in the lease, which is perfectly distinct. However, *Holt*, C. J. without considering the operation of the conveyance, and admitting there might be a resulting use on it, held, that the manner of pleading the release, as above, to the releasee was good; and that if a feoffment be pleaded in the same manner, without shewing the use or a consideration, with an averment *virtute cujus* the feoffee was seised, the use shall be intended to be to the feoffee: that that was the form of pleading before the statute; and the statute has not altered, but rather confirmed, this manner of pleading.

See Sand. 95, 96, 485.

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Uses and Trusts.

2 Fonbl. E. Tr. 15.

The legislature, by the stat. of 27 *H.* 8. *c.* 10. are thought by Lord *Coke* (1 *Rep.* 125.) to have intended to abolish uses and trusts, though this opinion is controverted by Lord *Bacon* in his Readings on the statute. If such was the intention, courts of law, by too strict a construction of its provisions, defeated it, and rendered it necessary for courts of equity to retain that jurisdiction of which a more liberal interpretation of the statute by courts of law would probably have deprived them; so that, as Lord *Hardwicke* observed, "A statute made upon great consideration, and introduced in the most solemn manner, by a strict construction, has had no other effect, than to add at most three words to a conveyance." Courts of equity have, however, in the exercise of this jurisdiction, wisely avoided, in a great degree, those mischiefs which made uses intolerable. They now consider a trust-estate (either when expressly declared or resulting by necessary implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to the same charges in equity, except dower, to which the other is subject at law: and by a long series of uniform determinations for a century past, with some assistance from the legis-

1 Atk. 591.

2 Bl. Comm. 337.

ture, they have raiſed a new ſyſtem of rational juriſprudence, by which ruſts are made to anſwer in general all the beneficial ends of uſes, without heir inconvenience or frauds.

(A) By what general Rules Truſts are governed.

But there is a difference between truſts *executed*, and truſts *executory*; or though the former are conſtrued in the ſame manner as legal eſtates, et it is otherwiſe with the latter; for they are ſo moulded by the courts f equity, as beſt to anſwer the intent of the parties creating them. How- ver, it muſt be acknowledged, that even with theſe, where it does not olate ſuch intent, the ſame rule of conſtruction is applied as to legal eſ- tes.

Lord Glenorchy v. Boſville, Ca. temp. Talb. 19 Garth v. Baldwin, 2 Vez. 655. Roberts v. Dixwell, 1 Atk. 608. Page 387

(a *A. being*) So, Chaplin v. Chaplin, 3 P. Wms. 234. Caſhborne v. Scarſe, 1 Atk. 603 rgeſs v. Wheate, 1 Bl. Rep. 138. 161.

But, where a father deviſed lands to truſtees, in truſt to apply the nts and profits to the ſole and ſeparate uſe of the daughter during her e, not ſubject to the debts and controul of her huſband, and alſo to rmit his daughter by deed or writing to deviſe the lands to ſuch per- s as ſhe ſhould think proper; Lord *Hardwicke* held, that the huſ- nd ſhould not be tenant by the curteſy of the truſt; becauſe, though e daughter had the benefit of a truſt of inheritance, yet ſhe had nei- er a legal nor equitable ſeiſin during the coverture.

Hearle v. Greenbank, 3 Atk. 715.

It is eſtabliſhed, that there ſhall not be tenant in dower of a truſt.

3 P. Wms. 234. 2 Atk. 525. Ca. temp. Talb. 138.

It hath alſo been holden, that a truſt is not liable to eſcheat to the d in conſequence of attainder or want of heirs; becauſe the truſt could er be intended for his benefit.

Burgeſs v. Wheat 1. Bl. Rep. 231. Sand. on Uſes, 250.

Truſts in general are not barred by the ſtatute of limitations. Thus, a ſtee has been decreed to account and reconvey after a poſſeſſion of nty years (*a*), So, where a truſt is created for payment of debts, it l not only take a debt out of the ſtatute of limitations, incurred *ſince* its ation (*b*), but will alſo *revive* a debt barred by the ſtatute before it was ed (*c*). But this rule, that a truſt eſtate is not within the ſtatute of li- ations, holds only as between *ceſtui que truſts* and *truſtees*, not between *ſtui que truſt* and *truſtees* on one ſide, and *ſtrangers on the other* (*d*). And is ſaid, that a fine and five years non-claim will, in favour of a chaſer, bar a truſt term, though *ceſtui que truſt* be an infant (*e*). if a truſtee neglects to ſue within the time preſcribed by the te of limitations, *ceſtui que truſt*, though an infant, is bound by it

(a) Berrington v. Maſon. Finch. Rep. 262. (b) Norton v. Turville, 2 P. Wms. 144. (c) Blakeway v. Earl of Strafford, 2 P. Wms. 373. Jones v. Earl of Strafford, 3 P. Wms.

Lacon v. Briggs, 3 Atk. 107. (*d*) Llewellin v Mackworth, 2. Eq Ca. Abr. 579. Townd v. Townſhend, 1 Br. Ch. Rep. 551. (*e*) 3 P. Wms. 310. note G. (*f*) Wych v. Eaſt Incompany, 3 P. Wms. 309.

(B) What

(B) What amounts to a Declaration of Truſt, and when a Truſt ſhall be raiſed.

(1 *The ſtatute*) It has been holden, that this proviſion does not extend to declarations of truſts of perſonalty. Nab v. Nab, 10 Mod 404. *Sed vide* Fordyce v. Willis, 3 Bro. Ch. Rep. 577.

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(6 *A truſt*) So where a bond was given to *ceſtuy que truſt* to aſſign as he ſhould direct. Moſcroft v. Dowding, 2 P. Wms. 314. So, where a bond was given by a mother to her ſon to ſurrender a copyhold eſtate to him; the mother's brother, whoſe heir at law ſhe was, having been diſappointed of deviſing the eſtate to the ſon from the impracticability of ſurrendering it to the uſe of his will, and having taken this method of ſecuring it to him. Parks v. Wilſon, 10 Mod. 515. 9 Mod. 62. S. C.

Earl of Plymouth v. Hickman, 2Vern. 167.

A covenant to make conveyances, or to purchaſe lands to certain uſes hath been holden to be a good declaration of truſt and binding upon the eſtate.

Blake v. Blake, 2 Bro. P. C. 350. Deg v, Deg, 2 P. Wms. 415.

(7 *If a man*) 2 Br. P. C. 39. O'Hara v. O'Neil, S. P.

(10 *A. in*) 2 Atk. 155. Cottington v. Fletcher S. P.

(11 *So if*) 1 Ro. Abr. 378. pl. 1. 4 Vin Abr. 395. pl. 3. Roſwell v. Every. 5 Vin. Abr. 52 pl. 31. Sellack v. Harris. Pr. Ch. 3. Davenish v. Baines. 2. Vern 506. Oldham v. Litchfield Ambl. 67. Reech v. Rennigate. 3 Veſ. jun. 152. Barrow v. Greenough, Anſtr. 343. Newcomb v. Burdon. Similar deciſions on the ground of fraud.

(12 *But where*) So, other caſes have ſaid, that words merely *of recommendation* will not be ſufficient to create a truſt. Bland v. Bland, 24th February 1745. Le Maiſtre v. Banniſter, 2d November 1770, ſtated in Finch's note to Eales v. England, Pr. Ch. 200. Cunliffe v. Cunliffe Ambl. 626. However, notwithſtanding theſe deciſions, it now ſeems to be ſettled, that words of deſire, requeſt or recommendation (for requeſt and recommendation are conſidered as convertible terms) are ſufficient to create a truſt, provided that the property be certain, and the objects diſtinctly marked. Where any perſon gives property, and points out the objects, the property and the way in which it ſhall go, that does create a truſt, unleſs the ſhews clearly that his deſire expreſſed is to be controuled by the party, and that he ſhall have an option to defeat it. Eales v. England, Pr. Ch. 200. 2 Vern. 486. Glynn v. Harding, 1 Atk. 469. Vernon v. Vernon Ambl. 4. Palmer v. Scrib, 8 Vin. Abr. 289. pl. 25. Harland v. Trigg, 1 Bro. Ch. Rep. 142. Nowlan v. Nelligan, *Id.* 489. Pierſon v. Garnett, 2 Bro. Ch. Rep. 38. 226. Richardſon v. Chapman, Burn's E. L. tit Biſhop, pag. 220. Maſſey v. Sherman, Ambl. 520. Wynne v. Hawkins, 1 Br. Ch. Rep. 179. Malim v. Keighley, 2 Veſ. jun. 333. Barrow v. Greenough, 3 Veſ. jun. 152. In Puſhman v. Filliter, 3 Vez. jun. 7. where a teſtator gave the reſidue of his perſonal eſtate to his wife, deſiring her to provide for his daughter *A.* out of the ſame, as long as ſhe, the wife, ſhould live, and at her deceaſe to diſpoſe of what ſhould be left among his children, in ſuch manner as ſhe ſhould judge moſt proper; upon a bill filed by the children againſt the wife's repreſentative to have the benefit of this reſiduary bequeſt, the Maſter of the Rolls ſaid, that it was now clearly ſettled, that any words of recommendation by any perſon having a right to command do create a truſt, if the perſon and property are defined; but the queſtion in this caſe, he added, is merely a queſtion of conſtruction upon the words, "what ſhould be left;" and thoſe words, conſtrued to convey an abſolute gift to the teſtator's wife of any part of his property to any uſe ſhe might think proper, clothed only with a truſt for his daughter *A.*

Sonley v. Clockmakers Company, Br. Ch. Rep. 81.

An eſtate was deviſed to a body corporate in truſt to ſell, and that the money ariſing from the ſale, and the receipt and profits till the ſale, ſhould be divided between the teſtator's nephews and nieces. The queſtion was, Whether the deviſe to the corporation being void, the heir at law ſhould take beneficially, or ſubject to the truſt? And by *Eyre*, B.—Although the deviſe to the corporation be void at law, yet the truſt is ſufficiently created to faſten itſelf upon any eſtate the law may raiſe. This is the ground

n which courts of equity have decreed, in cases where no trustee has een named.—Decreed that the heir at law is a trustee to the uses of the ill.

(C) What shall be deemed a resulting Trust, or Trust by Implication.

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(1 *Ibid*) That parol evidence is admissible to rebut a resulting use is fully established by the ase of Lord Altham v. Earl of Anglesea, 2 Salk. 676. Dougl. 26.

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(5 *But trusts*) We cannot help suspecting the fidelity of the reporter in this passage, as the Chancellour is not made to deliver himself with his usual precision and accuracy. For there certainly have been other cases, besides those which are here put by my Lord Hardwicke, wherein constructive trusts have been admitted. For instance, where there were three lessees under a church, and one of them surrendered the old lease. and took a new one in his own name, it was holden to be a resulting trust for them all. Palmer v. Young, 1 Vern 276. So, if a guardian, or trustee for an infant, renew a lease, the renewed lease will be to the use of the infant. Whalley v. Whalley, 1 Vern 484. Lee v. Vernon, 7 Br. P. C. 432. So, if a trustee purchase lands with his trust money, and take the conveyance in his own name without declaring the trust, but reciting or otherwise admitting that the purchase was made with the profits of the trust estate, a trust will result for the person entitled to the profits. Deg v. Deg, 2 P. Wms. 414. So, if a mortragee, whose mortgage was taken in the name of a trustee, buys in the equity of redemption, in the name of the same trustee, without any declaration of the trust, yet there is a good resulting trust to the mortgagee. Acherley v. Acherley, 4 Br. P. C. 67. So, if a term is created to pay debts, or devised for a specifick purpose, after the debts paid, or purpose answered, there is a trust for the heir. Countess of Bristol v Hungerford, 2 Vern. 645. Levet v. Needham, *Id.* 138. So a grant of the next avoidance of a church to a person, without his privity, is a resulting trust for the grantor. Duke of Norfolk v. Browne, Pr Ch. 80. 1 Eq. Ca. Abr. 381. pl. 4. S. C. Nor is there a resulting trust only in those cases, where part of the estate only is disposed of or conveyed; for though the whole estate be conveyed, yet if it be for particular purposes, or on particular trusts, which by accident or otherwise cannot take effect, a trust will result; as, where a testator devises real estates to trustees to sell and convert into personalty for particular purposes specified in the will, and those purposes cannot be effectuated, the real estates, or the produce thereof, will in such case result to the heir. Cruse v. Barley, 3 P. Wms. 20. Randall v. Bookey, Pr. Ch. 162. Hamblyn v. Freeman, *Id.* 541. Stonehouse v. Evelyn, 3 P. Wms. 252. Arnold v. Chapman, 1 Ves. 108. Digby v. Legard, Tr. 1774, reported in the note in 3 Cox's P. Wms. 22. Akeroyd v. Smithson, Ibid. and 1 Br. Ch Rep. 503. Robinson v. Taylor, 2 Br. Ch. Rep. 589. Spink v. Lewis, 3 Br. Ch. Rep. 355. *Sed vide* Ogle v. Ogle, 1 Br. Ch. Rep. 501. Neither is it universally true, as is observed by Mr. Fonblanque (2 Eq. Tr. 122. note), that what is not conveyed will result; as, where the grantor limits an estate for years to himself, and an estate to another, by way of use, upon a contingency which may not happen within the term of years, an estate of freehold will not result to the grantor. Adams v. Savage, 2 Salk 679 & *supra*.

(7 *Wherever*) But it should seem, that there can be no implied trust between a lessor and lessee; because every lessee is a purchaser by his contract and his covenants, which excludes all possibility of implying a trust for the lessor; and therefore in that case, if there be any trust at all, it must be declared in writing. Pilkington v. Bayley, 7 Br. P. C. 526. But between an assignor and assignee there may be an implied trust. Hutchins v. Lee, 1 Atk. 447.

(9 *But where*) Show. P. C. 83. The result of the different cases upon this point is well stated by Mr. Sanders in his edition of Atkyns's Reports, 2 Vol. 150. note (2). If the consideration-money is *expressed* in the deed to be paid by the person in whose favour the conveyance is taken, and nothing appears in such conveyance to create a presumption that the purchase-money belonged to another, parol proof cannot be admitted *after the death of the nominal purchaser* to prove a resulting trust; for that would be contrary to the statute of frauds and perjuries. See the principal case. Walter de Chirton's case, Pr. Ch. 88. Heron v. Heron, *Id.* 163. Newton v. Preston, *Id.* 103. Lincoigne v. Thwyng, 1 Vern. 366. Hooper v. Eyles, 2 Vern. 480. Crop v. Norton, 2 Atk. 75. But, if the nominal purchaser *in his lifetime* gives a declaration of, or confesses the trust, that takes it out of the statute. Ambrose v. Ambrose, 1 P. Wms. 322 Ryal v. Ryal, 1 Atk. 59. In Lane v. Dighton, Ambl. 409. there was evidence, in Mr. Dighton's own hand-writing, that *the trust was had been sold, and the money laid out from time to time in the purchase of land.* So, if it appears on

the face of the conveyance (whether by recital or otherwiſe) that the purchaſe was made with the money of a third perſon, that will create a truſt in his favour. As in the principal caſe, Deg v. Deg, 2 P. Wms. 414. Ryal v. Ryal, *ubi ſupra*. Young v. Peachy, 2 Atk. 257.

(*a*) Hobart v. Counteſs of Suffolk, 2 Vern. 645. (*b*) Starkey v. Brooke, 1 P. Wms. 390.

It is a general rule, that where lands are deviſed for a particular purpoſe, what remains after ſuch purpoſe is ſatisfied ſhall reſult to the heir at law of the teſtator. Thus, if lands are deviſed to executors for payment of debts and legacies; after payment of debts and legacies the executors will be truſtees, as to the ſurplus, for the heir at law *(a)*, though the executors have no legacy, and the heir at law has an expreſs one *(b)*.

City of London v. Garway, 2 Vern. 571.

So, where *A.* deviſed lands to truſtees to ſell, and to diſpoſe of the money as he ſhould appoint, and for want of appointment to his four nephews; *A.* appointed ſeveral ſums to be paid to different perſons, which ſums did not amount to the value of the land; it was holden, that the ſurplus reſulted to the heir.

Wych v. Packington. 11 Br. P.C. 372.

So, where *A.* deviſed to his wife a rent-charge for thirteen years for payment of debts; and deviſed lands to his wife in augmentation of her jointure; it was holden, that the ſurplus of the rent-charge, after the debts were paid, reſulted to the heir.

Stonehouſe v. Evelyn, 3 P. Wms. 253.

So, where a rent-charge was deviſed to be ſold for payment of legacies to the amount of 800*l.*; but, if the rent-charge ſold for 1000*l.*, then an additional legacy of 100*l.* was given to *B.*, and another of 100*l.* was given to *C.*: it was holden, that if the rent-charge ſold for above 800*l.*, and leſs than 1000*l.*, the reſidue, above 800*l.*, would reſult to the heir at law, and not be divided between *B.* and *C.*

Digby v. Legard, 3 Cox's P. Wms 22. Akeroid v. Smithſon, *Ibid.* S. P. Sand. on Uſes, 245. 1 P. Wms. 700. 2 P. Wms. 532.

So, where *A.* deviſed her real and perſonal eſtates to truſtees in truſt to ſell and pay debts, and to pay the reſidue to five perſons, to be equally divided between them ſhare and ſhare alike (which words in a will create a tenancy in common, 1 *P. Wms.* 700. 2 *P. Wms.* 282.); and one of the reſiduary legatees died in the lifetime of the teſtatrix; the court held that this was a reſulting truſt (as to the ſhare in the real eſtate of the reſiduary legatee, who died in the teſtatrix's lifetime), for the benefit of the heir at law. And upon a ſimilar bequeſt of perſonal eſtate, it ſeems, the ſhare of the legatee ſo dying would go according to the ſtatute of diſtributions

Gravenor v. Hallum, Ambl. 643.

So, where lands were deviſed to be ſold, and part of the money ariſing by the ſale was given to *charitable uſes*, and the reſidue of *the money* was given over; it was holden, that the part given in mortmain ſhould reſult to the heir at law, and not go to the reſiduary legatees.

Arnold v. Chapman, 1 Ves. 108.

So, where a teſtator gave a legacy to his executors by name, and then deviſed his copyhold to *A*, he paying his executors 1000*l.*, and after payment of debts and legacies, gave the reſidue to a charity, it was holden that the 1000*l.*, being a charge on the real eſtate, and not well diſpoſed of by reaſon of the mortmain act, the heir at law was entitled to it, by way of reſulting truſt.

Robinſon v. Taylor, 2 Br. Ch. Rep. 589.

So, where the teſtator directed the reſt and reſidue of his real and perſonal eſtates to be ſold by truſtees, and thereout to pay annuities and legacies, and then to pay the ſurplus to *A. B.* for her life: upon the death of *A. B.* it was holden, that ſo much of the ſurplus as aroſe from the real eſtate was a reſulting truſt for the heir at law, and the reſt for the next of kin.

Hutcheſon v. Hammond,

So, where a teſtatrix, having an eſtate which came to her *ex parte materná*, on her marriage conveyed the ſame to truſtees to ſuch uſes as

ſhould direct, with remainder to her own right heirs; and afterwards by will directed the eſtate to be ſold, the money to be laid out in the funds, and the truſtees to permit the huſband to receive the intereſt for his life; and then, after deducting 3500*l.* to certain uſes which veſted in *C. D.*, and after paying 1000*l.* to *A. B.*, to pay the reſidue to three perſons; and by a codicil gave her huſband a power of appointing the 3500*l.* in caſe *C. D* ſhould marry without his conſent; *A. B.* died in the teſtatrix's life-time before the codicil made, but the teſtatrix took no notice thereof in the codicil; it was holden, that the 1000*l.* were to be conſidered as real and not perſonal eſtate, and reſulted to the heir at law of the teſtatrix *ex parte materná*. 3 Br. Ch. Rep. 128.

So, where a teſtator directed real eſtate to be ſold, and the money ariſing from the ſale to be inveſted in the funds, and then ordered the reſidue of his perſonal eſtate to be laid out in the funds, to remain there for 10 years, and at the end thereof gave the ſame to his next of kin; the Chancellour held, that the next of kin in that caſe muſt mean next of kin at the time of the death; and the teſtator having but one brother, who fell within that deſcription, and he having died within the ten years, the legacy was lapſed, and ſo much as was produced by the real eſtate muſt revert to the heir at law of the teſtator, and ſo much as was perſonalty to the repreſentatives of the brother. Spink v. Lewis, 3Br. Ch. Rep. 355.

So, where a teſtator deviſed his real and perſonal eſtate to his executor in truſt to pay debts and legacies, and afterwards gave the reſt and reſidue to the executor, but declared, that the only purpoſe for which he deviſed his real eſtate was that he might ſubject it to his debts; it was holden, that ſo much of the real eſtate, as was not applied to the debts, ſhould go to the heir. Holliday v. Hudſon, 3 Vez. jun. 210.

But this rule, that where lands are deviſed for a particular purpoſe, after the purpoſe ſatisfied, there is a reſulting truſt for the heir at law, admits of ſeveral exceptions. Thus, Lord *Hardwicke* ſaid if *J. S.* deviſed lands to *A.* to ſell them to *B.*, for the particular advantage of *B*, that advantage is the only purpoſe to be ſerved according to the intent of the teſtator, and to be ſatisfied by the mere act of ſelling, let the money go where it would; and that there was no precedent of a reſulting truſt in ſuch a caſe. So, if *A.* deviſed lands to *J. S.* to ſell to the beſt price to *B.*, or to leaſe for three years at ſuch a fine, there could be no reſulting truſt to the heir of the teſtator. 1 Atk. 612.

Again, a teſtator deviſed to truſtees to ſell, and to diſpoſe of the money ariſing by the ſale, as they, or the major part of them ſhould think proper; he having previouſly intimated an intention of giving the money to charitable uſes. Here the heir at law can have no reſulting truſt; for a man empowering others to ſell may diſinherit his heir, as well as by his own actual diſpoſition. Nor can his truſtees have any beneficial intereſt; for his giving his eſtates to perſons whom he *names truſtees* to ſuch purpoſes, as they, or the *major part* of them, ſhall judge fit, plainly ſhews he intended them no benefit, but only an authority. Cook v. Duckenfield, 2Atk. 562.

So, a teſtator deviſed to his couſin *T. M.* by name all his meſſuage, &c., *in truſt* to ſell for the payment of all his debts and legacies within a year after his death, and made him executor, but gave him no legacy, though he was as nearly related to him as his heir at law. It was holden by two Lords Commiſſioners againſt one, that there ſhould be no reſulting truſt; for then the executor, who was taken notice of as his couſin, would have nothing but his labour for his pains. Coningham v. Meliſh, Pr. Ch. 31. 1 Eq. Co. Abr. 273. S. C.

Rogers v. Rogers, 3 P. Wms. 193.

So, a teſtator by his will made his *dearly beloved* wife *ſole heireſs* and executrix of all his real and perſonal eſtate, to ſell and diſpoſe thereof at her pleaſure, and to pay his debts and legacies, and gave his brother (who was his next of kin and heir) five pounds. It was decreed, that the teſtator's wife was entitled to the premiſes deviſed for her own benefit, and that there was no reſulting truſt to the heir at law of the teſtator: that the deviſe that the wife ſhould be ſole heireſs of the real eſtate did in every reſpect place her in the ſtead of the heir, and not as a truſtee for him: that it was the plainer by reaſon of the language of tenderneſs and affection, his *dearly beloved wife*, which muſt intend to her ſomething beneficial, and not what would be a trouble only: and what made it ſtill ſtronger was, that the heir was not forgotten, but had a legacy of 5*l.* left him.

Mallabar v. Mallabar, Ca. temp. Talb. 78.

So, a teſtator deviſed his real eſtate to his ſiſter *in truſt* to ſell and with the produce of the ſale to pay his debts and certain pecuniary legacies; and after payment of his debts and legacies gave her the reſidue of his perſonal eſtate. Lord *Talbot* held, that there was no reſulting truſt for the heir; and that the ſiſter ſhould have the whole reſidue, after the ſale of the eſtate, both of the money ariſing by the ſale, and of the perſonal eſtate.

Hill. v. Biſhop of London, 1 Atk. 618.

A teſtator deviſed the advowſon of a church to his mother-in-law, willing and deſiring her to ſell and diſpoſe of the ſame to *Eton College*, and on their refuſal, to *Trinity College* in *Oxford*; and on the refuſal of both theſe ſocieties, to any of the Colleges in *Oxford* or *Cambridge*. It was decreed that there was in this caſe no reſulting truſt to the heirs at law of the teſtator, but a deviſe of the beneficial intereſt to the teſtator's mother-in-law with an injunction to ſell to particular ſocieties.

Durour v. Motteux, 1 Vez. 320.

A. by his will gave all his real eſtate to truſtees to ſell and diſpoſe of the whole, with his perſonal eſtate, for payment of his debts, legacies, and performance of his will; and gave ſeveral legacies, and, among the reſt, 1200*l.* to be applied to charitable uſes within the mormain act; and then directed the truſtees to place out all the reſidue of his eſtate and intereſt therein upon ſecurities, and divide among ſeveral perſons. The whole of the 1200*l.* being a void deviſe, the queſtion was, Whether it ſhould go to the heir at law, or to the reſiduary legatees? Lord *Hardwicke* was of opinion, that the money which ſhould ariſe by ſale of the real eſtate was turned into perſonal by the teſtator, and ſo intended; and therefore the heir at law had no claim to it.

Wright v. Row. 1 Br. Ch. Rep. 61.

A deviſe was in truſt, among other things to pay 4*l.* a year, ariſing out of real eſtate, to a charity. This charge being void by the ſtatute of mortmain, it was holden, that it did not go to the heir at law, but ſurvived for the benefit of the ſpecifick deviſee, as ariſing out of his eſtate.

Popham v. Lady Ayleſbury. Ambl. 68.

A. deviſed freehold eſtates to truſtees in truſt by rents and profits, or by ſale or mortgage, to pay debts and legacies, which his perſonal eſtate ſhould not be ſufficient to diſcharge, and ſubject thereto, in caſe *T. B.* ſhould attain 21, in truſt for him and his heirs. It was contended, that the ſurplus profits of the eſtates, after payment of the annuities left by the will and the intereſt of the debts, were undiſpoſed of until *T. B.* ſhould attain 21, and, conſequently, the heir at law was entitled to them. But the court held this a complete deviſe to the truſtees until *T. B.* ſhould attain 21, and that the ſurplus profits, after the legacies, annuities, and intereſt of debts paid, ſhould be applied to ſink the principal of the debts.

(D) Who

(D) What shall be deemed an Advancement, and what a Trust.

A father purchased a copyhold in the name of the defendant his eldest son, an infant of 11 years old, and enjoyed it during his life, and afterwards having surrendered it to the use of his will, devised it to his wife for life, remainder to his younger children, and made other provisions for the defendant, who, having recovered in ejectment, the bill was to be relieved against it. Lord Chancellour *Jeffries* conceived, that as he was but an infant at the time of the purchase, the purchase was an advancement for him, and not a trust, notwithstanding the father enjoyed it during his life. Mumma v. Mumma, 2 Vern. 19.

So, where a father purchased a copyhold in his son's name, who was then 18 years of age, and the father continued in possession till his death; Lord *Hardwicke* said—I am of opinion it should be considered as an advancement for the son, and found my opinion greatly on the case of *Mumma* v. *Mumma (supra)*; and though two receipts are produced under the son's hand for the use of the father, I think that will not alter the case; for the son, being then under age, could give no other receipt in discharge of the tenants who held by lease from the father. Taylor v. Taylor, 1 Atk. 386.

In the manor of *H.* it is the custom to grant copyholds for three lives *successive*. *S. D.* purchased copyhold premises holden of this manor, and took the grant to himself and *M.* his wife, and *W.* his eldest son, to take in succession for their lives.—By his will he devised all his interest in these copyholds (amongst others) to his youngest son. There were no other circumstances in this case; and the question was, Whether this was an advancement to *W.*, or, whether he was a trustee for his father? The court, after full consideration, determined, that this was to be taken as an advancement for the eldest son.—The Chief Baron in delivering the judgment of the court, observed, that in the cases cited the circumstance of the nominee being a *child* of the purchaser, had been considered as a *circumstance of evidence to rebut the resulting trust*, and not as *raising a consideration* in itself, which seemed a more simple way of treating it. That the circumstance of the custom of the manor required two nominees besides the purchaser, had been insisted upon in the present case, as taking off the inference of an intended advancement, and had been relied upon in that view by the Lords Commissioners in *Dickinson* v. *Shaw* in Chancery, 22d May 1770, in which case also the grant was for three lives *successive*. But that, notwithstanding that authority, the court was of opinion, this circumstance was not sufficient to turn the presumption against the child. Dyer v. Dyer, in the Exchequer, Nov. 1788. Cox's P. Wms. 111, note.

But this is a weaker case than where the purchase is made in the son's name only; and therefore the son shall not have the benefit of survivorship against a judgment creditor of the father.

A father upon his son's marriage gave him a considerable advancement; and having several younger children who were unprovided for he sold an estate; but 500*l.* only of the purchase-money being paid, he took security for the remainder in the name of himself and his son. The father received the interest and great part of the principal without any opposition from the son, as did his executrix after his death, the son writing receipts for the interest. A question being made, Whether the son should be considered as trustee for his father, or interested in his own right? Lord *Hardwicke* said—No doubt, where a father takes an estate in the name of his Pole v. Pole. 1 Ves. 76.

his ſon, it is to be conſidered as an advancement; but that is liable to be rebutted by ſubſequent acts. So, if the eſtate be taken jointly, ſo as the ſon may be entitled by ſurvivorſhip: that is weaker than the former caſe, and ſtill depends on the circumſtances. The ſon knew here that his name was uſed in the mortgage deed, and muſt have known whether it was for his own intereſt, or only as truſtee for his father; and inſtead of making any claim, his acts are very ſtrong evidence of the latter. Nor is there any colour why the father ſhould make him any farther advancement, when he had ſo many children unprovided for; and in uſing his ſon's name, the father might have a view that his ſon ſhould be a truſtee rather than another.

Stileman v. Aſhdown, 2 Atk. 477.

A bill was brought by an executor to have ſatisfaction out of the eſtate of the defendant's late father upon a judgment given by him to the plaintiff's teſtator. It appeared, that in 1700 the father made a ſmall purchaſe jointly with the defendant to them and their heirs: that in 1708 he made another joint purchaſe with his youngeſt ſon; and ſettled it by way of proviſion for younger children, and paid the purchaſe-money for both eſtates, and continued in poſſeſſion till his death, which happened in 1735. The ſons afterwards entered upon theſe eſtates. It was inſiſted on the part of the defendants, that theſe two purchaſes were to be conſidered with reſpect to a moiety and on account of the ſurvivorſhip, as an advancement of the ſons, and, conſequently, they were entitled to retain the eſtate, and not liable to the plaintiff's judgment. But Lord *Hardwicke*, after obſerving that he thought the caſes had gone full far enough in favour of advancements, and that he ought not to carry it further, ſaid, Here, the purchaſe is in the names of the father and ſon as joint-tenants: now this does not anſwer the purpoſe of an advancement, for it entitles the father to the poſſeſſion of the whole till a diviſion, and to a moiety abſolutely even after a diviſion, beſides the father's taking a chance to himſelf of being a ſurvivor of the other moiety: nay, if the ſon had died during his minority, the father would have been entitled to the whole by virtue of the ſurvivorſhip, and the ſon could not have prevented it by ſeverance, he being an infant. Suppoſe a ſtronger caſe, that the father had taken an eſtate in the purchaſe to himſelf for life, with remainder to his ſon in fee, ſhould this prevail againſt the creditor? No, certainly, for the father having the profits for life, and the ſon only a remainder, the eſtate would have been liable. A material conſideration for the plaintiff, is, that the father might have other reaſons for purchaſing in joint-tenancy, namely, to prevent dower upon the eſtate, and other charges, *&c.* Then conſider how it ſtands in reſpect of the creditor. A father was in poſſeſſion of the whole eſtate, and muſt neceſſarily appear to be the viſible owner of it, and the creditor too would have had a right by virtue of an *elegit* to have laid hold of a moiety, and ſo it differs extremely from all the other caſes. Now it is very proper that this court ſhould let itſelf looſe as far as poſſible, in order to relieve a creditor, and ought to be governed by particular circumſtances of caſes. I ſhall therefore decree the creditor in this caſe to be let in upon theſe eſtates.

(E) What Acts of a Truſtee ſhall be a Breach of Truſt, &c. or ſhall be deemed to alter or vary the Nature of it.

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(1 *Truſtees*) But this opinion of Lord Hobart is directly contradicted by my Lord Hardwicke, who ſays, that "a truſt is where there is ſuch a confidence between the parties, that no action *at law* will lie; but it is merely a caſe for the conſideration of this court," meaning a court of equity. 2 Atk. 612.

(3 *Where*) 1 Eq. Ca. Abr. 385. S. C. Gil. Eq. Rep. 34. S. C.

(4 *S., where*) Note, this deciſion was upon an application to the court to direct the truſtee to ſue.

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(6 *If A.*) 2 Atk. 630. Story v. Lord Windſor, 3 Atk. 563. Shields v. Atkins. S. P.

If a truſtee conveys to one who has *no* notice of the truſt, and the grantee levies a fine, and five years paſs, and afterwards the truſtee purchaſes the ſame lands again for a *bonâ fide* conſideration; ſtill he ſhall be truſtee as he was before. Bovey v. Smith, 1 Vern. 70.

But, if a truſtee, when in poſſeſſion, alienate for a valuable conſideration, and without notice, the ſale will be good, and the purchaſer will not be a truſtee in his ſtead. The *ceſtui que truſt* may indeed compel the truſtee to make ſatisfaction in ſuch caſe; but the breach of truſt is conſidered but as a ſimple contract debt, and can only fall upon the perſonal eſtate of the truſtee, unleſs the truſtee has acknowledged the debt to the truſt-eſtate under hand and ſeal. Millard's caſe. 2 Freem. 43. Hardr. 469. 1 Ch. Rep. 245. Vernon v. Vaudrey, Barnardiſt. Ch. Rep. 280. 2 Atk. 119. S. C. Gifford v. Manley, Ca Temp. Talb. 109.

So, where an executor in truſt for an infant of a leaſe for 99 years, determinable on three lives, upon the lord's refuſing to renew but for lives abſolutely, complied with the lord, and changed the years into lives; this, upon the infant's dying under twenty-one and inteſtate, was adjudged to be a truſt for his adminiſtrator, and not for his heir. Witter v. Witter. 3 P. Wms. 99.

But, where a feme purchaſed a church leaſe to her and her heirs for three lives, and died, leaving an infant daughter, two of the lives died, and the guardian renewed the leaſe, it was holden, that this renewed leaſe was a new acquiſition, and ſhould go to the heirs on the part of the father. However, in general, it is true, that a guardian or truſtee ſhall not alter the nature of an infant's property, ſo as to change the right of ſucceſſion in it in caſe of the infant's death, unleſs by ſome act manifeſtly for the advantage of the infant at the time. Maſon v. Day, Pr. Ch. 319. Pierſon v. Shore, 1 Atk. 480. S. P. Rook v. Warth, 1 Vez 461. Tullit v. Tullit, Ambl. 370. Inwood v. Twyne, *Id.* 417. Vernon v. Vernon, cited in *ex parte* Bromfield Br. Ch. Rep. 513.

(F) What Acts of the Truſtee, jointly with *Ceſtui que Truſt*, or by *Ceſtui que Truſt* only, ſhall defeat the Truſt, or deſtroy contingent Remainders.

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(2 *If Truſtees*) 1 Br. P. C. 359. S. C.

(G) In

(G) In what Cases Equity will decree Trusts to join in a Recovery, &c. with *Cestui que Trust.*

Symance v. Tattam, 1 Atk. 613.

On a bill to compel trustees to join in a sale which would destroy the contingent remainders, and likewise the uses in a settlement made before marriage, it appeared, that the limitations were to the husband for 99 years, if he so long lived, to the wife for her life, remainder to trustees to support contingent remainders, remainder to the heirs begotten on the body of the wife, remainder to the heirs of the husband; and that the first declaration under it was, that it was the intention of the settlement to make a provision for the children of the marriage, with a covenant on the part of the husband, that he would not bar the estate-tail to the wife, but would preserve the uses before limited and appointed. Lord *Hardwicke* dismissed the bill, and said—There are many cases in which the court will compel the trustees to join in such conveyance as will destroy contingent remainders; but then it must be in some measure to answer the uses intended by the settlement, and has been usually done in the case of old settlements as in *Winnington* v. *Foley*, *(supra)*; but, I believe, there is no instance where they have compelled such trustees to join with the father, termor for years, and the son to sell the estate. The old notion was, that these trustees were only honorary; but this has been varied since, for in the case of *Pigot* v. *Pigot*, Lord *Harcourt* was of a different opinion, and in *Mansell* v. *Mansell*, *(supra,)* Lord Chancellour *King*, assisted by Lord Chief Justice *Raymond* and Lord Chief Baron *Reynolds*, was of opinion, that *trustees for preserving contingent remainders, joining to destroy them, were guilty of a breach of trust, and that there was no diversity, whether the settlement be voluntary, or for a valuable consideration, or by will only.* But the reason of those cases turned upon what the court do, after trustees have actually destroyed the remainders: here the case is different, for the application to the court is to compel the trustees to do an act which would destroy the remainders. There is another difficulty, which is, the husband's actually covenanting in the settlement, that he will not bar the estate-tail to the wife, but preserve the uses before limited; and even though the husband were dead, the wife could not do any act by which she could bar the estate-tail, notwithstanding the trustees should consent to join with her; for she is absolutely restrained from barring it by 11 *H.* 7. c. 20. If it had been an application only to destroy the contingent remainders, I should have taken more time to consider: but here, it would overturn all the uses of a marriage settlement, which would be assuming too much power, and would be making a decree to compel a breach of the husband's own covenant.

Woodhouse v. Hoskins, 3 Atk. 22.

J. H. devised his lands after the death of his wife and a trust-term of 1000 years, to his son *B. H.* for 99 years, if he should so long live, without impeachment of waste, remainder to two trustees and their heirs during the life of his son *B.*, to preserve contingent remainders, remainder to the first and other sons of *B.* in tail-male, remainder to *H. H.* his second son for 99 years, if he should so long live, remainder to the same trustees and their heirs during the life of *H. H.* to preserve contingent remainders, remainder to his first and every other son, remainder to his other sons in like manner, remainder to *J. H.*'s daughters, remainder to the testator's heirs. There was a power for the sons, when in possession, to make jointures and leases, except as to particular lands, and another power for

nd the other ſons within two years after being in poſſeſſion, and having a
n of the age of 18, to revoke the former uſes, and to limit new uſes, ſo
at the premiſes be limited to the heirs-male of the ſons in the ſame man-
er as theſe limitations, and to ſettle ſuch like power of revocation. The
eſtator died. *B. H.* his eldeſt ſon died without iſſue. *H. H.* the ſecond
on married and had a ſon *C. H.*, now above 21. *H. H.* and his ſon be-
ame indebted by bonds to creditors, and made aſſignments of the ſettled
ſtates in truſt for creditors, and agreed to ſuffer a common recovery, to
ake the aſſignment and proviſion for the creditors effectual. A bill was
rought by the creditors againſt *H. H.* and his ſon *C.*, and againſt *T. H.*
he fifth ſon of *J. H.*), (all the ſons who had intermediate remainders as
efore, being dead without iſſue,) and againſt *A. B.* the heir of the ſurviv-
g truſtee, to preſerve contingent remainders, in order to compel her to
in in a common recovery, and that the plaintiffs might have an effectual
curity and ſatisfaction for their debts. Lord *Hardwicke*—It is agreed,
ere is no precedent where the court have decreed in ſuch caſes the truſtee
join; and I am of opinion, this is not ſuch a caſe, where the court
ght to decree it. Truſtees of this kind are called *honorary* truſtees, and
truſted by parties to preſerve the contingent remainders: but, I will not
y, if the truſtee who is appointed ſhould join, it would be ſuch a breach
truſt, that this court would decree a ſatisfaction. The reaſon of mak-
g the father tenant for 99 years is, in order to preſerve the eſtate. It
y likewiſe be the deſign of ſuch ſettlements to prevent the father's in-
ence over the ſon when of age, if the father were ſeized of the free-
ld, to get the ſon to deſtroy the ſettlement. Here the intention is to
y the debts of the father. The objection is, that the truſtee is truſtee
the firſt tenant in tail, and that when the tenant in tail is ſeiſed of the
eehold, then he has a power to bar, and not before. As to the caſes,
ere are but few: Mr *Winnington*'s was in order to let in the jointure,
d a proviſion for younger children, which was ſtill carrying it on in the
mily. The argument made uſe of by the plaintiff's counſel, was, that
re it is prayed to execute the truſt of articles; and to be ſure, it is true;
this court is not to decree every truſt created by the parties; and
ough, as has been ſaid before, the court might not condemn the truſtee,
he conſented, yet it does not follow that the court will compel the truſ-
, and I think *this* the very caſe which was intended to be prevented by
truſt: wherefore the bill muſt be diſmiſſed.

F. B. deviſed freehold and copyhold eſtates to *T. C. B.* for 99 years, if ſhould ſo long live, remainder to the defendant *L.* during the life of *C. B.* in truſt to preſerve contingent remainders, remainder to the firſt other ſons of *T. C. B.* in tail male, remainder to *J W.* in fee. *T. C.* had iſſue only one ſon, who had attained 21 years of age, and the fa- r and ſon now filed a bill againſt *L.* the truſtee, and *J. W.* the re- inder-man, ſtating, that they were deſirous of ſuffering a recovery and ting the eſtate ſo as to preſerve the contingent remainders to the ſecond other ſons of *T. C. B.*, and praying, that *L.* the truſtee might be de- d to join in making a tenant to the *præcipe* for that purpoſe, ſubmitting declare the uſes of the recovery to the ſecond and other ſons of *T. C. B.* way of contingent remainders as limited by the will, and to limit an te to a truſtee for the purpoſe of ſupporting and preſerving thoſe con- ent remainders. The Maſter of the Rolls, Sir *Thomas Sewell*, obſerv- that, with reſpect to remainders to remote relations in *ſettlements*, re the perſons to whom they were limited were not the immediate ob-

Barnard v. Large, 2 Cox's P. Wms. 684. note. 1 Br. Ch. Rep. 534. S. C. Ambl. 774. S. C.

jects

jects of the parties, or, where they ſtand in oppoſition to the firſt tenant in tail, deſiring a reaſonable benefit, conſiſtent with the intentions of the creator of the limitations, their pretenſions have not been much conſidered; but in the principal caſe, all took as volunteers, and were all equally to be attended to. His Honour then conſidered the ſeveral caſes on this ſubject, and ſaid, that, from a view of them all, it ſeemed, that when the eldeſt ſon, tenant in tail, is of age, and about to marry, and thereby create *diſcontinue*, inſtead of *deſtroying* the purpoſes of the ſettlement, and in ſome caſes where there has been particular diſtreſs under particular circumſtances, which ought to have induced the truſtee to join, the court has interfered; otherwiſe not: that in the principal caſe he was called upon to diſturb the teſtator's diſpoſition merely for the ſake of diſturbing it, for which he ſaw no reaſon, and diſmiſſed the bill with coſts.

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(*Note*; *A deviſe*) The rule now ſeems to be, that wherever the character of truſtee can be faſtened on the deviſee, the aſſets ſhall be equitable. Lewin v. Oakley, 2 Atk. 52. Silk v. Prime, 1 Br. Ch. Rep 138. Batſon v. Lindegreen, 2 Bro. Ch. Rep. 94.

(H) When a Truſt is to be executed, what Eſtate or Intereſt is to be conveyed, and to whom.

1 Eq. Abr. 387. Trevor v Trevor.

A. in conſideration of an intended marriage, entered into articles, by which he covenanted with truſtees to ſettle an eſtate to the uſe of himſelf for life, without impeachment of waſte, remainder to his intended wife for life, remainder to the uſe of the *heirs males* of his body upon the body of his intended wife to be begotten, and the heirs males of ſuch heirs males iſſuing, remainder to the right heirs of the ſaid *A.* for ever; and covenanted, that in caſe the ſaid limitations were not thereafter well made according to the intent of the ſaid articles, that he and his heirs would ſtand ſeiſed of the premiſes, until a further aſſurance thereof ſhould be made to ſuch uſes, intents, and purpoſes, as in the articles were before expreſſed and declared. The marriage took effect, and *A.* had iſſue four ſons and two daughters. The articles were laid *by unnoticed* for ſeveral years; and *A.* levied a fine of the lands (ſuppoſing himſelf to be tenant in tail under the articles); and afterwards, both the truſtees being dead without requeſting a ſettlement, *A.*'s eldeſt ſon having married againſt his father's conſent, and by ſeveral other acts of weakneſs and diſobedience much offended him, *A.* by deed reciting the ſaid articles, and the weakneſs and diſobedience of his eldeſt ſon, declared, that the ſaid fine levied by him, ſhould enure to the uſe of himſelf for life without impeachment of waſte, remainder to his wife for life, remainder to his ſecond ſon in tail male, with like remainders to his two younger ſons, with remainder to his own right heirs; and after making a like ſettlement of other lands, *A.* died inteſtate, leaving a great perſonal eſtate, and leaving a real eſtate in *Ireland*, and new-purchaſed lands in *England*, together of the value of 1000*l.* *per annum* and upwards. Upon his death, the eſtate in *Ireland* and the new-purchaſed lands deſcended to his eldeſt ſon, who alſo became entitled to his ſhare (upwards of 9000*l.*) of the perſonal eſtate. The ſecond ſon entered upon the ſettled eſtates, and the eldeſt ſon having got poſſeſſion of the articles, which it appeared had been thrown by ſeveral years as uſeleſs, brought his bill for a ſpecifick performance thereof.

It was inſiſted for the defendant, that though by the firſt part of the

s they ſeemed to be *executory*, yet by the covenant to ſtand ſeiſed in the part of them, they were actually and immediately *executed;* that he eby covenanted to ſtand ſeiſed to the before-mentioned uſes, till a ſet- ent was made accordingly; that no ſettlement having been made, the continued to be executed by virtue of that covenant; that by theſe he was plainly tenant in tail, and by the fine had bound his iſſue, and e himſelf maſter of the eſtate, and might diſpoſe of it as he thought But Lord Chancellour ſaid, that upon articles the caſe was ſtronger on a will; that articles were only minutes or heads of the agreement he parties, and ought to be ſo modelled when they come to be carried execution, as to make them effectual. That the intention was to give only an eſtate for life; that if it had been otherwiſe, the ſettlement ld have been vain and ineffectual, and it would have been in *A.*'s er, as ſoon as the articles were made, to have deſtroyed them; that covenant to ſtand ſeiſed was, until ſuch time as the ſaid uſes were well ed, according to the true intent and meaning of the articles. That ſettlement had been made defective in any particular, it would not e been final or concluſive; that a ſecond ſettlement muſt have been *e till the uſes were well and truly raiſed;* and that this covenant for ſubſiſted till ſuch ſettlement ſhould be made; that he hoped never ee the time when the court would ſo far have power as to judge what aviour of a ſon ſhould amount to a forfeiture of his eſtate; and there- thought, if a ſettlement had been made, no miſbehaviour of the ſon ld amount to a forfeiture of it. That this eſtate being ſpecifically ed to be ſettled, it was a truſt for the eldeſt ſon, which paſſed with lands into whoſe hands ſoever they came, and could not be defeated by act of the father or the truſtees. And therefore he decreed a con- nce to the plaintiff, and the heirs male of his body, and an account the profits from his father's death, and the deeds and writings to be de- ed up. This decree was afterwards affirmed in the Houſe of Lords. 2 Brown. Caſes Parl. 122.

o where the huſband, before marriage, agreed by articles to ſettle s to the uſe of himſelf and his intended wife for their lives, and the of the ſurvivor, and afterwards to the uſe of the heirs of his body on wife, and after the marriage, by ſettlement reciting the articles con- d the lands to the uſe of himſelf and his wife for their lives, and the of the ſurvivor, remainder to the uſe of the heirs of his body by his ; it was held not to be a *proper execution* of the articles, though the les did not expreſsly mention the intent to provide for the iſſue. For, d *Talbot* obſerved, it could not be doubted but that, upon an applica- to the court for carrying the articles into execution, it would have de- d it to be done in the ſtricteſt manner, and would never have left it in huſband's power to defeat and annul every thing he had been doing; the *nature of the proviſion* was ſtrong enough for that purpoſe, with- any expreſs words. Streatfield v. Streatfield, Caſ. temp. Talb. 176.

Where articles were entered into by the huſband, in which he covenant- hat as well all the real eſtate that he had then in *Ireland*, as all the s and tenements which he ſhould purchaſe during the life of his in- ed wife, ſhould *deſcend and come to the heirs male* to be begotten *on the of the intended wife by the huſband*, and ſhould be ſecured and ſettled he ſaid *heirs male* by the huſband, as the counſel of the intended wife ld adviſe. Upon an appeal to the Houſe of Lords, from a decree of court of Chancery in *Ireland*, the decree was reverſed; and it was ered that a ſon of the marriage ſhould be deemed a *tenant in tail*, under the Cuſack v. Cuſack, 1 Er. Caſ. Parl. 470.

jects of the parties, or, where they ſtand in oppoſition to the firſt tenant in tail, deſiring a reaſonable benefit, conſiſtent with the intentions of the creator of the limitations, their pretenſions have not been much conſidered; but in the principal caſe, all took as volunteers, and were all equally to be attended to. His Honour then conſidered the ſeveral caſes on this ſubject, and ſaid, that, from a view of them all, it ſeemed, that when the eldeſt ſon, tenant in tail, is of age, and about to marry, and thereby create *tinue*, inſtead of *deſtroying* the purpoſes of the ſettlement, and in ſome caſes where there has been particular diſtreſs under particular circumſtances, which ought to have induced the truſtee to join, the court has interfered; otherwiſe not: that in the principal caſe he was called upon to diſturb the teſtator's diſpoſition merely for the ſake of diſturbing it, for which he ſaw no reaſon, and diſmiſſed the bill with coſts.

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(H) When a Truſt is to be executed, what Eſtate or Intereſt is to be conveyed, and to whom.

1 Eq. Abr. 387. Trevor v Trevor.

A. in conſideration of an intended marriage, entered into articles, by which he covenanted with truſtees to ſettle an eſtate to the uſe of himſelf for life, without impeachment of waſte, remainder to his intended wife for life, remainder to the uſe of the *heirs males* of his body upon the body of his intended wife to be begotten, and the heirs males of ſuch heirs males iſſuing, remainder to the right heirs of the ſaid *A.* for ever; and covenanted, that in caſe the ſaid limitations were not thereafter well made according to the intent of the ſaid articles, that he and his heirs would ſtand ſeiſed of the premiſes, until a further aſſurance thereof ſhould be made to ſuch uſes, intents, and purpoſes, as in the articles were before expreſſed and declared. The marriage took effect, and *A.* had iſſue two ſons and two daughters. The articles were laid *by unnoticed* for ſeveral years; and *A.* levied a fine of the lands (ſuppoſing himſelf to be tenant in tail under the articles); and afterwards, both the truſtees being dead without requeſting a ſettlement, *A.*'s eldeſt ſon having married againſt his father's conſent, and by ſeveral other acts of weakneſs and diſobedience much offended him, *A.* by deed reciting the ſaid articles, and the weakneſs and diſobedience of his eldeſt ſon, declared, that the ſaid fine levied by him, ſhould enure to the uſe of himſelf for life without impeachment of waſte, remainder to his wife for life, remainder to his ſecond ſon in tail male, with like remainders to his two younger ſons, with remainder to his own right heirs; and after making a like ſettlement of other lands, *A.* died inteſtate, leaving a great perſonal eſtate, and leaving an eſtate in *Ireland*, and new-purchaſed lands in *England*, together of the value of 1000*l.* *per annum* and upwards. Upon his death, the eſtate in *Ireland* and the new-purchaſed lands deſcended to his eldeſt ſon, who alſo became entitled to his ſhare (upwards of 9000*l.*) of the perſonal eſtate. The ſecond ſon entered upon the ſettled eſtates, and the eldeſt ſon having got poſſeſſion of the articles, which it appeared had been thrown by ſeveral years as uſeleſs, brought his bill for a ſpecifick performance thereof.

It was inſiſted for the defendant, that though by the firſt part of the

s they ſeemed to be *executory*, yet by the covenant to ſtand ſeiſed in the part of them, they were actually and immediately *executed*; that he eby covenanted to ſtand ſeiſed to the before-mentioned uſes, till a ſet- ent was made accordingly; that no ſettlement having been made, the continued to be executed by virtue of that covenant; that by theſe he was plainly tenant in tail, and by the fine had bound his iſſue, and e himſelf maſter of the eſtate, and might diſpoſe of it as he thought But Lord Chancellour ſaid, that upon articles the caſe was ſtronger on a will; that articles were only minutes or heads of the agreement the parties, and ought to be ſo modelled when they come to be carried execution, as to make them effectual. That the intention was to give only an eſtate for life; that if it had been otherwiſe, the ſettlement ld have been vain and ineffectual, and it would have been in *A.*'s er, as ſoon as the articles were made, to have deſtroyed them; that covenant to ſtand ſeiſed was, until ſuch time as the ſaid uſes were well ed, according to the true intent and meaning of the articles. That ſettlement had been made defective in any particular, it would not e been final or concluſive; that a ſecond ſettlement muſt have been le *till the uſes were well and truly raiſed*; and that this covenant for ſubſiſted till ſuch ſettlement ſhould be made; that he hoped never ee the time when the court would ſo far have power as to judge what aviour of a ſon ſhould amount to a forfeiture of his eſtate; and there- thought, if a ſettlement had been made, no miſbehaviour of the ſon ld amount to a forfeiture of it. That this eſtate being ſpecifically eed to be ſettled, it was a truſt for the eldeſt ſon, which paſſed with lands into whoſe hands ſoever they came, and could not be defeated by act of the father or the truſtees. And therefore he decreed a con- nce to the plaintiff, and the heirs male of his body, and an account he profits from his father's death, and the deeds and writings to be de- red up. This decree was afterwards affirmed in the Houſe of Lords. 2 Brown. Caſes Parl. 122.

o where the huſband, before marriage, agreed by articles to ſettle s to the uſe of himſelf and his intended wife for their lives, and the of the ſurvivor, and afterwards to the uſe of the heirs of his body on wife, and after the marriage, by ſettlement reciting the articles con- d the lands to the uſe of himſelf and his wife for their lives, and the of the ſurvivor, remainder to the uſe of the heirs of his body by his ; it was held not to be a *proper execution* of the articles, though the cles did not expreſsly mention the intent to provide for the iſſue. For, d *Talbot* obſerved, it could not be doubted but that, upon an applica- to the court for carrying the articles into execution, it would have de- d it to be done in the ſtricteſt manner, and would never have left it in huſband's power to defeat and annul every thing he had been doing; the *nature of the proviſion* was ſtrong enough for that purpoſe, with- any expreſs words. Streatfield v. Streatfield, Caſ. temp. Talb. 176.

Where articles were entered into by the huſband, in which he covenant- hat as well all the real eſtate that he had then in *Ireland*, as all the s and tenements which he ſhould purchaſe during the life of his in- ed wife, ſhould *deſcend and come to the heirs male* to be begotten *on the of the intended wife by the huſband*, and ſhould be ſecured and ſettled he ſaid *heirs male* by the huſband, as the counſel of the intended wife ld adviſe. Upon an appeal to the Houſe of Lords, from a decree of court of Chancery in *Ireland*, the decree was reverſed; and it was red that a ſon of the marriage ſhould be deemed a *tenant in tail*, under Cuſack v. Cuſack, 1 Br. Caſ. Parl. 470.

the

the articles, and to hold and enjoy the lands againſt all perſons claim under a ſubſequent ſettlement by his father; who had *levied fines and ſuffered recoveries* to bar the *ſuppoſed entail.*

Nandick v. Wilkes, 1 Eq. Abr. 393. c. 5. Gilb. Eq. Rep. 114.

And in a caſe where the *huſband* entered into a bond to ſurrender co holds to the uſe of himſelf for life, remainder to his wife for life, rema der to the heirs *of their bodies*, then to the huſband in fee; upon a bill agai the huſband, after the marriage, for execution of this engagement; decree was, for him to ſurrender to the uſe of himſelf for life, remain to the uſe of his wife for life, remainder to the uſe of the firſt and ot ſons in tail general ſucceſſively, with remainder to the daughters in general.

Vide Burton v. Haſtings, *infra*, 167.

So, where the intended wife's eſtate was articled to be ſettled on huſband and wife, and on the *heirs of their two bodies*, Lord *Cowper* mitted, that if no ſettlement had been made, the court would have ta care to ſecure to the daughters the proviſion intended them by the artic

Whately v. Kemp, cited 2 Vez. 358.

Where by articles previous to marriage it was agreed to purchaſe ha and ſettle them to the uſe of the huſband for life, then of the wife for remainder to the uſe of the *heirs of her body by him*; they purchaſed joined in a recovery to the uſe of a mortgagee in fee. Upon a bill by eldeſt ſon after the death of his mother, inſiſting that he was entitled, the conſtruction of theſe articles in equity, to have the eſtate ſettled to firſt, *&c.* ſon in tail male, Sir *Joſeph Jekyll* ſaid, that if this had be *common limitation*, he ſhould have thought what was inſiſted on was ri and that the mortgagee muſt have loſt his eſtate. But that this was ticular to *the heirs of the body of the wife by the huſband*, and being *ex viſione viri*, would ſecure the children againſt the father alone; and it might be the real intent that *both might bar*, comparing it to a *of revocation both by father and mother*; and the defendant was ther well barred.

Green v. Ekin, 2 Atk. 473.

So, in a ſubſequent caſe, Lord *Hardwicke* ſaid he might compare it the caſe where, by a ſettlement of lands, the wife has an eſtate *ex viſione viri*, the court has refuſed to interpoſe to ſettle the eſtate *otherw* becauſe the intent will prevail, ſince ſhe cannot alien by ſtat. 11 *H.* 7.

Highway *et al.* v. Banner *et al.* 1 Br. Chan. Caſ. 584.

Again, by marriage-articles cuſtomary lands of inheritance of the tended huſband, holden by copy of court-roll, were agreed to be ſett to the uſe of the intended huſband for life, remainder to his intended for life, and after the deceaſes of both, to the uſe of the heirs of body by him if *he* ſurvived her, but if *ſhe* ſurvived him, to the heirs *his* body on her body to be begotten, remainder to his own right he The marriage was had and the huſband afterwards ſurrendered the l to the uſes mentioned in the articles, and was admitted accordin And at the ſame court he and his wife ſurrendered to certain uſes. A on a queſtion between a ſon of the marriage claiming under the entail the articles, and others claiming under the ſaid ſurrender by the huſb and wife; one of the points made, and that on which the deciſion p ceeded, was, Whether the ſurrender to the uſes in the articles was t execution of the uſes of the articles; and whether, by the ſubſequ ſurrender, the huſband gained an abſolute power over the wife? We to obſerve, that eſtates-tail were barrable by ſurrender, according to cuſtom.

The Maſter of the Rolls ſaid, that the rule had been ſettled and adhe to in many caſes, that articles for a ſettlement on a huſband, and the *of his body*, ſhould be carried into execution in ſtrict ſettlement; and

d been conſidered as vain to make a ſettlement which inſtantly might be feated by a recovery; but the doctrine had never gone ſo far, where t party could not ſuffer a recovery *alone*. He obſerved, that it was antly a common mode of ſettlement to the huſband for life, to the wife life, and to the heirs of the body of the wife by the huſband; it was ought a ſufficient precaution to preſerve the entail, that it could not be troyed unleſs *both* huſband and wife concurred. That in the principal e, the limitations appeared to be anxiouſly worded; the concurrence of *parties* was neceſſary to deſtroy the entail; it was out of the power of *ſurvivor*. He was not to look to the impropriety of what had been ne, but to the power the parties had to do it, and he thought that point ar.

In a caſe where money, in the hands of truſtees, was articled to be laid in the purchaſe of lands to be ſettled on the huſband for life, remainder the intended wife for life for her jointure, remainder to the firſt and er ſon and ſons of the marriage in tail male ſucceſſively, chargeable with ool. for younger children, remainder to the huſband in fee; and the ſband's father by the ſame articles covenanted to ſettle other lands on the ſband, and the *heirs male of his body*, remainder to the heirs of the her: upon a queſtion, Whether a ſubſequent ſettlement of the laſtntioned lands by the huſband's father, on the huſband and *the heirs le of his body*, with remainder to the father in fee, was a good permance of the agreement; or whether the limitation ought not to have n on the huſband *for life*, with remainder to the firſt and other *ſons in male* ſucceſſively in *ſtrict ſettlement?* Lord Chancellour *King* held, that ſettlement was a *good execution* of the agreement, and therefore conned the ſettlement. He ſaid, that by the articles thoſe lands were not ended to be ſettled as a *proviſion for the children* of that marriage, *they re taken care of* by the *other part* of the articles by the truſt-money; and was not like the common caſe of articles for a ſettlement on the iſſue of marriage where *no other proviſion* or *care is taken* for them; and the *rent manner* of penning the articles in relation to the *truſt-money*, and *thoſe lands*, the one to be in *ſtrict ſettlement* to the firſt, *&c.* ſon of marriage, the other limited to the huſband and the *heirs male of his* generally, and not tied up to *the iſſue of that marriage*, ſhewed plainly parties *underſtood*, and had in contemplation the *difference* between a *ſettlement upon the iſſue of that marriage*, and a *general ſettlement* upon huſband and the *heirs male* of his body.

Chambers v Chambers, Fitzgibb. Rep 127. 2 Eq. Abr. 35. c. 4.

And accordingly, in a caſe of marriage-articles, where *part* of the te was limited to the huſband for life, remainder to the wife for life, after the death of the ſurvivor, remainder to the *heirs of the body of wife by the huſband*, another part to the huſband for life, remainder to *heirs of his body*, remainder to the wife; upon a bill filed by the eldeſt to have the articles carried into execution ſtrictly to the firſt, *&c.* ſon ail, Lord *Hardwicke* obſerved, there was a difference in the penning the two limitations; on the firſt they might have it in view to leave it he power *not* of the *father only*, but *of both* to vary; but on the ſed there could be no ſenſe of the limitation, but as the ſon contended ; otherwiſe it would be abſolutely in the power of the father, by fine, ar it, and defeat all the iſſue. They intended the wife ſhould have a ure in the one, in the other not. It ſeemed a ſtrong diſtinction on the of the articles, and there had been caſes adjudged on that.—That re by articles part of an eſtate was limited to father for life, to wife for

Howell v. Howell, 2 Vez. 358.

for life, to first and every other ſons and daughters in tail, another p to teſtator for life, and the heirs male of his *body by that wife*, L *Macclesfield* ſaid, if that had been the *ſole limitation*, he ſhould, with ſcruple, decree in *ſtrict ſettlement* according to the common rule; where the parties had ſhewn they *knew the diſtinction* when to put it *the power of the father*, and when to leave it *in his power*, he would vary the laſt limitation; decreeing to the father *in tail* as to the though not as to the firſt.—That as in the principal caſe there was a di rence in the penning of the articles, in one of which they might intend leave it in the power of the father, in the other not in his power to d alone, it was a reaſonable way.

The report in Vezey does not aſcertain the caſe thus cited by Ld. Hardwicke.

Honor v. Honor, 2 Vern. 658. 1 P.W. 123.

Articles were made previous to, and in conſideration of a marri for ſettling lands to the uſe of the huſband for life, remainder to the w for life, remainder to the heirs of the body *of the wife* by the huſb begotten, remainder to the huſband in fee; and before the marriage a tlement was made reciting the *articles*, and expreſſed to be in *purſu thereof*, limiting the lands to the uſe of the huſband for life, remainde the wife for life, remainder to the *heirs of the body of the huſband* by wife, remainder to him in fee. There was iſſue of the marriage one ſ the father married again, had ſeveral other children, and having cured his ſon, without any conſideration, to join with him in mortga the eſtate, and limiting the fee-ſimple and equity of redemption to father. Upon a bill afterwards brought by the ſon to compel his fa to reſettle the land on the ſon, after his (the father's) death, purſuan the articles,

Lord Chancellour held it was a plain miſtake in making the ſettlem vary from the articles, which were prudent articles; and the ſettlem ſaid to be made *purſuant thereto*, ſhewed there was *no alteration* of the tention, nor any new agreement between the making of the articles the ſettlement; and this appearing on the face of the articles and ſe ment, the length of time (about 25 years) was immaterial. And he creed the father and his ſecond wife to join in a conveyance to ſettle eſtate as by the articles, *viz.* to the father for life, remainder to the ſo tail; but as to the mortgage, the ſon having joined in it, the court c not ſet it aſide, but directed the father to keep down the intereſt during life.

Burton v. Haſtings, Gilb. Eq. Rep. 113. Eq. Abr. 393.

But, where marriage-articles were entered into for ſettling the wi eſtate on *the huſband and wife, and* on *the heirs of their two bodies to be gotten*: after the marriage, a ſettlement was made of the lands upon huſband and wife for their lives, remainder to the heirs of the body of wife by her ſaid huſband: there was iſſue of the marriage one daug only: and after the death of the huſband, his widow married again, joi in a fine of the lands, and ſettled them to other uſes: a bill was bro by the daughter of the firſt marriage, to carry the articles into executi for that no care was taken of the daughters by the ſettlement, as the l tation to the heirs of the body of the wife by her firſt huſband made tenant in tail; and conſequently left her the power to bar them, w was contrary to the intent of the articles, that being to make an effec proviſion for all the iſſue of that marriage. But Lord *Cowper* diſmiſſed bill; ſaying, if no ſettlement had been made, and application had b made to the court for making one purſuant to the articles, the court wo have taken care to have ſecured to the daughters the proviſion inten

em by the articles. But a ſettlement having been actually made and ac-
pted by the parties, he could make no alteration in it.

Again, articles were entered into for ſettling lands to the uſe of *B.* the intended huſband for life, without waſte, remainder to *M.* the intended wife for life, remainder to *the heirs male of the body of* B. *by* M. remainder to the heirs male of the body of *B. by* any other wife, remainder to *the heirs female* of the body of *B.* by the ſaid *M.*, with leaſing and jointuring powers to *B.* Afterwards, and before the marriage, a ſettlement was made, and mentioned to be *in purſuance and performance* of the articles; and the lands were thereby limited to *B.* for life, remainder to *M.* for life, remainder to the firſt, *&c.* ſon of the marriage ſucceſſively in tail male, remainder to the firſt, *&c.* ſon of *B.* by any other wife in tail male ſucceſſively, remainder *to the heirs of the body of the ſaid* B. *by the ſaid* M., remainder over. They had iſſue only one daughter, who died, leaving two daughters. *B.* having an eſtate-tail under the limitation to the *heirs of the body*, &c. ſuffered a recovery, ſold part of the lands, deviſed the reſidue, and died. The grand-daughters brought their bill into the Exchequer againſt the executors of *B.* to rectify the miſtake in the ſettlement, in limiting an eſtate-tail to *B.*, inſtead of limiting it in ſtrict ſettlement, as by the articles it ought to have been. The articles were made in *December*, the ſettlement in *March* 1685; the ſale of the lands in 1698, and the will in 1722: the defendant pleaded the ſettlement, the recovery, the will, and the long enjoyment; but the plea was over-ruled by Lord Ch. B. *Gilbert*, and the other Barons; and after hearing the cauſe, Lord Ch. B. *Pengelly* and the other Barons diſmiſſed the bill without coſts; it appearing to them dangerous to ſet aſide a ſettlement, which ſeemed to have been ſolemnly and deliberately made. But on an appeal to the Lords, his diſmiſſion was reverſed, and the lands *not ſold* were decreed to be conveyed to *the grand-daughters and heirs female* of their bodies, as tenants in common, with croſs remainders to them in tail female; and the deviſee to account for the profits, and the executor to account for the purchaſe-money received by *B.* for the lands by him ſold, and to pay intereſt for the ſame; the writings to be brought into the court of Exchequer, and poſſeſſion to be delivered to the appellants; and the principal monies ariſing by the ſaid ſale to be laid out in lands, to be ſettled to the ſame uſes as the lands unſold were decreed to be conveyed to.

2 P. Wms. 349. Weſt v. Erriſey.

3 Br. Caſ. Parl. 327.

Marriage-articles were entered into for ſettling lands to the uſe of the huſband *D.* for life without waſte, remainder to truſtees and their heirs during his life, to ſupport contingent remainders, remainder in part to the wife *E.* for her jointure, remainder as to the whole to firſt, *&c.* ſon of the marriage in tail male ſucceſſively, remainder to the *heirs male of the body of the huſband*, (*i. e* by any wife,) remainder to the *heirs of his body by his ſaid wife* E., remainder to his own right heirs, with a clauſe empowering huſband and wife to make leaſes; and alſo a clauſe, that if he ſhould die without iſſue male by his ſaid wife, if there ſhould be one daughter, ſhe ſhould have 3000*l.*, and if there were more daughters than one, they ſhould have 4000*l.* among them; which portions were to be ſecured on ſome part of the eſtate. It happened there was iſſue of the marriage only one daughter. *D.* ſurvived his wife, and ſuffered a common recovery of the lands, and made another ſettlement of them in conſideration of, and previous to, his ſecond marriage; ſubject as to part to a truſt for raiſing 3000*l.* for his daughter by his firſt wife, in ſatisfaction of the portion ſhe was entitled to under the firſt articles, and maintenance for her

Powell v. Price, 2 P. Wms. 535.

in

in the mean time. The queſtion was, (here being notice of the firſt ar
cles,) whether the limitation in the firſt articles *to the heirs of the body*
D. *by* E. *his wife*, ſhould not be taken as if it had been to the daughte
of *D.* by his ſaid firſt wife? For then they could not be barred by the
covery (conſidering the preceding intermediate limitation to the heirs m
of his body at the ſame time as words of purchaſe.) It was inſiſted, t
here the limitation to the heirs of the body of *D.* by *E.* his firſt wife, m
be the ſame as if it had been to the *daughters;* for it could not be intend
in favour of the ſons of that marriage, there being an expreſs limitat
before to them; and though in the caſe of a ſettlement, there being a p
cedent eſtate for life to *D.*, it would have been an eſtate-tail in him bar
ble by the common recovery, yet it was otherwiſe where it reſted upon
Supra. ticles; and the caſe of *Weſt* v. *Erriſſey* was cited.

On the other ſide it was ſaid, and reſolved, that the 3000*l.* ſecured
the ſettlement on the ſecond marriage, was an actual ſatisfaction of all
mands under the articles; and that though a limitation by articles to
heirs male of the marriage, after an expreſs eſtate for life to the fath
ſhould be taken to mean a remainder to the firſt *&c.* ſon, it does not foll
that a limitation to the *heirs of the body* muſt be equivalent to a remain
limited to daughters; eſpecially in this caſe, where they were poſtpo
to the limitation to the heirs male of the body of *D.* by any wife;
where there was an *expreſs pecuniary proviſion* made for the daughters
the firſt wife; which was all they were to depend upon.

SeeFearne's C. R. 147, &c. And the following diverſities were taken by the court, between this
caſe and the caſe of *Weſt* and *Erriſſey*; in the caſe of *Weſt* and *Erriſſey*
portions were provided for the daughters of the firſt marriage; in the
caſe, portions in all events were ſecured to ſuch daughters. In the ca
Weſt v. *Erriſſey*, after the limitation in the articles to the *heirs male* of
body of the huſband and wife, and the remainder to the *heirs male* of
body of the huſband by any wife, came the remainder to the *heirs fe*
of the body of the huſband by the firſt wife, *&c.* ſo that the daughters
more immediately in the view and contemplation of the parties, tha
the laſt caſe.

Roberts v. Kingſley, 1 Vez. 238. An eſtate was articled to be ſettled on the huſband for life, *fans w*
remainder to the heirs male of his body, with power to raiſe portions
younger children. A ſettlement was afterwards made, before marri
in purſuance of the articles, and obſerving the very words of the arti
The huſband afterwards levied a fine to the uſe of himſelf in fee, an
will made a proviſion for his ſon's debts. Lord *Hardwicke* ſaid it
the common caſe; the variation from the intent of the articles, and
the ordinary courſe of ſettlements not ariſing from any new agreem
(being made *in purſuance* of the articles,) but from miſtake in not arti
ing to a ſtrict ſettlement. The reaſon of which was unanſwerable,
that on a ſettlement for valuable conſiderations to make the father *tena*
tail, would be nugatory, and the ſame as making him tenant in fee.

Vid. 1 Br. Chanc. Caſ. 587. of election in theſe caſes. the ſon having ſubmitted to and taken a benefit under his father's
muſt be bound thereby; and therefore, though he was entitled to
the ſettlement rectified according to the true intent of the articles, he c
not retain both, but muſt make his election.

Dodd v. Dodd, Ambl. Rep. 274. By articles previous to marriage it was agreed that 3000*l.* ſhould be
out in the purchaſe of a freehold eſtate, to be ſettled on the huſban
life, remainder to the wife for life, remainder to the uſe of ſuch iſſ
their bodies, in ſuch parts and manner as the huſband and wife ſho

eed or writing appoint; and for want of appointment to the uſe of *the iſſue of their bodies*, remainder to the right heirs of the huſband. There was o proviſion for younger children. The huſband died without appointment, leaving his wife and two ſons and a daughter. Upon a bill by the eldeſt ſon to have the money laid out, according to the articles, in land to e ſettled on him in tail, remainder to his brother and ſiſter in tail, with reverſion in fee to himſelf; and a croſs bill by the younger children to have e lands to be bought ſettled on them equally with the eldeſt ſon. The aſter of the Rolls was of opinion, that the lands to be purchaſed ought be ſettled in ſtrict ſettlement, and limited to the firſt, *&c.* ſons in tail, ith remainder (the daughter being dead without iſſue) to the right heirs the huſband; and decreed accordingly.

Lord *Talbot* laid it down as a rule, that where articles are entered into efore marriage, and a ſettlement made *after marriage*, different from thoſe icles, (as if by articles the eſtate was to be in ſtrict ſettlement, and by e ſettlement the huſband is made tenant in tail,) the court will ſet up the icles againſt the ſettlement. But, where both articles and ſettlement e *previous* to the marriage, at a time when all parties are at liberty, the tlement differing from the articles, will be taken as a new agreement tween them, and ſhall controul the articles. And although in the caſe *Weſt* and *Eriſſey* the articles were made to controul the ſettlement de *before* marriage, yet that reſolution did not contradict did not contradict the general rule; for in that caſe the ſettlement was expreſsly mened to be made *in purſuance and performance of the ſaid marriage articles*, ereby the intent appeared to be ſtill *the ſame* as it was at the making of articles. Caſ. temp. Talb. 20. Legg v. Goldwire.

Articles were entered into for ſettling an eſtate to the huſband for life, er his death to the intended wife for her life, and after her death to the of *the heir male of the huſband to be begotten on the body of the wife*; erwards, and before marriage, by a ſettlement declared to be in *part formance of the ſaid articles*, the lands were ſettled upon the huſband for , then to the wife for life, and after her death to the uſe of the *heirs* of the huſband begotten on the body of the wife. Afterwards the rriage took effect, and the huſband ſuffered a common recovery, and rtgaged the land in fee; which mortgage was afterwards aſſigned to other mortgagee. After the father's death, his eldeſt ſon brought his for an account of the rents and profits, and for poſſeſſion, and to have full benefit of the marriage articles; inſiſting that his father was inded to be tenant for life only, with remainder to his firſt and other ſon ſons ſucceſſively in tail; that he was a purchaſer under thoſe articles, they ought to be conſidered as if they had been ſtrictly carried into exion. The mortgagee denied notice of the articles, and inſiſted on being a purchaſer for valuable conſideration. Lord *Hardwicke* ſaid it certainly true, from the general principles of the court, that if artion marriage are to ſettle an eſtate to *A.* for life, remainder to his wife life, remainder to the heirs male of the body of *A.*, it is taken in that rt to be in *ſtrict ſettlement*, and an eſtate for life only in the father and ther; and if the ſettlement be made after marriage, it ſhall be rectified the articles before;—that the caſe of *Weſt* and *Erriſſey* was both upon icles and a ſettlement before marriage; and was the firſt caſe where the rt altered a ſettlement, and made it conformable to articles, and relieved on the head of miſtake, *the ſettlement referring expreſsly to the articles*. that was between the parties to the articles and ſettlement, and their Warwick v. Warwick and Kniveton, 3 Atk. 291. Glanville v. Payne, 2 Atk. 39. S. P.

 repreſentatives,

repreſentatives, and *mere volunteers*; and had not been carried into ex
cution againſt a *purchaſer*;—that it was true, the court had given re
againſt perſons who claimed under the ſettlement and their repreſentative
but no caſe had gone ſo far as to relieve againſt purchaſers.—He alſo
ſerved, that there was no caſe, but where there are *articles as well* as a
tlement, in which the court will conſtrue words which make a legal eſta
tail, to be carried into ſtrict ſettlement. And upon the whole, L
Hardwicke, after delivering his opinion that there was not ſufficient pr
of notice of the articles in the aſſignee of the mortgagee, diſmiſſed the
ſo far as it prayed to be relieved againſt the mortgage; but decreed that
plaintiff might be at liberty to redeem.

Cardwell v. Makrill, Ambl. Rep. 515.

And the court have refuſed to rectify a ſettlement according to articl
for want of the production of the articles themſelves. The articles w
previous to marriage, for ſettling, by the wife's father, certain eſtate
the uſe of the huſband and wife for their lives, and the life of the
vivor, and after the death of the ſurvivor to the uſe of the *heirs of the*
of the huſband on the wife, remainder over. A ſettlement was made
ter marriage *reciting* the articles, and ſaid to be made in conſideratio
the marriage, and *purſuance and performance of the articles*. Upon a
by a ſon of the marriage, to have the articles carried into execution, L

and *vide* Ambl. Rep. 148.

Hardwicke diſmiſſed it, for want of the articles being produced; by w
alone, he ſaid, he could alter the ſettlement. It was impoſſible, he
for him to determine otherwiſe, unleſs the *whole of the inſtrument* wa
fore him; for the true conſtruction depended on *words*; and *other*
of the deed might be *material* to find out the true meaning. He could
ſee reaſon to lay it down as a rule, that in *all caſes* of *articles*, the huſ
was to be only tenant for life.

White v. Thornburgh, 2 Vern. 702.

The huſband, upon his marriage, covenanted to levy a fine of freeh
and ſurrender copyhold lands to the uſe of himſelf for life, remainde
his wife for life, remainder to the heirs male of his body by his wife
mainder to the *heirs of their two bodies*. He afterwards died, wit
levying the fine or making the ſurrender, leaving a ſon and a daughte
his wife. The ſon afterwards, for indemnifying ſome ſureties for
covenanted to levy a fine of the freehold, and ſurrender the copyho
and died, having ſurrendered the copyhold; but without levying a
the freehold. Upon a bill by his ſiſter and her huſband to have the
hold and copyhold lands aſſured to her according to the *intent of the*
ment, Lord *Harcourt* conſidered the deed by the father in the *natu*
articles, to be executed in a ſtricter manner than in the words of the
and that a *remainder* might be limited to the daughters; ſo that a fi
the ſons could not have barred it. But upon a rehearing before
Cowper, he held that the ſettlement, by the deed to lead the uſes o
fine, was not to be conſidered *as articles*, but a *defective ſettlement*, an
uſes *not to be altered or varied*: but that a court of equity would
ſo far, as to conſider it as if a fine had been levied (by the huſband),
then the plaintiff would not have been barred *without a fine* (b
father), and ſhe was to be conſidered as *heir of the body* of her
And that the limitation in the deed to the heirs of the bodies, cou
inſerted for no other end or purpoſe, but to carry the eſtate to the
ters of the marriage; it being before limited to the *heirs male*; and
fore he confirmed the decree as to the *freehold*. But, as to the *cop*
there appearing no particular cuſtom in the manor for ſuffering a reco
he held the ſurrender (by the ſon) would have barred the *entail*, in ca
cop

copyhold had been well ſettled; and therefore varied the decree, and diſmiſſed the bill as to that.

So, upon a deviſe for the ſettling of lands on *A.* for life, and after his deceaſe to the *heirs male of his body*, and the *heirs male of the body of every ſuch heir male, ſeverally and ſucceſſively as they ſhould be in priority of birth and ſeniority of age*, remainder to *B.* In arguing the queſtion, Whether *A.* was tenant for life only or in tail, the common caſe of marriage-articles was cited, where, though they were ſo worded as to give the huſband an eſtate-tail, yet the court had decreed a ſettlement on the huſband for life only, and then upon the firſt and other ſon and ſons, *&c.* Upon which part of the argument Lord Keeper obſerved, that where *ſettlements were uſed to be made upon valuable conſideration*, the court would aid in artificial words, and make an artificial ſettlement: but he never knew it done *for a mere volunteer.* Legat v. Sewell, 1 Eq. Abr. 395.

Lands were deviſed to truſtees and their heirs for payment of debts and legacies, and afterwards, to *ſettle* what ſhould remain unſold, one moiety to the teſtatrix's ſon *H.*, and the heirs of his body by a ſecond wife, with remainder over; and the other moiety to the teſtatrix's ſon *F.*, and the heirs of his body, with remainders over; taking ſpecial care in *ſuch ſettlement*, that it ſhould *never be in the power* of either of the ſons to *dock the entail of either of their moieties.* Upon a queſtion, Whether the ſons were entitled to have eſtates-tail conveyed to them, or only eſtates for life? the court held, that the ſons muſt be made only tenants for life, and ſhould not have eſtates-tail *conveyed* to them; but their eſtates for life ſhould be without impeachment of waſte. Becauſe in that caſe an uſe was *not executed*, but only *executory;* and therefore the intent and meaning of the teſtatrix was to be purſued. She had declared her mind to be, that her ſons ſhould not have it in their power to bar their children, which they would have, if an eſtate-tail were to be conveyed to them. And the court took it to be as ſtrong in the caſe of an *executory* deviſe for the benefit of the iſſue, as if the like proviſion had been contained in marriage-articles; but had ſhe by her will deviſed to her ſons an eſtate-tail, the ſame muſt have taken place; and they might have barred their iſſue, notwithſtanding any ſubſequent clauſe or declaration in the will, that they ſhould not have power to dock the entail. Leonard v. Earl of Suſſex, 2 Vern. 526

Again, *A.* deviſed a ſum of money to truſtees in *truſt*, to be laid out in lands, and to be ſettled on *B. for life, without impeachment of waſte*, remainder to truſtees and their heirs during the life of *B.*, to ſupport contingent remainders, remainder to the *heirs of the body of B.*, remainders over, with a power to *B.* to make a jointure.—The univerſality of the rule reſtraining the union of the limitation to the anceſtor for life, with that to *heirs of his body*, &c was urged in ſupport of *B*'s being entitled to an eſtate-tail in the lands to be purchaſed. To which it was anſwered, that the rule in conſtruction of wills was, that the intention of the party ought to take place, however improperly expreſſed. That it would be a downright violation of the teſtator's intention, to conſtrue the eſtate deviſed to be an eſtate-tail. For 1ſt, the eſtate was deviſed to *B.* for *his life*, expreſsly; 2dly, it was to *B. without impeachment of waſte*, which would plain words, if *B.* were to have more than an eſtate for life; 3dly, the eſtate was deviſed to truſtees, *during the life of B.*, to preſerve *contingent remainders*, ſo that the teſtator expreſſed his intention, that the remainders limited to the iſſue of *B.* ſhould *be contingent remainders;* and what could be more contradictory to this expreſs and plain intent, than to ſay thoſe 2 P. Wms. 471. Papillon v. Voice.

remainders ſhould not be contingent, but give a veſted eſtate-tail to
As to the notion that the *conveyance directed by a will* ſhould be in
words made uſe of in the will, it was impoſſible that rule could
verſally hold: for ſuppoſe the direction of the will was, that the truſt
ſhould convey the lands to *A.* for life, remainder to *B. for ever*; this
a deed would not convey *a fee*, as it would in a will; and therefore th
was no neceſſity that the words in *the conveyance* ſhould purſue thoſe in
will. So, if the words of the will had directed the eſtate to be conve
to *A.* for life, remainder to the *iſſue of his body*, (he having none at
time born) this would be an *eſtate-tail* in a will, but in a *deed* it would
be ſo. Again, if the words in a will were that the *conveyance* ſhould
to *A.* and his heirs male, this would be an eſtate-tail; but put ſuch wo
into a *deed*, and there, for want of ſaying of *whoſe body* the heir muſt
they would give a fee-ſimple; to which the court agreed. And the L
Chancellor *King* declared the court had a power over the money directe
be inveſted in land: that the diverſity was between the will's paſſing a
eſtate and leaving the eſtate *executory*, ſo that the party muſt come into
court of Chancery, in order to have the benefit of the will; that in
latter caſe the intention ſhould take place, and not the ſtrict rules of l
and he decreed, that *B.* ſhould have but an eſtate for life on the land
be purchaſed.

Vide Earl of Stamford v. Sir John Hobart, *infra*.

Lord Glenorchy v. Boſville, Caſ. temp. Talb. 3.

In another caſe, of a deviſe to truſtees and their heirs, in truſt, till
marriage, or death of the teſtator's grand-daughter, to receive the r
and profits, and pay her an annuity for her maintenance, and as to th
ſidue to pay his debts and legacies, and after payment thereof in truſt
his grand-daughter; and if ſhe married a proteſtant, after her age
with conſent, &c. then to *convey* the eſtate after ſuch marriage to th
of her for life, *without impeachment of waſte*, remainder to her huſban
life, remainder to the *iſſue of her body*, with ſeveral remainders over.
queſtion aroſe, Whether under the will the teſtator's grand-daughter (
Glenorchy) was tenant for *life* or *in tail?* which depended on two po
Firſt, Whether the words of the will, in an *immediate deviſe* of a
eſtate, would have carried an eſtate-tail? Secondly, if ſo, Whethe
court would make any difference between a *legal* title and a *truſt*
executory?

Lord *Talbot* ſaid, he ſhould upon the firſt queſtion have made no
culty of determining it an *eſtate-tail*, had it been the caſe of an imm
deviſe. He thought, in caſes of *truſts executed*, or immediate deviſes
conſtruction of the courts of law and equity ought to be the ſame
there the teſtator did not ſuppoſe any *other conveyance* would be
But in *executory truſts* he left ſomething to be done; the truſts to b
cuted in a more careful and more accurate manner. That in the c
Legat and *Sewell*, the words, if in a ſettlement, would have ma
eſtate-tail, and in that of *Baile* v. *Coleman*, the execution was to be
ſame eſtate he *had in truſt*, which, in conſtruction of law, was an
tail. That the caſe of "*Papillon* and *Voice*" ſeemed a ſtrong aut
for executing the intent in *executory truſts*, as well as in articles; a
accordingly decreed the Lady *Glenorchy* but an eſtate for life, with re
der to her firſt and other ſons, &c.

Earl of Stamford v. Sir John Hobart, 1 Br. Parl. Caſ. 288.

Sir *John Maynard*, after deviſing his eſtates in remainder after t
ceaſe of his wife (afterwards *Counteſs of* Suffolk) to truſtees and
heirs, he directed them, *after his wife's deceaſe*, to *convey* certain
thereof to the uſe of, or in truſt for, Sir *H. Hobart* and *Elizabeth* h

their lives and the life of the longer liver of them; the remainder to *first son* of the said *Elizabeth* for *ninety-nine* years, if he should so long ; the remainder to the *heirs male of the body of such first son:* the remainder to all and every the sons of the said *Elizabeth* for 99 years, if ery such son respectively should so long live; the remainder to the *heirs le* of every of them, to take, not jointly, but successively, one after the ther, according to the births of each of them; each son to take the term 99 years, with *immediate remainder to his said heirs male*; the remainder ereof to *Mary Maynard* (afterwards Countess of *Stamford*) for her life; e remainder thereof to all and every her sons for such like term of 99 ars, and with remainder to the heirs male of the body of every such immediately after each term. The testator left the said *Elizabeth Hort* and *Mary Maynard* his grand-daughters and coheirs at law, who neier of them had any issue male at the time of his decease. Afterwards, some disputes between Sir *H. Hobart* and his lady, Lord *Stamford* and lady, and the Countess of *Suffolk*, an act of parliament was obtained, hereby it was enacted that the real estate, by the said Sir *John Maynard's* ll given or appointed, *should go unto, and be held and enjoyed by such per- and persons, to and for such estates and interests, and under and subject to charges, limitations, and appointments, and in such manner and form, as in the said will expressed.* And the said trustees were thereby authorised and empowered to *convey* the said manors and lands *immediately*, unto ch person and persons, and for such estate and estates, as the same were and by the said will limited and appointed to be conveyed, as if the d Countess of *Suffolk were dead.*

After the decease of Sir *H. Hobart* and his wife, upon a bill filed by Sir hn *Hobart*, their only son, the trustees were directed to convey the lands *rding to his will and the words of the act of parliament.* And a draft of nveyance being accordingly settled by the master to trustees, *habendum* them and their heirs, *to the several uses, intents and purposes in the said ll and act of parliament limited, expressed, and declared, and to and for no er use, intent, or purpose whatsoever;* the plaintiff excepted to it, for that premises ought, at least, to have been limited to the *use* of the said stees and their heirs; and only in *trust* for such person and persons, and h estate and estates, as were in and by the said will and act of parliaent limited; whereby the *legal estate* might be vested in the said trustees, the better preservation of the *contingent limitations*, which otherwise, as draft was prepared, were liable to be destroyed, and the testator's intion plainly defeated.

Upon the hearing of this exception, Lord Chancellor *Cowper* declared, hat in matters *executory*, as in cases of articles, or a will *directing a nveyance*, where the words of the articles or *will* were improper, or nformal, that court would not direct a conveyance according to such mproper or informal expressions in the articles or *will*; but would order the *conveyance or settlement* to be made in a proper and legal manner, o as might best answer the *intent* of the parties; and in that case his ordship conceived the true intent of the will to be, that the estates hould be *secured*, as far as the rules of law would admit, to the issue male of the respective devisees, and that it was designed to be as strict settlement as possible by law." His lordship therefore decreed, that he said conveyance, where any part of the estate was limited in use to plaintiff for 99 years, if he should so long live, there should be a limitaover to trustees and their heirs *during his life* to preserve the contingent

uses

uſes in remainder; and then to the firſt and other ſons of the plaintiff in tail male ſucceſſively.

Upon an appeal to the lords from this *laſt decree*, it was contended, among other things, that the act of parliament, which was ſo very expreſs in confirming the eſtates appointed by the will, could never intend that a court of equity ſhould have power to *direct* a conveyance to *other uſes* than what were *mentioned in the will*; but the decree complained of did ſo, and was therefore repugnant both to the will and act of parliament, as well as to the *former decree*. To this it was anſwered, that in caſes of *executory articles*, for the ſettling of eſtates, in proſpect of *future conveyances* to be *afterwards made*, it was uſual for courts of equity to help informalities and ſupply defects; eſpecially when the things ſupplied were neceſſary to *ſupport the main intent* of the parties, and to carry ſuch articles into execution, according to that intent, ſo far as it might agree with law, though not ſtrictly according to the words and penning of the articles; and *à fortiori* would courts of equity do ſo in the caſe of *a will*, where the eſtate was only *executory* by a *conveyance to be made*. That the act of parliament made *no alteration* in the *will*, in the point in queſtion; it only hastened the time for the truſtees to convey; even in the lifetime of the Counteſs of *Suffolk*, and in ſome other particulars not relative to the queſtion. But in all other reſpects the act *confirmed the will*, and being ſtrictly *relative to it*, the intent of the will ought to be the *rule for the conveyance*. The decree was accordingly affirmed by the Lords.

Allgood v. Withers, in Chanc. in 1735, cited 2 Bur. 1107. 1 Vez. 150. 2 Atk. 582. 2 Vez. 648. and *vide* Aſhton v. Aſhton, cited 1 Vez. 149. 2 Atk. 582.

In a caſe where one by deed conveyed his freehold land to truſtees and their heirs, and his leaſehold to truſtees and their executors, upon truſt to apply the rents and the benefit of the redemption to *W.* for life, and after her death to the *heirs of the body of the* ſaid *W*, and of *G.* and of *M.*, *their hers, executors, and aſſigns*, during the continuance of the eſtate in the premiſes; upon a queſtion, Whether *W.* took for *life*, or *tail?* Lord *Talbot* held, that ſhe took an eſtate *for life*, and that the heirs took by purchaſe. In which caſe, we may obſerve, the limitation to the heirs of the body of *W.* was blended with that to the heirs of the bodies of ſeveral others, who could take no otherwiſe than by purchaſe, and there were words of limitation not only to the heirs, but to the aſſigns of all the ſaid heirs of the bodies alike.

1 Vez. 142. 2 Atk. 246. 570. 577. Bagſhaw v. Spencer.

A. deviſed lands to five truſtees, their heirs and aſſigns *in truſt*, by rents and profits, *ſale or mortgage*, to pay his debts, *&c.*, and *after payment thereof* he deviſed the ſame eſtates to three of the ſame truſtees, their executors, *&c.* for 500 years, upon truſt to pay his legacies, and an annuity of 20*l. per ann.* to his ſiſter for life; and after the determination of the ſaid eſtate for years, he deviſed the ſame premiſes to all the ſaid truſtees and their heirs in truſt, as to a moiety, to the uſe of *T.* his nephew for life, without impeachment of waſte; and after the determination of that eſtate, to the truſtees and their heirs during the life of *T.* to ſupport contingent remainders, and after his deceaſe to the uſe of the heirs of the body of *T.* lawfully begotten, and for want of ſuch iſſue, then to the uſe of his nephew *B.* for the term of his *natural life*, without impeachment of waſte; and after the determination of that eſtate, *to the ſame truſtees, during the life of B. to preſerve contingent remainders*, and after his deceaſe, then to the uſe of *the heirs of the body of* B. lawfully begotten, with like remainders to other nephews. The firſt deviſee *T.* died without iſſue; upon whoſe deceaſe *B*, the eldeſt in remainder, filed his bill againſt the truſtees and all proper parties, praying amongſt other things, to be let into poſſeſſion of a moiety of the eſtate after

erwards *B.* dying pending the ſuit, his widow and deviſee brought a bill revivor and ſupplemental bill, charging that *B.* in his lifetime, by bar- and ſale enrolled, conveyed his moiety of the eſtates to two perſons their heirs, to make them tenants of the freehold, and ſuffered a re- very thereof (in which he was vouched) to the uſe of himſelf in fee; and erwards deviſed his ſaid moiety to his ſaid widow in fee, and died with- iſſue. The general queſtion between the parties was, Whether an *te-tail*, or an eſtate for *life* only, paſſed by the will of *A.* to *B.*? It was ſted for the plaintiff, that it was an eſtate-tail; upon the general rule, t where lands are limited to a man for life, with a limitation in the ſame ed or gift to the heirs of his body, that this makes an eſtate-tail, and t a deviſe of lands in the ſame way paſſed the ſame eſtate; that the itation was either a *legal eſtate*, or a *truſt veſted or executed*, and not *utory*. On the other hand it was contended, that thoſe rules were arti- l, not founded in juſtice, but for ſupport of the feudal tenures, and refore the judges ought to ſhew themſelves *aſtuti* in ſupporting exceptions ſuch rules. The Maſter of the Rolls, however, held it to be a *truſt*, *not a legal eſtate*; but decreed that *B.* was entitled to an *eſtate-tail* in the ery ſo deviſed to him; as it was the caſe of an immediate deviſe, and a deviſe of lands *to be ſettled*. Upon an appeal to Lord *Hardwicke* n this decree, he agreed that this deviſe was only *a truſt* in equity; deviſe being to *truſtees and their heirs*, which carried the whole fee in t of law, and the deviſe *to ſell* being ſufficient to carry the fee, if the d *heirs* had been omitted; and therefore the whole fee being in the tees, no *legal* remainder could be limited to *B.*; and as to its being idered as an *executory deviſe* to *B.* (which, it ſeems, had been con- ed at the bar), it was too remote to be good in that view; being after debts indefinitely paid, which, in point of time, might exceed a life or in being, or any other time allowed by law; and beſides, *in that caſe* recovery by *B* being before the debts were paid, and conſequently ſt the legal fee remained in the truſtees, *B.* could make no good tenant he præcipe; and that would prevent it from paſſing by *B.*'s will: for ever made that recovery void, equally defeated the plaintiff's title; ch made it neceſſary for the plaintiffs to admit that all the deviſes ſub- ent to that to the truſtees were *truſts* in equity. That the main queſ- whether it was an equitable *eſtate-tail*, or for *life* only, depended on conſtruction of the words *heirs of the body*, whether they ſhould be n as words of limitation or of purchaſe.—That the intent was clear they ſhould be taken as words of purchaſe, from the clauſe *without achment of waſte*, and the limitation to truſtees *to ſupport contingent re- ders*. That there were ſeveral caſes even at law, where they had been n as words of purchaſe, as *Archer's* caſe; that the words of limitation d there, and in all ſuch caſes, were only demonſtration of the intent he teſtator in uſing the firſt words. That the caſe of *Colſon* and *Colſon*, h was objected as an authority, that the interpoſition of truſtees to ort contingent remainders is not ſufficient to turn theſe ſubſequent limi- s to the *heirs of the body* into words of purchaſe, differed from the cipal caſe; here being (in the principal caſe) a clauſe without impeach- of waſte; although that might be thought of little weight; but the *difference* was, that *this* was a deviſe of a *truſt in equity*, *that* of a *legal* eſtate, *the words of which muſt be taken as they ſtood, according to ſtrict legal determination*. That here all the limitations were the direc- of a *truſt*, which the court was bound to carry into execution accord- o the intent of the teſtator.

That

Sed vide Wright v. Pearſon, Ambl. 358. but more fully Fearne's C. R. 187. Auſten v. Taylor, Ambl. 376. Jones v. Morgan, 1 Br. Ch. Ca. 206.

That as to the difference between truſts *executed* and *executory*, the d tinction had never been eſtabliſhed by any direct reſolution. That all tru in notion of law were executory, and to be carried into execution by t court by *ſubpœna*. That if *B.* had himſelf come to have a conveyance c creed him, the queſtion would have been, whether the court ſhould ha inſerted truſtees to ſupport contingent remainders, if they had not, th would have departed from the words of the will; if they had, the mainder muſt have been to firſt, &c. ſon and ſons in ſtrict ſettlement, otherwiſe there would have been no remainders to be preſerved; and the fore, if the court muſt at all events depart from the words of the w ſuch departure muſt rather be to ſupport than to fruſtrate the plain intent the teſtator. For theſe reaſons Lord *Hardwicke* reverſed ſo much of decree at the Rolls as gave *B.* an eſtate-tail under the will.

Bale v. Coleman, 2 Vern. 670. 1 P. Wms. 142. Peere Williams ſtates it as a deviſe to four perſons for *payment of debts*, afterwards to the uſe of them and their heirs; and that the teſtator by codicil deviſed that his will ſhould ſtand, ſaving that one of the ſaid deviſees ſhould have his eſtate for life, with power of leaſing, remainder to the heirs male of his

One deviſed lands to truſtees and their heirs for payment of debts legacies, and after debts and legacies paid, willed that one-fourth part ſho be and remain in truſt for *E.* for life, with power of leaſing; and after deceaſe, in truſt for *C. for and during the term of his life*, with like *powe leaſing*, and after his deceaſe to the *heirs male* of the body of *C.*, remain over. Now this was the deviſe of a *truſt;* and Lord *Cowper* concei that it differed from an *immediate deviſe*, and that it was rather to be loo upon in the nature of an executory deviſe, to take effect after debts p which were conſiderable; or in nature of marriage articles: beſides, the enabling *C.* to make leaſes, ſeemed to imply very ſtrongly that he to have no power to diſpoſe of the inheritance. But the cauſe comin before Lord *Harcourt*, upon a re-hearing, he ſaid the caſe of a will *dif* from the ſeveral caſes of marriage-articles, in the nature of which the were particularly conſidered, and looked upon as purchaſers. That in of a *will*, where the parties claim voluntarily, the teſtator's intent mu preſumed to be conſiſtent with the rules of law; that at law thoſe w would certainly create an eſtate-tail; and it could not be inferred (with certainty) from the power of leaſing, that no eſtate-tail was intended; power being more beneficial than that given to tenant in tail by the ſtat and as the debts were admitted by the pleadings to be all paid, the conſtruction was to be made as if there had been originally no truſt; ſo decreed *A.*'s ſhare to be conveyed to him and the heirs male of his b remainder over.

But conſidering the firſt deviſe for *payment of debts*, the deviſee's *beneficial* intereſt in either of the caſe, appears to have been in the nature of a *truſt*. 1 P. Wms. 242.

Garth v. Baldwin, 2 Vezey, 646.

Where there was a deviſe of lands to a truſtee, *in truſt* to pay the and profits to *S.* for her ſeparate uſe for life, as if ſhe were ſole, and her deceaſe to pay the ſame to *E. her ſon for life*, and afterwards to pa ſame *to the heirs of his body*, and for want of ſuch iſſue, to pay the to all and every other ſon or ſons of the body of *S.* begotten, &c.; the queſtion, whether *E.* was entitled to the lands in tail or for life Lord *Hardwicke* proceeded on this principle, *viz.* that in limitatio a *truſt*, either of a real or perſonal eſtate to be determined in that the conſtruction ought to be made according to the conſtruction of tations of a *legal* eſtate, unleſs the intent of the teſtator or author truſt *plainly* appears to the contrary. He laid it down as a rule (he that he was not, in a court of equity, to over-rule the *legal* conſtru

the limitation, unleſs the intent of the teſtator or author of the truſt appears by declaration plain, that is, by *plain expreſſion* or *neceſſary implication*. And upon this ground Lord *Hardwicke* decreed a conveyance in tail to ... of the real eſtate ſo deviſed.

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(to *Where a*) Roberts v. Dixwell, 1 Atk. 610. a ſimilar deciſion by Ld. Hardwicke on an eſtate in gavelkind.

(I) Truſtee in what Caſes favoured, and in what Caſes decreed to account.

AND if a truſtee errs in the management of the truſt, and is guilty of a breach of truſt, yet, if he goes out of the truſt with the approbation of the *ceſtui que truſt*, the breach of truſt ought rather to fall upon the eſtate of *ceſtui que truſt*; for the courts are ever anxious to deliver the truſtee from any miſapplication of the truſt-money. Trafford v. Boehm, 3 Atk. 444.

But it is an eſtabliſhed rule, that a truſtee, executor, or adminiſtrator ſhall have no allowance for his care and trouble: the reaſon of which ſeems to be, that on theſe pretences if allowed, the truſt-eſtate might be loaded and rendered of little value. Beſides, the great difficulty there might be in ſettling and adjuſting the *quantum* of ſuch allowance, eſpecially as one man's time may be more valuable than that of another, and there can be no hardſhip in this caſe upon any truſtee, who may chooſe whether he will accept the truſt or not. Robinſon v. Pett, 3 P. Wms. 251. See Harwood v. Harriſon, Moſ. 128.

An executor in truſt who had no legacy, and where the execution of the truſt was likely to be attended with trouble, at firſt refuſed, but afterwards agreed with the reſiduary legatees, in conſideration of 100 guineas, to act in the executorſhip, and he dying before the execution of the truſt was completed, his executors brought a bill to be allowed theſe 100 guineas out of the truſt-money in their hands, inſiſting, that the reſiduary legatees might as well make a contract with the executor, touching the overplus, (which was their own property,) as the teſtator himſelf; and that no harm could happen thereby to the truſt-eſtate. But the court ſaid, all bargains of this kind ought to be diſcouraged, as tending to eat up the truſt; and here the executor had died before he had finiſhed the affairs of the truſt: wherefore the plaintiff's demand was diſallowed. Gould v. Fleetwood, *ibid.* In Ayliffe v. Murray, 2 Atk. 60. Lord Hardwicke is reported to ſay, "If a truſtee comes in a fair and open and tells the *ceſtui que truſt* will contracted where

"that he will not act in ſuch a troubleſome and burdenſome office, unleſs the *ceſtui que truſt* gave him a further compenſation, over and above the terms of the truſts, and it for between them, I will not ſay this court will ſet it aſide, though there is no inſtance they have confirmed ſuch a bargain."

It ſeems to be owing to this jealouſy, which a court of equity entertains of an executor or truſtee, that if *they* compound debts or mortgages, and buy them in for leſs than is due thereon, they ſhall not take the benefit of it themſelves, but other creditors and legatees ſhall have the advantage of it, and for want of them, the benefit ſhall go to the party who is entitled to the ſurplus; whereas, if one who acts for himſelf, and is no in the circumſtances of an executor or truſtee, buys in a mortgage for leſs than is due, or for leſs than it is worth, *he* ſhall be allowed all that is due thereon. Thus in the caſe of *Baldwyn* v. *Baniſter*, heard at the Rolls, *Paſche*, 1718. The caſe was, a mortgagor in fee died, and the mort- *Ibid.* 1 Salk. 155. 1 Vern. 476 2 Atk. 54.

gagee

gagee bought in the mortgagor's wife's right of dower. Decreed, that the heir of the mortgagor, on his bringing a bill to redeem, should have the benefit thereof, on this principle, that the mortgagee is but a trustee for the mortgagor after the money paid. So, in the case of *Powell* v. *Glover*, *Mich.* 1721, at the Rolls, where a guardian compounded debts, decreed, that it should be for the benefit of the infant.

Whelpdale v. Cookson, 1 Vez. 9. Killick v. Flexney, 4 Br. Ch. Rep. 161.

So, it hath been holden upon the same principle, that a trustee shall not be allowed to become the purchaser of that which he holds in trust. It is said indeed in one case (*a*), that if the title be *re vera* in a third person, the trustee may purchase as well as any one else.

(*a*) Leslie's case, 2 Freem. 52.

(4 *If a*) If a trustee has not misbehaved himself, it is the rule to allow him his costs. Perry v. Treby, Pr. Ch. 254. 1 Eq. Ca. Abr. 125. pl. 4 S. C. *Secus*, if he has misbehaved himself. Dawson v. Parrott, 3 Br. Ch. Rep. 236. Ball v. Montgomery, 2 Vez. jun. 191. Horsley v. Challoner, 2 Vez. 83.

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(9 *If a trustee*) Bird v. Lockey, 2 Vern. 744. Perkins v. Bayntum, 1 Br. Ch. Rep. 375. Franklin v. Firth, 3 Br. Ch. Rep. 433. S. P. A trustee neglecting to pay money into court after an order for that purpose, shall be charged with interest: but as light difference between the sum remaining in his hands, and those reported due by the Master, is not a sufficient reason for the court to order him to pay interest. Sammes v. Rickman, 2 Vez. jun, 36.

(10 *Likewise*) 1 Br. Ch. Rep. 375. Perkins v. Bayntum, *Id.* 384. Treves v. Townshend, 359. Newton v. Bennet, 1 Vern. 196. Radcliffe v. Graves. S. P. And if a trustee appear to have employed the trust-money in trade, whence he has derived profits beyond the rate of interest, he shall account for the whole of those profits, Brown v. Litton, 10 Mod. 21. Forbes v. Ross, 2 Br. Ch. Rep. 430.

(11 *But afterwards*) The doctrine here advanced, though sanctioned by great opinions in subsequent cases, Adams v. Gale, 2 Atk. 106, Child v. Gibson, *Id.* 613. is not to be considered as law. Newton v. Bennett, 1 Br. Ch. Rep. 359. Horsley v. Challoner, 2 Ves. 85.

(12 *If a*) *Vide* Ambl. 219. *contra.*

Ex parte Champion, cited in Hutcheson, v. Hammond, 3 Br. Ch. Rep. 147.

It hath been holden, that if an executor invest money in the funds, he shall not be liable to the fall of stocks; because the court, if applied to, would have made the same appropriation.

Harrison v. Harrison, 2 Atk. 121. Bostock v. Blakney, 1 Br. Ch. Rep. 1656. Waite v. Whorwood, 2 Atk. 159.

Where a trustee sells out stock contrary to the trust, the *cestui que trust* may elect to have the stock restored, or the produce of it paid. But if a trustee for the benefit of the trust-estate, sells out of one fund, and invests the produce in another, or transfers the money from one real security to another, the property continues unaltered, and he shall not be chargeable.

Worsley v. Earl of Scarborough, 3 Atk. 392.

(K) How far Trustees are answerable for each other.

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(2 *But if*) The distinction between executors and trustees as to this point appears also in Applyn v. Brewer, Pr. Ch. 173. Attorney General v. Randall, 2 Vin. Abr. 534. pl. 9. & infra. *Ex parte* Belchier, Ambl. 219. Leigh v. Barry, 3 Atk. 584. Read v. Truelove, Ambl. 417. And notwithstanding the inclination expressed by Lord Harcourt in Churchill v. Lady Hobson, 2 P. Wms. 241. and 1 Salk. 318. and by Lord Northington in Westley v. Clarke, 1 Cox's P. Wms. 82. to favour executors equally with trustees; yet the distinction still prevails, and where by *any act done* by one *executor*, any part of the estate comes to the hands of another executor, the former will be liable for his companion in the same manner as if he had enabled a stranger

ger to receive it. Sadler v. Hobbs. 2 Br. Ch, Rep. 117. Scarfield v. Howes, 3 Br. Ch. Rep. In Westley v. Clarke, one of the executors had actually received the money without the currence of his co-executors, and they signed the receipt afterwards, so that, as Lord Thur- observed in commenting upon that case, there was no act done by the co-executors which it into the power of the executor who received the money to get at it, since in fact he had it e time; for Lord Northington said, that he should have thought the co-executors *liable*, if had been present at the time when the money was paid. See Cox's P. Wms. 241. note. hurchill v. Lady Hobson, *ubi supra*, where Lord Harcourt held, that where two executors d in the receipt, and one only actually received the money, the latter only should be charge- to legatees, though it would be otherwise as to creditors (a distinction by the way not to be d in the decree, nor adopted in later cases, Sadler v. Hobbs, 2 Br. Ch. Rep. 117. though e met with in an earlier case. Gibbs v. Heiring, Pr. Ch. 49.); it appeared that the executor received the money had been the testator's banker, and that circumstance had been consi- d as having had some weight in the determination.

7. 8. *by*) For where, by any act or agreement of a trustee, money gets into the hands of companion, they shall both be chargeable. Sadler v. Hobbs, 2 Br. Ch. Rep. 116. Keble v. mpson, 3 Br. Ch. Rep. 110. So, if a trustee know of the embezzlement of the trust- d by his companion, he shall be charged with the amount. Boardman v. Mosman, 1 Br. Rep. 68.

(M) The Power of *Cestui que Trust*.

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It has) So, in North v. Champernoon, 2 Ch. Ca. 64 it is said by Ld. Ch Finch, that tenat tail of a trust may bar his issue by a feoffment, or bargain and sale. Beverley v. Beverley, 2 rn. 131. Baker v. Bailey, *Id.* 225. It was determined in Bowater v. Elly, 2 Vern. 344. that *i que trust*, if the trustees join, may bar the entail by a feoffment. But in Legatt v. Sewell, . Wms. 91. and 2 Vern. 552. Lord Cowper intimated a doubt, "whether only a deed, xecuted by *cestui que trust* in tail, should bar the remainder-man, or even the issue, in regard a eed may be made at a tavern and by surprise; but a recovery is a solemn and deliberate act." d indeed it seems to be now settled, that the issue in tail is not barred without a recovery ually suffered Weale v. Lowe. (cited) 2 Vern. 306. Kirkham v. Smith, Ambl. 518.

OF USURY.

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(B) Of Usury by the Statute Law.

By *st.* 3 *G.* 1. *c.* 8 § 39. the Governor and Company of the Bank of *gland* are enabled to borrow money at such rate of interest as they may ink fit, although the same may happen to exceed the interest allowed by w to be taken.

It is declared by 14 *G.* 3. *c.* 79. that all mortgages and other assurances lands, and their assignments or transfers, in *Ireland* and the plantations, r securing money already executed in *Great Britain*, shall be as valid as executed on the mortgaged lands, and shall continue to carry interest at e rate allowed of by the laws of the colony where the mortgaged lands : but, as to future loans, the act limits them to 6*l. per cent.*, and pro- des against fraud by confining the loan to the real value of the lands, &c. likewise gives treble forfeiture of the sum borrowed beyond the value of the

This act relates only to mortgages and other securities relating to *lands* in Ireland and the West Indies, but does not extend to *personal con-*

tracts. the land mortgaged; and, for greater notoriety and certainty, requir
Dewar v. Span, 3 TermRep. 425. all ſuch mortgages or transfers to be regiſtered in the country where t lands lie, elſe to remain liable to the 12th of *Anne*.

(C) What kinds of agreements or contracts shall be deemed uſurious, and what not.

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(13 *But a*) 3 Atk. 154. Cowp. 795.

Jeſſon v. Brooke, Cowp. 793. One broker had borrowed of another on a note of hand 45*l.* on demand to purchaſe certain goods that were then on ſale, on condition of having the future profits on the re-ſale. The goods were purchaſed and re-ſold for 5*l.* profit, the lender demanded his money within two hours after the lending, which made it carry intereſt; and the action was brought for 2*l.* 10*s.* over and above the principal and intereſt: the plaintiff was non-ſuited: for Lord *Manſfield* was of opinion, in which the three other judges concurred, "that the intention of the contract was to get more than prin-"cipal and legal intereſt on the note, which is *uſury* within the meaning "of the ſtatute.

Floyer v. Edwards, *Id.* 112. The plaintiffs, who were gold-refiners, had advanced gold wire to others in the ſame trade, upon the terms of paying ſuch a price, if the money were paid within three months; and if not, then to pay at the rate of an halfpenny an ounce *per* month over and above the price agreed for, which in fact, upon calculation, exceeded the rate of 5 *per cent.* This at the trial was found to be the conſtant uſage of the trade. A verdict was given for the plaintiff, and a queſtion reſerved for the opinion of the court, Whether this contract were uſury? Under all the circumſtances, eſpecially the conſtant uſage of the trade, the court was of opinion, that it did not amount to uſury within the ſtatute. But though this tranſaction could not be conſidered as uſury within the ſtatute, yet in a ſubſequent caſe un-

Plumbe v. Carter, *Id.* 116. der theſe circumſtances, where the defendant had paid into court the principal and intereſt at 5*l.* *per cent.* from the time of the bargain, the court would not allow the plaintiff in an action for money had and received to recover the exceſs of intereſt, notwithſtanding it appeared manifeſtly at the trial, that ſuch exceſs was only to be taken in caſe of default of payment at the end of three months, and for no other reaſon whatever.

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(21 *So where*) And Mr. J. Burnet, in Cheſterfield v. Janſen, 2 Veſ. 142. ſays—"Suppoſe "there is a purchaſe of an annuity at ever ſuch an under price, if the bargain was really for "annuity, *it cannot be uſury*: but, if the communication was about borrowing and lending, it may "uſury within the ſtatute: and how? If by reaſon of all the circumſtances and the communica-"tion, the exility of the ſum given, the original contract being a borrowing and lending, the "court thinks the annuity was a mere device to pay the principal with uſurious intereſt to evade "the ſtatute, this will be within the ſtatute; though in the face of the bargain it appears ever "fair a ſale of an annuity; the contrivance of the annuity as the uſurious reward for the loan "money ſhall not evade the ſtatute made for the benefit of mankind. This I take to be the "ſum and ſubſtance to be collected out of the ſeveral caſes. Tanfield v. Finch, Cro. El. "Fuller's caſe, 4 Leon. 208. and *ſupra*. Symonds v. Cockerill, Noy, 151. Cotterell v. Hi-"rington, Brownl. 180. & *ſupra*, and King v. Drury, 2 Leon. 7."

Murray v. Harding, 2 Bl. Rep. 859. 3 Wilſ. 390. S. C. An annuity was granted at ſix years purchaſe for the life of the grantee, a clergyman, then of the age of 32 years, charged upon his living, with a clauſe for redemption at the option of the grantor after the expiration of five years and a half's purchaſe. It was recited in the annuity deed, that

agreement had been made for a loan of the money, which was paid as price or conſideration for the annuity. But it appeared to the court, t this recital was made by the attorney without the privity or direction his client, who really and ſubſtantially meant to purchaſe an annuity. e court determined, that the annuity was not uſurious, and that the ccuracy of the recitals in the inſtrument ſhould not vitiate a contract, t otherwiſe ſeemed to be a fair one. *De Grey*, C. J. in giving judgent in this caſe, obſerved, "That it was eſſential to the nature of a uſurious contract, that there muſt be, 1. a loan. 2. That illegal intereſt is to be paid for ſuch loan. And it is eſſential to the nature of a loan, that the thing borrowed is at all events to be reſtored (*a*). If that be *bonâ fide* put in hazard, it is no loan, but a contract of another kind. So alſo, if illegal intereſt is to be certainly paid, or even upon a reaſonable poſſibility, the contract is uſurious." To evade theſe principles ny expedients have been tried. 1. To make the intereſt precarious and certain. 2. To make the principal itſelf precarious. 3. Communicaon concerning a *loan* has ſometimes infected the caſe, and turned a conct into uſury. But then the communication muſt be mutual, and it uſt be with the party himſelf, and not with his attorney. There is no ſe where even a mediated loan has been *bonâ fide* converted into a purchaſe, and afterwards held uſurious. 4. Inequality of price is alſo a ſuſpicious circumſtance, eſpecially if very inadequate. 5. If a power of reemption be given, though only on one ſide, it is a ſtrong circumſtance to ew it a loan, as in *Hooper* v. *Lawley*, 3 *Atk.* 278. But that alone ill not be concluſive. 6. The form of the inſtrument. If that imports loan, and it was ſo meant, the contract may become uſurious. At e ſame time if the tranſaction be *bonâ fide*, the blunder of an agent ill not make it otherwiſe, as in *Buckley* v. *Guildbank*, *Cro. Ja.* 677. here intereſt was made payable by ſuch miſtake two days after. 7. ubſequent acts of the parties may alſo be a material evidence of intention.

In Lawley v. Hooper, 3 Atk. 278. Lord Hardwicke in determining that an annuity granted by Lawley for his life, with a proviſo for repurchaſing or redeeming it, upon giving ſix months notice to the grantee, was a loan, ſeemed to lay great ſtreſs upon the effect of the proviſo. From the language his lordſhip uſed upon that occaſion, an idea prevailed for a conſiderable time, that the inſerting of ſuch a proviſo infected the deed with uſury. It is

aniſeſt, however, from this caſe of Murray v. Harding, that a right in the grantor to determine the annuity for his own benefit, does not create that neceſſity or obligation of repaying the incipal loan in all events, without which the courts have repeatedly declared uſury againſt the rties cannot be committed. And Lord Thurlowe, in Irnham v. Child, 1 Br. Ch. Rep. 92. id, *To ſell an annuity, and make it redeemable, is not uſury, becauſe it is not a loan.* (*a*) That there uſt be a loan to conſtitute uſury is laid down in ſeveral other caſes. 2 Anderſ. 15. pl. 8. 22 ſt. Abr. 300. S. C. Loveday's caſe, 8 Co. 65. But there may be uſury, where a party takes more an the law allows for the forbearance of a debt, and yet in that caſe there is no loan in the ordinary acceptation of the term. Thus in Pollard v. Scholy, Cro. El. 20. "Pollard ſold to the fendant ſome oxen to be paid for at a given time: "when the time was arrived, Scholy required a longer day for payment, and Pollard granted it, paying to him ſo much wheat, as exceeded in value the legal rate of intereſt. The defendant in debt pleaded the ſtatute, and would avoid the contract, and the opinion of the juſtice was, that the ſtatute doth not make the contract void, which was duly made, but both only avoid all contracts for uſury: and this laſt contract is void, being againſt the ſtatute, but the firſt was good, being made *bonâ fide*." e alſo Spurrier v. Mayoſs. 1 Veſ. jun. 531.

If in truth it appear on the whole of the tranſaction that a loan was intended under colour of an annuity, and the mode of annuity was forced by the lender on the borrower, the court will conſider it as uſurious, notwithſtanding a colourable contingency, as that the lender at the end of a given time engage to ſupply the borrower with money to redeem. Richards v. Brown, Cowp. 770.

Dr.

Moore v. Battie, Ambl. 371.

Dr. *Battie*, at the requeſt of *Moore*, ſold out 1000*l.* *South Sea* a nuities, at a loſs upon the whole of 76*l.* and took a mortgage for 100 from *Moore* at 5*l. per cent.* reducible to 4*l. per cent.* if the money were paid in a given time. Dr. *Battie* afterwards ſold out, at Mr. *Moore's* queſt, 1400*l. S. S.* annuities at a loſs upon the whole of 267*l.* 15*s.*, a took another mortgage from *Moore* for 1400*l.* with intereſt at 5*l. per ce* with a power to *Moore* to reinſtate the 1400*l.* at any time within t years. Upon a bill for foreclоſure, the Maſter reported the two prin pal ſums of 1000*l.* and 1400*l.* with intereſt and coſts due thereupon; whi having been paid by the plaintiff into court, he brought his bill (*inter al* to be paid the ſeveral ſums of 76*l.* and 267*l.* 15*s.* with intereſt, inſiſtin that the defendant ought to have been charged with them in the accou The defendant pleaded the proceedings under the decree in bar: his pl on being argued was ordered to ſtand for an anſwer, and two queſtio were made, 1. Whether it were uſury? 2. Whether the court would r lieve? As to the firſt, Lord Keeper *Henley* was clearly of opinion, th it was a ſhift within the ſtatute; the plaintiff having received but 92 inſtead of 1000*l.*, and 1132*l.* 5*s.* inſtead of 1400*l.*, and yet having pa as much intereſt as was equal to 5*l. per cent.* upon the ſums of 1000*l.* a 1400*l.* His lordſhip therefore decreed payment.

But a mere loan of ſtock is not uſurious, nor the payment of the d vidends in the mean time, though they exceed the legal rate of intere

Tate v. Wellings, 3 TermRep. 531.

Thus, where *A.*, to accommodate *B.*, ſold out ſtock, and lent *B.* t money produced by the ſale, on an agreement that *B.* ſhould replace t ſtock on a certain day, or repay the money lent on a ſubſequent day, wi ſuch intereſt in the mean time as the ſtock itſelf would have produced; was adjudged, that this was not uſurious, though the intereſt exceeded 5 *per cent.* The loan was not originally uſurious, becauſe for a limited tim the party borrowing had it in his power to repay the money or replace t ſtock itſelf, if he had choſen.

Morſe v. Wilſon, 4 TermRep. 353.

Where the borrower of money gave a bond for the payment of the pri cipal and intereſt at 5*l. per cent.*, and covenanted at the ſame time alſo t pay the lender a certain portion of the profits of a trade carried on by hi in partnerſhip with another perſon, it was adjudged to be uſury; for th principal was no farther hazarded than in the caſe of every other loa namely, by the riſk of the borrower's inſolvency; as between the lend and the partners in the buſineſs, he was not liable to contribute to the loſſ in the trade. Here is a proviſion to receive the profits, but none to enga for the loſſes of the trade.

Spurrier v. Mayoſs, 4 Br. Ch. Rep 28. 1 Vez. jun. 531. S. C.

On a bill praying that the defendant might be decreed to complete the purchaſe of certain houſes, the defendants inſiſted that the contract for th purchaſe was uſurious. The agreement was, to purchaſe the houſes fo 430*l.*, 200*l.* to be paid in money, and the remainder on a future day, wit 5*l. per cent.* intereſt, or in default of payment, to pay a rent of 42*l. per an* till payment, ſubject to a deduction of 5*l. per cent* for ſo much of the re maining ſum of 230*l.* as ſhould be then paid. Poſſeſſion was delivered t the defendants. Adjudged not to be uſury.

Maſſa v. Dauling, 2 Str. 1243.

A perſon paid 19*l.* for a note of 20*l.* which had three months to ru and at the expiration of that time took another note of 20*l.* upon ac vancing 3*l.* more for other three months. Upon an iſſue out of Chancer *Lee*, C. J. held it uſury. However in the caſe of *Lloyd* v. *Williams*. 2 B *Rep.* 793. *Blackſtone* J. ſaid, "he conceived that intereſt may as lawfull "be received beforehand for forbearing, as after the term is expired fo harin

having forborne. And it ſhall not be reckoned as merely a loan for the balance; elſe every broker in *London*, who takes 5*l. per cent.* for diſcounting bills, would be guilty of uſury. For if upon diſcounting a 100*l.* note at 5*l. per cent.* he ſhould be conſtrued to lend 95*l.* only, then at the end of the time he would receive 5*l.* intereſt for the loan of 95*l* principal, which is above the legal rate." It has been ſince determined, that in diſcounting notes the common uſage of charging ſomething for trouble, *&c.* beyond the rate of legal intereſt is not uſurious, provided no corrupt bargain be made for taking uſurious intereſt. So, in an action for uſury, tried before *Buller*, J. againſt a banker at *Sudbury*, it appeared, that it was their conſtant uſage to diſcount bills in *London* for their correſpondents at *Sudbury*, for which the bankers charged beyond the legal intereſt for the time the bills had to run 5*s. per cent.* on the groſs ſum, without any reference to the time the bills had to run. The jury found for the defendant under the judge's direction. Auriol v. Thomas, 2 Term Rep. 32. Winch v. Penn. Sitt. after Hil. 1786.

Where upon a negotiation for a loan of money, the lender ſaid, he could not advance money, but would furniſh goods, which the borrower took, and ſold by the intervention of a broker recommended by the lender, and upon the iſſue of the negotiation the borrower, inſtead of 200*l.* which he meant to borrow, received only 117*l.* 2*s.* 2*d.*; the court held the tranſaction to be a loan of money for more than 5*l. per cent.* under colour of a ſale of goods, and therefore uſurious. Lowe v. Waller, Dougl. 736.

B., a ſtudent of a college in *Oxford*, applied to *A.* a Jew to raiſe him a ſum of money: *A.* recommended one *P.*, and *P.* introduced him to *V.*, who let him have the goods to the amount. *A.* attended, and recommended the choice of the ſilks, for which *B.* gave his note for 2224*l* at twelve months date. The ſilks were afterwards bought by one *R.* for about half the price. The note was afterwards indorſed by *V.* to *D.* in the ſettlement of an account, who was completely ignorant of the tranſaction with *B.* Upon *B*'s application to the court to compel the delivery up of the note, on payment of what the ſilks actually produced, Lord *Thurlowe* ſaid, "I am to enquire whether, under the maſk of trading, this is not "a method of lending money at an extraordinary rate of intereſt; and "there is not a doubt, that in this caſe the tranſaction was merely for the "purpoſe of raiſing money, to ſupply the neceſſities of this young man. "Do they deny knowing the goods were to be ſold? I take it there"fore as an advancement of goods inſtead of money to ſupply his ne"ceſſities." Barker v. Vanſommer, 1 Br. Ch. Rep. 149. In arguing this caſe, ſeveral other caſes of a like tendency were cited: as, that of Cecil v. Sutton and Roundtree in the Exchequer, where the defendants ſupplied the plaintiff with goods, in order to enable him to take up a note, and the court granted an injunction till the amount for which the goods ſold ſhould appear. In Lord Polwarth v. Cooke, his lordſhip had applied for the loan of 150*l.*, and Cooke gave him 50*l.*, a gold watch, and a Cremona fiddle; and the court ordered the ſecurities to be given upon payment of what was obtained by ſale.

A. applied to *B.* for the loan of 1500*l.* on mortgage: *B.* ſaid his money was in the funds, and that he had purchaſed at 75*l.*; if therefore *A.* would have ſtock at that value, he would transfer as much as would amount to that ſum; which he did, and *A.* gave a mortgage accordingly for 1500*l.* *A.* loſt two and a half *per cent.* on the ſale of the ſtock. The executor of *B.* could not maintain an ejectment on the mortgage deed; for in fact the deed was void by the ſtatute: and moreover, no action could be maintained on a contract uſurious at common law. Daviſon v. Barnard Pitt. Eſpin. N. P. 1,

So,

Pratt v. Willey, *Id.* 40.

So, if the diſcounter of a bill of exchange make the holder t goods at a higher price than they are worth upon a fair eſtimate, i uſury.

1 Br. Ch. Rep. 151.

But in the Duke of *Ancaſter* v. *Pickett*, the court refuſed to relieve Duke who had purchaſed goods of *Pickett*, and had ſold them again leſs money: for the jewels were ſold in the common courſe of trade, not with any view of accommodating the Duke with the means of ra or borrowing money upon them.

Bodily v. Bellamy, 2 Burr. 1094.

An action was brought here upon a bond entered into at *Calcutta*, wh both parties then reſided, and the plaintiff ſtill reſided; but the defend was in *England*; and nine *per cent.* was the rate of intereſt made pay by the condition of the bond. Lord *Mansfield* ſaid, "The plaintiff i "juſtice entitled to recover the ſum really lent to the defendant, toget "with *Indian* intereſt till the ſigning of the judgment: but with o "legal intereſt of this country (which is no more than fiv "*cent.*) from the time of the liquidation of the debt by the ju "ment."

Le Grange v. Hamilton, 4 Term Rep. 613. 2 H. Bl. 142. S. C. in error.

A ſpecial memorandum was indorſed on a bond given for the paym of 100*l.* with intereſt at 5*l. per cent.* in payments of 20*l.* yearly by quar ly payments of 5*l.* each. The indorſement was to this effect: that at end of each year, the year's intereſt due was to be added to the princ ſum: and then the 20*l.* received during the year to be deducted, and balance to continue as principal. As the intention of the parties did appear to be uſurious; as not the intereſt on the whole 100*l.*, but intereſt due, was to be added to the principal at the end of the year, the intereſt due could only be taken to mean what was legally due there was no loan, but the conſideration of the bond was the giving u an annuity; the court of K. B, *diſſent. Kenyon*, C. J., held, that contract was not uſurious, and that opinion was afterwards affirmed the Exchequer-chamber.

(D) What kind of Hazard or Caſualty will bri an Agreement, &c. out of the Statute of Uſur

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(7 *Mr. Spencer*) 2 Vez. 125. S. C. 1 Wilſ. 286. S. C.

(E) In what Caſes Securities ſhall be forfeited avoided on account of Uſury.

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(11 *Likewiſe*) Murray v. Harding, *ſupra* 724.

(12 *It is*) A bill of exchange given upon a uſurious conſideration is void in the hands indorſee for a valuable conſideration without notice of the uſury. Lowe v. Waller, D 736.

(G)

(G) In what Cases Relief is given against usurious Contracts.

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(5 *Upon*) See the observations on this case *supra*, Vol. 1. pag. 166. Notwithstanding what here advanced, courts of law now view the borrower in a more favourable light, and will permit him to recover the excess of interest in an action for money had and received. Browning v. Morris, Cowp. 792. But to entitle him to bring such an action, he must shew that he has done what that equity requires. In an action, therefore, to recover goods which the plantiff had pawned upon a usurious contract, the court held, that he must shew he had tendered all the money really advanced. Fitzroy v. Gwillim, 1 Term Rep. 153.

(6 *It is said*) 1 Atk. 450. Earl of Suffolk v. Green. 2 Atk. 393. Chauncy v. Tahourdin.

(H) What Informations will lie in Cases of Usury, and where they are good, and where not.

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(11 *It has*) *Vide* Rex v. Upton, 2 Str. 816. 1 Barnard. K. B. 97. S. C. Regina v. Smith, Salk. 680.

(13 *But it*) Ca temp. Hardw. 233. S. C. In such case the court relieve by staying the proceedings on the judgment, and directing an issue to try, whether the contract were usurious or not. Cooke v. Jones, Cowp. 727.

If there is an agreement to pay legal interest, and a premium is paid down over and above the interest, the agreement is usurious and void. But the penalty under the statute of *Anne* is not incurred, if the premium itself does not exceed legal interest, nor till more than legal interest is actually received; so that an action may be brought for the penalty, though more than a year has elapsed since the payment of the premium, if it is not a year since that which exceeded legal interest has been received. Fisher v. Beasley, Doug. 235.

But where one lends 100*l.*, and takes 6*l.* 5*s.* for the interest thereof three months by way of advance at the time of lending, the penalty is at instant incurred, and the action for it must be brought within a year from that time. Lloyd v. Williams, 3 Wils. 250. 2 Bl. Rep. 792. S. C.

If there be a corrupt agreement for the forbearance of money *till one or the other of two days* at the option of the borrower, it must be pleaded according to the fact: for if it be pleaded as an *absolute* forbearance *till one of those days*, the evidence will not support the plea. Tate v. Wellings, 3 Term Rep. 531.

In an action on a bill of exchange, if there is a plea of a usurious agreement, and that the bill was given in consequence thereof, the plaintiff may traverse the usurious agreement, and conclude with a verification. Smith v. Dover, Dougl. 428.

(I) Of the Trial and Evidence in Cases of Usury.

THE defendant lent 2000*l.* to the plaintiff on mortgage, with a usurious clause in the deed, that he should have 40*l.* as a pretended salary for receiving the rents. The deed was made and executed in *London*: Scott v. Brest. 2 Term Rep. 238.

the lands lay in *Middlesex*: the account was settled in *London*, and t receipt for the balance signed in *London*, but the draft given for it w upon a banker in *Middlesex*. It was adjudged, that the venue was p perly laid in *London*; for not only the usurious taking, but also the co tract, by which the defendant was appointed receiver, were both *London*.

Barbe v. Parkere, 1 H. Bl. 283.

But, where in an action on the statute for the penalty, the declarati stated a specifick sum of money to have been lent, (in which the usu consisted), but the evidence was, that the loan was *part in money* a the rest in goods of a known value, which the borrower *agreed to t as cash*; it was holden to be good evidence to support the decla tion.

Smith v. Prager, 7TermRep. 60. Abrahams v. Bunn, 4 Burr. 2251.

It has been ruled, however, in later cases, and seems now to be s tled, that in such an action, the borrower of the money is a compet witness to prove the whole case, as well the repayment of the money, the other facts.

OF WARRANTY.

(E) What shall be deemed a good Warranty Law.

Page 439 (2 *The words*) *Vide* Gilb. Ten. by Watkins, note lvi.

(H) Of the nature of a collateral Warranty Common Law, and how far it is barred,

Page 442 (2 *As if*) Lord Chancellour Cowper said, that " a collateral warranty was certainly one of " harshest and most cruel points of the common law; because there was not so much as " intended recompence; yet he could not find, that Chancery had ever given relief in " 10 Mod. 3, 4.

Warrant of Attorney.

Hutson v. Hutson, 7TermRep. 7.

It should seem from a late decision, that the court will in no c allow of any infringement of the rules which require the presence defendant's attorney, when he executes a warrant of attorney custody.

Crompton v. Steward, 7TermRep. 19.

But these rules do not extend to warrants of attorney executed by sons in execution. Their object was the protection of persons in cust on *mesne process*, from the consequences of an act by which in considera of being released from immediate imprisonment, they might subject th selves to the payment of a larger sum than was really due from them. when they are charged in execution, that mischief is not to be appreh ed; and therefore the rules do not apply to such a case.

OF WASTE.

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(1 *The ſtatute*) 299. But this opinion of Lord Coke, that there was no remedy at common for waſte, except againſt tenant by the curteſy, in dower, and a guardian, it ſhould ſeem is well founded. *Vide* Bract. lib. 4. c. 18. 2 Reeves's Hiſt. Law, 73, 74. 148. note.

Note, the word *ſale* is not in the original act. Bracton, ſpeaking of the terms *waſte*, *deſtruction*, *exile*, ſays, that the two firſt ſignified the ſame thing; but *exilium* meant ſomething of a more grievous nature; as ſpoiling or ſelling houſes; proſtrating and extirpating trees in an orchard avenue, or about any houſe; all theſe were conſidered, ſays he, *ad maximam deformitatem curiæ capitalis meſſuagii*, and as they either drove the inhabitants away, or had a tendency ſo to do, they were called *exilium*. Bract. lib. 4. c. 18. § 13. 1 Reeves's Hiſt. Law. 386.

(C) What Acts ſhall be deemed Waſte.

The rule which ſeems pretty clearly eſtabliſhed by the above caſes, that whatever is annexed to the freehold, becomes part of it, and cannot be removed without doing waſte, has been relaxed in later times, upon motives of publick policy, as between two deſcriptions of perſons, that is, landlord and tenant, and tenant for life or in tail, and the remainder-man or reverſioner. As between landlord and tenant, it is now admitted, that the latter may, *during the term*, take away all ſuch chimney pieces, wainſcot, *&c.*, and all ſuch things neceſſary for trade, as brewing veſſels, coppers, fire-engines, cyder-mills, *&c.* as he has himſelf put up or erected. We have ſaid *during the term*, for if he remove them *after the term*, he will be a treſpaſſer. And as between tenant for life or in tail, and the remainder-man or reverſioner, it is alſo admitted, that the former may remove fire-engines, cyder-mills, coppers, *&c.* which he has erected, and thereby not only enjoys the profits of the eſtate, but likewiſe carries on a branches of trade. And if he does not remove them in his lifetime, they belong to his perſonal repreſentatives. But as between *heir* and *executor* the common rule of law ſeems ſtill to hold; for though in an action of trover by an executor againſt an heir for a cyder-mill tried at *Worceſter* before Lord Chief B. *Comyns*, his Lordſhip was of opinion, that it was perſonal eſtate, and directed the jury to find for the executor; yet Lord *Mansfield* has obſerved, that that caſe in all probability turned upon a cuſtom: and that where no circumſtance of that kind ariſes, the rule ſhall ſtill hold in favour of the heir, ſeems fully eſtabliſhed by the deciſion of the Court of King's Bench in *Lawton* v. *Lawton*, *Eaſter* 22 *G.* 3.

Ex parte Quincy, 1 Atk. 477. Ld. Dudley v. Ld. Ward, Ambl. 113. Bull. N. P. 34. S. P. Poole's caſe, 1 Salk. 368. Lawton v. Lawton, 3 Atk. 13.

(G) Who may bring an Action of Waſte.

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(g *Ifa*) But in ſuch caſe a court of equity would interpoſe by injunction to preſent waſte. Perrot v. Perrot, 3 Atk. 94. Robinſon v. Litton, *Id.* 210. Farrant v. Lovell, *Id.* 723.

(H) Against whom the Action of Waste may be brought.

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(3 *Or otherwise*) In this point, with deference to the high authority of Lord *Coke*, the act did not introduce that which was not at the common law; for tenant for life was punishable for waste at common law, as may be seen in Bracton, lib. 4. c. 18.

(I) At what time an Action of Waste may be brought.

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(2 *If a*) That is, the statute of 20 E. 1. c. 4.;—which statute is an authoritative decision of parliament of a point arising in a cause then pending in the bench, upon which occasion the parliament not only declared how the law should be held in future, but likewise directed the justices to proceed in that manner in the case then before them. Note, This act is not to be found either upon the parliament rolls, or among the statute rolls.

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(9 *But if*) And 3 Atk. 94. 210. 723.

(N) In what Cases in general Waste may be restrained by Injunction in Equity.

Stonor v. Strange, Mitf. Eq. Rep. 123. Whitelegg v. Whitelegg, 1 Br. Ch. Rep. 37. F. R. C. 213. (*a*) Lowther v. Stamper, 3 Atk. 496. (*b*) Anon. Ambl. 209.

A Court of equity will interpose by injunction to prevent the assertion of a doubtful right in a manner productive of irreparable injury. Therefore, where the tenants of a manor, claiming a right of estovers, cut down a great quantity of timber of great value, their title being doubtful, the court entertained a bill at the suit of the lord of the manor to restrain the assertion of it. But in this, and indeed in all cases of waste, the title of the plaintiff must be set forth fully and particularly in his bill, else the defendant may demur. The bill must likewise be supported by an affidavit of the waste committed or threatened; though in some cases the injunction has been granted without one. But the court will not restrain the defendant from working a mine already opened, even where there is an affidavit (*a*), unless it appear that he has only a term for the estate for years or for life, and that the reversion be in the plaintiff or (*b*), that it be a breach of an express covenant, or an undisputed mischief.

Bradly v. Stratchy, Barnardist. Ch. Rep. 399. Strachy v. Francis, 2 Atk. 217. Hoskins v. Featherstone, 2 B. Ch. Rep. 552.

If a parson commit waste upon the glebe, an injunction will be granted on the application of the patron. So, if the widow of the late incumbent commit waste during the vacancy.

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(2 *If there*) 3 Atk. 54. 210. 723. S. P.

Roswell's case, 1 Ro. Abr. 377. (*a*) Molineux v. Powell, Pasch. 1730. *per* Lord King. 3 P. Wms. 268. note [F].

A tenant for years, remainder to *B*, for life, remainder to *C*. in tail, *A*. is doing waste. *B*., though he cannot bring waste, not having the inheritance, is yet entitled to an injunction. But (*a*) if the waste be of a trivial nature, and *á fortiori* if it be a meliorating waste, as by building on the premises, (see *Co. Litt.* 53.) the court will not injoin: nor if the reversioner or remainder-man in fee be not made a party, who possibly may approve of the waste.

(5

(s Ora) Pr. Ch 454. S.C.

On a bill to reſtrain a jointreſs *without impeachment of waſte* from committing waſte, a perpetual injunction was granted to reſtrain her and her agent from ploughing the paſture and meadow lands of her inture. Baſſett v. Baſſett, Finch's Rep. 190.

A. tenant for life, remainder to *B.* his ſon in tail, remainder to *C.* for , with remainders over. *A.* files a bill in his own name and that of his ſon then an infant, ſtating *(inter alia)* that there were great quanes of timber upon the eſtate going to decay, and praying that he (*A.*) ght be empowered to cut down and ſell ſuch timber as was decaying at its full growth, for the benefit of *B.* The defendants by their aners admitted that there were ſeveral trees in a ſtate of decay, and that would be for the benefit of all perſons intereſted in the premiſes to have n cut down. It was decreed, that the Maſter ſhould inquire what ber was ſtanding upon the eſtate that was in a decaying condition, ich was neither a ſhelter nor ornament to the ſeat, and that ſuch deing timber as the Maſter ſhould direct ſhould be cut down and ſold, the produce of the ſale inveſted upon proper ſecurity in the names truſtees for the benefit of *B.* the infant, to be paid him when he came age. Bewicke v. Whitfield, 3 Cox's P. Wms. 266. In this caſe, it is to be obſerved, the tenant for life was co-plaintiff with the remainder-man in tail, and claimed no benefit from the ſale of the timber. But ſuppoſing a contract to

ntered into between the tenant for life and remainder-man to ſhare in the profits of the ſale, ich ſeems not to be unreaſonable, for no timber can be cut, without the conſent of the te- t for life,) could the court in that caſe authorize the cutting down of the timber? For if the re- nder-man in tail were to die before his eſtate veſted in poſſeſſion, the rights of the perſon next remainder would be varied. Where, therefore, the court had authorized the cutting down imber on the eſtate of an infant tenant in tail in remainder, and the tenant for life claimed life-eſtate in the money produced by the ſale, Lord Commiſſioner Eyre ſaid, he thought the rt had done wrong in doing for the tenant in tail what he could not do for himſelf; and the ney was ordered to be inveſted in the funds, that when the infant came of age, the claims of parties might be diſcuſſed in a bill. Mildmay v. Mildmay, 4 Br. Ch Rep. 76. It is, howr, a rule, that the money raiſed by the ſale of timber cut down by tenant for life, impeach- of waſte, ſhall be paid to him who has the firſt eſtate of inheritance, whether in fee or in ; and this, though there may be ſeveral intermediate remainders that may ariſe. Lee v. on, 3 Br. Ch Rep. 37. But yet, where the tenant for life has alſo in himſelf the next ent eſtate of inheritance, ſubject to intermediate contingent remainders, he ſhall not take antage of his own wrong in cutting down timber, but the court will preſerve it for the bene- of the contingent remainder-men. Williams v. Duke of Bolton, Feb, 24, 1784, 3 Cox's P. s. 268. note (1).

In general, an injunction will not iſſue where the perſons applying for re tenants in common with the perſon in poſſeſſion; for he has an equal e to the poſſeſſion with them, and they may have a partition againſt n. However, where it appeared that the perſon in poſſeſſion was inſolt, and could not pay the plaintiffs their ſhare of the money produced by e ſale, Lord Chancellour granted the injunction. Smallman v. Onions, 3 Br. Ch. Rep. 621.

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(1) *Ibid.* At common law, the clauſe, *without impeachment of waſte*, only exempted the te- t for life from the penalty of the ſtatute, the recovery of treble value, and the place waſted, giving the property of the thing waſted. But in Lewis Bowle's caſe, 11 Co 79. it was de- mined, that theſe words alſo gave the property: the neceſſary conſequence of which was, t in general, unleſs on particular circumſtances, he was not to be reſtrained in equity; for t would be to determine, that he ſhould not make uſe of that property which the law allowed . But afterwards ſeveral inſtances were conſidered, in which this very large power might be rciſed contrary to conſcience and in an unreaſonable manner by the tenant for life; as, where act was to the *deſtruction* of the thing ſettled: which was the ground of Lord Bernard's caſe, ſtrongeſt that could happen: yet that was not an original caſe without precedent or judicial ion to ſupport it, as appears from a caſe 5 Ja. 1. (before Lewis Bowle's caſe,) which proba- occurred then, though the determination there did not operate upon it. *Per* Lord Hard- ke, 1 Ves. 265.

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(16 *A bill*) 3 Atk. 215. S. C. In this caſe the plaintiff alleged, that the defendant, Sir Packington, had cut down *a great number* of trees, and had *threatened* to cut down and deſtroy the *all*: that Sir H. Packington's agent had agreed for the ſale of 2000 trees, and that in conſequence thereof *ſome* trees had been actually felled. It does not appear from the allegations of the plaintiff upon moving for the injunction, whether the agent had admitted this fact. Sir H. Packington's anſwer was not come in. Lord Hardwicke granted the injunction to reſtrain Sir H. Packington, his agents, ſervants, and workmen, from cutting down timber-trees growing in Wood Park aforeſaid, which were for the *ſhelter* or *ornament* of the ſaid manſion-houſe there; and alſo any timber-trees, which were planted, or grew in any *lines, avenues, or ridings, for the ornament of the ſaid park until the ſaid Sir* H. Packington *ſhould fully anſwer the plaintiff's bill.* Reg. B. 1744. fol. 325.

Roltv. Lord Somerville. 2 Eq. Ca. Abr. tit Waſte (A), pl. 8. (*a*) Even where a ſon tenant in tail brought a bill againſt his father tenant for life, without impeachment of waſte, charging waſte in pulling up a *deal floor*, removing ſome young oaks, and turning meadow into plough land, but did not apply for an injunction, the bill was diſmiſſed. Piers v. Piers, 1 Vez. 521. For the ground of going into a court of equity is to ſtay the waſte, not by way of ſatisfaction for the damages but by way of prevention of the wrong. The account is only incident to the preventive juriſdiction by injunction, and is given upon the maxim of prevention multiplicity of ſuits, that the party may not be obliged to proceed both at law and in equ

A very conſiderable real eſtate was limited to Mrs. *Rolt*, who afterwards married the defendant the Lord *Somerville*, for life, without impeachment of waſte, remainder to the plaintiff *Rolt* for life, without impeachment of waſte, with ſeveral remainders over. The defendant, Lord *Somerville*, to make the moſt of this eſtate during the life of his wife, pulled down ſeveral houſes and out-buildings upon the eſtate, and ſold them, and alſo took up lead water-pipes that were laid for the conveyance of water to the capital meſſuage, and diſpoſed thereof; and alſo cut down ſeveral groves of trees that were planted for ſhelter or ornament of the capital meſſuage. Upon this a bill was brought by the plaintiff to compel the defendant to account for the money raiſed by particulars before mentioned, and to put the eſtate in the ſame plight and condition it was in before. The defendant demurred, and inſiſted, that this waſte was committed by tenant for life without impeachment of waſte, and therefore he was not liable to be called to account for what he had done either at law or in equity; and if he was, yet the plaintiff could not call him to an account, becauſe he was not a remainder-man of the inheritance. Lord *Hardwicke*—Though an action of waſte will not lie at law for what is done to houſes, plantations for ornament or convenience by tenant for life without impeachment of waſte, yet this court hath ſet up a ſuperior equity, and will reſtrain the doing of ſuch things on the eſtate. In Lord *Bernard's* caſe the court reſtrained him from going on, and ordered the eſtate to be put in the ſame condition. In Sir *Blundel Charleton's* caſe, the Maſter of the Rolls decreed, that no trees ſhould be cut down that were for ornament of the park; but Lord Chanc. *King* reverſed that, and extended it only to trees that were planted in rows. My only doubt is, as to the trees that have been cut down; for if this bill had been brought before ſuch trees *(a)* had been cut down as were for the ornament or ſhelter of the eſtate, this court would have interpoſed: but here the miſchief is done, and it is impoſſible to reſtore it to the ſame condition as to the plantations, and therefore it can lie in ſatisfaction only; and I cannot ſay the plaintiff is entitled to a ſatisfaction for the timber, which is a damage to the inheritance; yet as to pulling down the houſes and building and taking up the lead pipes, that may be reſtored, or put in as good condition again. In my Lord *Bernard's* caſe there were directions for an iſſue at law to charge his aſſets, with the value of the damages, not having performed the decree in his lifetime.—The demurrer was allowed as to ſatisfaction on account of the timber, but over-ruled as to the reſt.

court therefore have refuſed to entertain a bill merely for ſatisfaction for timber cut down the eſtate of the tenant who cut it down was determined, no injunction having been prayed. College v. Bloom, 3 Atk. 262.

Sir *T. A.*, in the ſame ſettlement in which he made himſelf tenant for without impeachment of waſte, with full liberty to commit waſte, ed a jointure upon his wife for life without impeachment of waſte. ſettling another part of his eſtate, he created a term on truſt to ſecure nt-charge of 300*l. per annum* to his wife, as a further part of her join-, and afterwards out of the rents and profits thereof to raiſe money n time to time, to reimburſe her expences in ſuſtaining and repairing jointure eſtate. A bill was brought by the daughter of Sir *T. A.* after death and the death of her brother without iſſue, againſt her mother to in her from committing ſpoil and deſtruction on her jointure eſtate, for ſatisfaction for the damage done thereby; ſuggeſting, that ſhe had down even ſuch timber as was not fit for repairs, and young ſaplins, , leaving not a twig on the eſtate. Lord *Hardwicke* upon the general nd, conſidering the queſtion merely as it concerned tenant for life out impeachment of waſte under a ſettlement, ſeemed to think that court could not interpoſe to prevent ſuch a tenant from cutting down er in an improper ſtate. But on the ſpecial circumſtances of the caſe, lordſhip expreſſed himſelf to this effect—This ſettlement is all in the or's own hand-writing, who does not appear to have been a lawyer: though a counſel was ſaid to be employed, there is no evidence eof. It is natural to ſuppoſe, that from the variety of expreſſions in additional words to the clauſe, wherein he makes himſelf tenant for he thought there was ſome difference. Beſides, the term for his 's reimburſement is extraordinary; and it is abſurd to ſuppoſe he nt to leave her at liberty to cut down and ſtrip the eſtate of every of timber, (which are the natural *botes* for repairs,) and then to come his term to be reimburſed her expences in buying timber of repairs: it ontrary to the plain intent, which was that ſhe ſhould be tenant for life out impeachment of waſte to prevent trouble in little matters; but ſhe ſhould be reimburſed out of this term what ſhe ſhould pay out of own pocket. Therefore, as the defendant has cut down timber on this e without applying it to repairs, ſhe ſhall have no benefit of this term, ſhe has reimburſed to the eſtate what ſhe has ſo unreaſonably cut y: and as to the future, the evidence being that ſhe has left no er fit even for the repair of farm-houſes, I ſhall reſtrain her by the ree from cutting any more timber off the eſtate without leave of the rt.

Aſton v. Aſton, 1 Vez. 264.

, *D.* deviſed his real eſtates, ſituate at *C.*, *W.*, and *B.*, to his wife, defendant, for life, remainder to *E. H.* for life, remainder to the ntiff in fee. Juſt before his death he added two codicils, the laſt of ch, and the material one in the preſent queſtion, was in theſe words— Whereas I have deviſed my eſtates by my laſt will and teſtament, as herein mentioned, and my dear wife has no power to cut down any imber; now *I give unto my ſaid wife for and during ſo long time as ſhe ſhall continue my widow, full power and authority to cut timber upon any part of my eſtate, for her own uſe and benefit, at all ſeaſonable times in the year.*" The defendant, under this power, made contracts for, and an to fell timber: whereupon the plaintiff filed his bill againſt her, rging, that ſhe had cut down a great many trees that had been planted ſheiter and ornament to the manſion-houſes, and which ſtood in the lawns

Chamberlyne v. Dummer, 1 Br. Ch. Rep. 166.

(*a*) The injunction was ſa dto iſſue nearlyinthe termsofthat of Obrien v. Obrien, 20th May 1751. which was, to reſtrain the defendants

fromcutting any timber trees or other trees growingupon the eſtates, which were planted or growing therefor the ornamentor ſhelterofthe manſion-houſe, or thatgrew in viſtas,planted walks, or lines, for the ornament of the park part of the eſtate, and alſo fromcutting down any ſaplins growing on any part of the eſtate not proper to be felled, till anſwer or further order.

lawns, gardens, and pleaſure-grounds belonging to the teſtator, and a great numbers of ſaplins, and timber trees unfit to be cut, and praying account of the timber ſo cut, and ſatisfaction for the ſame, and an injun tion to reſtrain the defendant from committing waſte and deſtruction the eſtates. The defendant in her anſwer admitted, that ſhe had cut do ſeveral trees in the lawns and pleaſure-grounds, but inſiſted that it was the improvement of the place, by widening the paſſages, and preventi damps: ſhe alſo alleged, that oak and aſh trees of ſuch a dimenſion w accounted timber trees, and that ſhe had cut down none under ſuch ſiz An injunction *(a)* however, was granted to reſtrain her from cutting tr which were ſaplins, and not proper to be cut as timber. The def dant afterwards intermarried, and the cauſe coming on to be heard *(b)* Lord Chancellour was pleaſed to direct a trial at law upon the follow iſſue, *viz.* Whether the defendant had cut any trees or other tim which had been placed, or deſignedly left for the ornament or ſhel of the manſion-houſe, gardens, and pleaſure-grounds at *C.* and at *W* and alſo, whether ſhe had cut any ſaplins or young trees down which not proper to be felled as timber, and what damage had been ſuſtai thereby.

(*b*) 3 Br. Ch. Rep. 549.

Leighton v. Leighton, 22d March 1747-8, 1 Br. Ch. Rep. 167.

A bill was filed by the eldeſt ſon tenant in tail, expectant on the de of the father tenant for life, to reſtrain the father from committing wa by cutting down timber, eſpecially ſuch as was ornamental to the ho The court, upon affidavit, and certificate of the bill filed, granted an junction to reſtrain the defendant from committing waſte upon ſuch p of the eſtate, whereof he was ſubject to impeachment for waſte, and to the manſion-houſe, out-houſes, gardens, and orchards, timber grow for ornament and ſhelter to the houſe, to reſtrain him from commit waſte therein till anſwer or further order.

Counteſs Dowager of Plymouthv. Lady Archer, 1 Br. Ch. Rep. 159.

Lands were deviſed to truſtees to be ſold, and the money to be l out in the purchaſe of other lands, which, when purchaſed, were to ſettled to the uſe of *A.* for life, without impeachment of waſte, remain over. The rents and profits of the lands to be ſold were directed to till ſale, to the uſe of the ſame perſons who would be entitled to the la that were to be purchaſed. It was decreed, that *A.*, the tenant life, could not cut down timber on the lands that were directed to ſold.

Counteſs of Strathmore v. Bowes, 2 Br. Ch. Rep. 88.

Although, as appears from the above caſes, an injunction will l to prevent a tenant for life *without impeachment of waſte* from com ting improper waſte, yet if the anſwer deny any intention of doing be not excepted to, and be full, the order for the injunction will be charged.

(O) What relief may be given in Equity, in Caſ of Waſte.

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(9 *One*) It appears by Reg. Lib. B. 1723. fol. 576. that there were in this caſe truſtees to ſ ſerve the contingent remainders, and the bill expreſsly ſtated applications to have been made the heir of the ſurviving truſtee, to interpoſe and put a ſtop to the commiſſion of the waſte, that he refuſed to act.

(12

(12 *Abing*) 1 Vez. 524. 546. S C. 3 Atk. 751. S. C.

An eſtate was ſettled upon *A.* for her jointure without impeachment of waſte except in pulling down houſes and felling timber, remainder to ſon *B.* for life without impeachment of waſte generally, remainder to ſtees to preſerve contingent remainders, remainder to his iſſue in tail, mainder to his ſiſter *C.* in tail. *B.* in the lifetime of *A.*, and with her vity, ſells timbers upon the eſtate, and afterwards dies in her lifetime; hereupon *C.* brought an action of waſte againſt *A.* to recover treble da-ages, and the place waſted, and had a verdict. But it being proved at the timber was cut down with the knowledge of *C.*, and that ſhe en-uraged the doing ſo, a perpetual injunction was granted to reſtrain her om proceeding any farther at law. Aſton v. Aſton, 1 Vez. 396.

Of Wills and Teſtaments. Page 496

(A) What is a Will and Teſtament, and wherein they differ.

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(1 *A Teſtament*) *Teſtamentum eſt voluntatis noſtræ juſta* [id eſt, ſolennis et legitima] *ſententia, de eo quid quis poſt mortem ſuam fieri velit l.* 1. MODESTIN. LIB. 2. PANDECT.

(2 *A will*) *Alienatio in mortis eventum, ante eam revocabilis, retento interim jure poſſidendi et fruendi teſtamentum. Grot. lib.* 2, *De Jure Belli ac Pacis, c.* 6. *n.* 14.

(3 *It is*) Hence Vinnius gives the following as the moſt perfect definition of a teſtament: *Teſtamentum eſt ſuprema conteſtatio in id ſolenniter facta, ut, quem volumus, poſt mortem noſtram habeamus eundem. Comment. in Inſtitut. lib.* 2. *c.* 10. The civilians define a codicil to be *ultima teſtati vel inteſtati voluntas minùs ſolennis:* for by the Roman law, there might be a codicil, whether the party died teſtate or inteſtate: and if he died teſtate, the codicil might either be precedent or ſubſequent to the teſtament; and in this caſe the validity of the codicil depended upon the validity of the teſtament; the codicil had relation to the date of the teſtament, and required to be confirmed by the teſtament. But the codicils of an inteſtate derived all their efficacy from themſelves, ſtood in need of no confirmation, and were regarded only from the day on which they were made.

So, a writing purporting to be an indenture, but by the party making declared to be his will, has been conſidered as a teſtamentary inſtrument Hickſon v. Witham, Finch. Rep. 195.

(B) Who are capable of making a Will and Teſtament.

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(5 *And yet*) The doctrine above ſtated, that the teſtamentary power commences in males at fourteen, and in females at twelve, ſeems to be the moſt relied upon. *Vide* Hargrave's edit of Co. Litt. 89. b. note (*b*).

(6 *It has*) This is a very looſe *dictum*, entitled to no attention.

(9 *Of the*) *Vide ſupra*, tom. iv. 244, 245.

(D) Of

(D) Of the ſeveral kinds of Wills and Teſtament

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(1 *There*) But not without writing, and ſigned and atteſted in like manner as wills of ob lands, ſince the ſtat. 29 Car. c. 3.

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(5 *The*) *Sed vide* 2 Vez. jun. 427.

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(13 *It has*) Gryle v. Gryle, 2 Atk. 176. *Sed vide* Smith v. Evans, 1 Wilſ. 313., and Rig v. Price, Dougl. 244. *contra*.

(15 *Where*) Grayſon v. Atkinſon, 2 Vez. 454. S. P.

(17 *If a*) So, Jones v. Lake, Feb. 1, 1742, B. R. 2 Atk. 176. by Sanders, notes. 2 Ve 455. S. C.

Bond *et al.* v. Seawell *et al.* 3 Burr. 1773. S. C. Black. Rep. 407. 422. 454.

It was proved that *C.* made his will, conſiſting of two ſheets of pap all of his own hand-writing, and ſigned his name at the bottom of eac page; and that he alſo made a codicil of his own hand-writing upon on ſingle ſheet, and called in *H.*, ſhewed him both the ſheets of his will, an his ſignature to every page thereof, and told him that was *his will*; an then ſhewed *H.* the codicil, and deſired him to atteſt both the will an codicil: which he did, in the preſence of the teſtator, and in the ma ner appearing upon the face of the inſtrument, and then went out of th room. *V.* and *L.* came in immediately afterwards, and the deviſor ſhe ed them the codicil, and the *laſt ſheet of the will*, and ſealed both befo them. *C.* then took each of them up ſeverally as his act and deed for th purpoſes therein mentioned. Then the witneſſes atteſted the ſame in th teſtator's preſence, but NEVER SAW *the* FIRST *ſheet of the will; nor* e THAT *ſheet* PRODUCED *to them; nor was the ſame, or any other paper* UPO THE TABLE. *Both* the ſheets of the will were found *with the codicil* i the teſtator's bureau, after his death, all wrapped up in one piece of pa per; but the two ſheets of the will were not pinned together. And th queſtion upon theſe facts was, Whether this will was duly executed ac cording to the ſtatute of frauds? After three ſeveral arguments before th court of King's Bench, and one argument before all the judges in th Exchequer-chamber, Lord *Mansfield* delivered the judgment. His lord ſhip ſaid, that the queſtion made at the trial, and ſubmitted by the ca as it then ſtood, turned upon the ſolemnity *of the* EXECUTION; and the were of opinion, "that the due execution of this will could not be com "at, in the method wherein the matter was then put;" that if this wer conſidered as a ſpecial verdict, they thought it was defectively found as t the point of the *legal execution* of the will; that every *preſumption* ought t be made by a jury, in *favour* of ſuch a will, when there was no doubt o the teſtator's intention; and that they all thought the circumſtances ſuffici ent to *preſume* that the firſt ſheet was in the room; and that the jury ought t have been ſo directed: but, upon a ſpecial verdict, nothing could be pre ſumed; therefore they were all of opinion. "that it ought to be tried over again;" and if the jury ſhould be of opinion, "that it was the in the room," they ought to find for the will generally, and they ought to *preſume*, from the circumſtances proved, "that the will *was* in the "room.

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(20 *A will*) 2 Atk. 176. by Sanders, notes, S. C. 2 Vez. 455. S. C.

(21 *It was*) Grayſon v. Atkinſon, 2 Vez. 454. S. C.

22 *A will*

(22 *A will*) Dougl. 244. notes S. C.

(23 *The*) In Caſſon v. Dade, 1 Br. Ch. Rep. 99. Lord Thurlowe, relying on the authority of this caſe, inclined to think a will well atteſted, where the teſtatrix could ſee the witneſſes through the windows of her carriage, and of the attorney's office.

The law, as ſtated by Lord *Macclesfield* in the laſt caſe, ſeems conformable to the deciſion of the court of King's Bench in the caſe of *Right* and *Price*, in which the court held, that corporal preſence merely was not ſufficient, unleſs there was likewiſe mental knowledge of the fact. In this caſe, on the laſt day on which the teſtator made an effort to ſign the will but failed, the witneſſes being preſent, the form of an atteſtation was written on the ſecond ſheet, and they put their names to it in the room where the teſtator lay, but he was in a ſtate of inſenſibility. And the queſtion was, Whether this will was duly executed for paſſing lands according to the ſtatute of frauds? In ſupport of the will it was argued, that inſenſibility was ſomething ſhort of death, and if the teſtator was alive, it could not be ſaid that the will was not atteſted in his preſence. That the queſtion was, Whether the teſtator having done all that was neceſſary on his part, and the atteſtation having been made according to the words of the ſtatute, a fair tranſaction ſhould be ſet aſide becauſe a formality required, according to an implied intention of the legiſlature, had not been complied with: that it did not appear but that the teſtator might, by poſſibility, have opened his eyes while the witneſſes were ſubſcribing their names; and *that*, according to the law as laid down in *Shires* and *Glaſcock*, would have been ſufficient. *Sed per curiam*—The court will lean in ſupport of a fair will, and not defeat it for a ſlip in form, where the meaning of the ſtatute has been complied with: this was the principle of *Shires* and *Glaſcock*'s caſe, and other caſes of that ſort. But the caſe now before the court was not one where there was a meaſuring caſt and room for preſumption. All the witneſſes knew, at the time of the atteſtation, that the teſtator was inſenſible. He was a log, and totally abſent to all mental qualities. That it was uſual in precedents of wills to ſay, that the witneſſes ſubſcribed *at the requeſt of the teſtator*: that indeed was not expreſsly required by the ſtatute, but the practice ſhewed the general underſtanding, and the nature of the thing implied a requeſt. The atteſtation in the teſtator's preſence was as eſſential as his ſignature, and all muſt be done while he was in a capacity to diſpoſe of his property. In this caſe the teſtator could not know whether the will that he had begun to ſign was that which the witneſſes atteſted; he was dead to all purpoſes or power of conveying his property.

Right v. Price, Dougl. 241.

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(39 *If a*) The neceſſity that a will of copyholds ſhould be in writing, is queſtioned by Mr. Watkins in his Treatiſe on Copyholds.

Where the witneſſes were deceived by the teſtator at the time of the execution, and were led to believe, from the words uſed by the teſtator at the execution of the inſtrument, that it was a deed and not a will (for it was delivered as his act and deed, and the words "*ſealed and delivered*" were put above the place where the witneſſes were to ſubſcribe their names): it was adjudged by the court, as it is ſaid, for the inconveniences that might ariſe in families from having it known that a perſon had made his will, that this was a ſufficient execution.

Trimmer v. Jackſon, 4 Burn's Eccl. Law, 117.

So,

(D) Of the ſeveral kinds of Wills and Teſtame

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(1 *There*) But not without writing, and ſigned and atteſted in like manner as wills of lands, ſince the ſtat. 29 Car. c. 3.

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(5 *The*) *Sed vide* 2 Vez. jun. 427.

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(13 *It has*) Gryle v. Gryle, 2 Atk. 176. *Sed vide* Smith v. Evans, 1 Wilſ. 313., and v. Price, Dougl. 244. *contra*.

(15 *Where*) Grayſon v. Atkinſon, 2 Vez. 454. S. P.

(17 *If a*) So, Jones v. Lake, Feb. 1, 1742, B. R. 2 Atk. 176. by Sanders, notes. 2 455. S. C.

Bond *et al.* v. Seawell *et al.* 3 Burr. 1773. S. C. Black. Rep. 407. 422. 454.

It was proved that *C.* made his will, conſiſting of two ſheets of p all of his own hand-writing, and ſigned his name at the bottom of page; and that he alſo made a codicil of his own hand-writing upon ſingle ſheet, and called in *H.*, ſhewed him both the ſheets of his will, his ſignature to every page thereof, and told him that was *his will*; then ſhewed *H.* the codicil, and deſired him to atteſt both the will codicil: which he did, in the preſence of the teſtator, and in the ner appearing upon the face of the inſtrument, and then went out of room. *V.* and *L.* came in immediately afterwards, and the deviſor ſi ed them the codicil, and the *laſt ſheet of the will*, and ſealed both be them. *C.* then took each of them up ſeverally as his act and deed for purpoſes therein mentioned. Then the witneſſes atteſted the ſame in teſtator's preſence, but NEVER SAW *the* FIRST *ſheet of the will; nor* THAT *ſheet* PRODUCED *to them; nor was the ſame, or any other paper u* THE TABLE. *Both* the ſheets of the will were found *with the codic* the teſtator's bureau, after his death, all wrapped up in one piece of per; but the two ſheets of the will were not pinned together. And queſtion upon theſe facts was, Whether this will was duly executed cording to the ſtatute of frauds? After three ſeveral arguments before court of King's Bench, and one argument before all the judges in Exchequer-chamber, Lord *Mansfield* delivered the judgment. His l ſhip ſaid, that the queſtion made at the trial, and ſubmitted by the as it then ſtood, turned upon the ſolemnity *of the* EXECUTION; and t were of opinion, "that the due execution of this will could not be c "at, in the method wherein the matter was then put;" that if this w conſidered as a ſpecial verdict, they thought it was defectively found a the point of the *legal execution* of the will; that every *preſumption* ough be made by a jury, in *favour* of ſuch a will, when there was no doub the teſtator's intention; and that they all thought the circumſtances ſuf ent to *preſume* that the firſt ſheet was in the room; and that the jury ough have been ſo directed: but, upon a ſpecial verdict, nothing could be ſumed; therefore they were all of opinion. "that it ought to be t over again;" and if the jury ſhould be of opinion, "that it was t in the room," they ought to find for the will generally, and they ou to *preſume*, from the circumſtances proved, "that the will *was* in "room.

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(20 *A will*) 2 Atk. 176. by Sanders, notes, S. C. 2 Vez. 455. S. C.

(21 *It was*) Grayſon v. Atkinſon, 2 Vez. 454. S. C.

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So,

Swinb. 52. God. O. L. 66.

So, if the deviſor ſhew the will unto the witneſſes, ſaying, "This is my laſt will and teſtament," or, "herein is contained my laſt will," this is ſufficient without making the witneſſes privy to the contents thereof, provided the witneſſes be able to prove the identity of the writing; that is to ſay, that the writing ſhewed is the very ſame writing, which the teſtator in his lifetime affirmed before them to be his will, or to contain his laſt will and teſtament.

And publication may be inferred from circumſtances, and will have the ſame force to render the inſtrument valid, as if expreſſed by parol declaration.

Wallis v. Wallis, 4 Burn's Eccl. Law, 114.

In a caſe which came on at the aſſizes at *Lincoln* before Mr. Juſtice *Deniſon* and a ſpecial jury, the facts were theſe: *W.* made his will in his own hand-writing, thereby deviſing his real eſtate, and the form of the teſtation was in theſe words, "*ſigned, ſealed, publiſhed, and declared* "*the laſt will and teſtament of the ſaid* W. *in the preſence of us*," I. M. J. W., and W. P. The heir at law brought an ejectment; and, to prove the will, the deviſee produced *W. P.*, one of the three ſubſcribing witneſſes, who depoſed, that about *July* 1760, *J. W.*, then butler to *W.* the deviſor, came and told him that he muſt come to his maſter; that upon entering the room, he found his maſter ſitting with a table before him, on which were ſome papers open; and that his maſter called him and the ſaid *J. W.* and *I. M.* (then his houſekeeper) up to the table to him, where they all came; then *W.* further addreſſed himſelf to them and deſired them *to take notice*, and then took a pen, and, in all their preſence ſigned and ſealed each part of his will, and laid both the ſaid parts open and unfolded before them to ſubſcribe their names as witneſſes thereto, which they all did, by the direction of the ſaid *W.* in his preſence, and in the preſence of each other, he ſhewing them ſeverally where to write their names. But that the ſaid *W.* otherwiſe than as above, did not declare or publiſh either part to be his will, or ſay what it was. The counſel for the plaintiff contended, that this was not a ſufficient proof, by one witneſs, of a complete execution of the will; and they produced, on the other hand, the other two ſubſcribing witneſſes, who, in many particulars, did not give a clear and diſtinct evidence; and could not recollect whether they had ſigned one or two papers; or whether then, or at any time before the ſaid *W*'s death, they underſtood what they had ſo witneſſed to be *W.*'s will, though *J. W.* ſeemed to admit he conjectured it ſo to be. But both *J. W.* and *I. M.* ſwore that they did not ſee the ſaid *W.* either ſign or ſeal any part of his will; that *P.*, the other ſubſcribing witneſs, was not at that time in the room, when (at the ſaid *W*'s deſire) they wrote their names to the papers as they then appeared; that *W.* did not declare or publiſh it as his will, nor did they know it to be a will. The counſel for the deviſee then called *R. P.* the teſtator's groom, who ſwore, that one morning, in the beginning of *July* 1760, *J. W.* told him, that his maſter had much wanted him, and that, upon his the ſaid *R. P.*'s offering to go to his maſter to receive his orders, *J. W.* told *R. P.* that the buſineſs was done, and that *J. P.* had ſupplied his place, and that he the ſaid *W. P.*, *J. W.*, and *I. M.* had that morning been witneſſing their maſter's will. And *S.* being called, ſwore, that in the beginning of *July* 1760. *I. M.* came one morning after breakfaſt into the kitchen, and told her that ſhe, and *J. W.* and *W. P.* had that morning witneſſed their maſter's will, though he had not told them it was ſo. Upon the ſtate of the evidence on both ſides, it was inſiſted for the plain-

, that as the law ſtood before the ſtatute of frauds, publication of a will s an eſſential part thereof; and, if ſo, there was nothing in that ſtatute take it away: and it was further inſiſted, that, by the ſaid ſtatute, e requiſite to a good and valid deviſe of lands was, that it ſhould be at-ted and ſubſcribed in the preſence of the deviſor by three or four credi-witneſſes, and that the words *atteſted and ſubſcribed* muſt import, that ſhould be publiſhed as a deviſe or will by the teſtator, in the preſence the witneſſes. On the contrary, for the defendant it was contended, t neither before nor ſince the ſtatute, publication was neceſſary; d further, ſuppoſing any ſuch publication was neceſſary, that the teſtator d uſed words and done acts which amounted to a publication within the aning of the ſtatute, which had not directed or preſcribed any particu-form or manner in which ſuch publication ſhould be made; that the ſtator's uſing theſe ſignificant words to all the witneſſes when he called em up to the will, "*take notice*," and then ſigning both parts of his will, d then delivering both the parts thereof to the witneſſes to atteſt, di-ting them where to ſign their names, and to witneſs each part under e common and uſual form of atteſtation, which the witneſſes did, was ſufficient execution and publication of his will; the words "*ſigned, ſealed, publiſhed*, and *declared*," being all written in the teſtator's own nd-writing, and the witneſs *P.* ſwearing that both parts of the will lay en to the inſpection of all the witneſſes when they ſubſcribed their mes, and it appearing, by the evidence of *P.* and *D.*, that both the her witneſſes had declared that they had been atteſting *W.*'s will. And *ſupra.* ey ſaid that this was a much ſtronger caſe than that of *Peate* and *Ougly*. nd Mr. Juſtice *Denniſon* was of opinion, that, if the witneſſes for the de-dant were credited by the jury, this was a due execution within the tute, and a ſufficient publication; and the jury found accordingly for e defendant. But the plaintiff's counſel inſiſted that the point, whether ood publication or not, ſhould be reſerved for a caſe to be argued above. owever, the matter was compromiſed on the defendant's remitting the ſts.

An illiterate man drew up himſelf, and wrote on two ſides of a ſheet paper, ſeveral deviſes and bequeſts, which he ſubſcribed; but they ere neither ſigned or witneſſed. He afterwards added a *memorandum*, o called by the teſtator himſelf,) beginning at the end of the ſecond, or e beginning of the third ſide of the ſame ſheet of paper, by which he ſpoſed of a part of his perſonal eſtate, but ſaid, that he did not mean ereby to diſannul any part of his former deviſe or diſpoſitions. This emorandum was ſubſcribed by him in the preſence of three witneſſes, and e declared it to be his laſt will in their preſence, and he delivered it to em, and deſired them to ſubſcribe and atteſt it, which they did in his eſence, and in the preſence of one another. The court of King's Bench eld this to be a ſufficient publication of the original will to paſs the real tate. Carleton v. Griffin, 1 Burr. 549.

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(53 *But*) Lord Camden, ſpeaking of this caſe in the Attorney General v. Downing, Ambl. 4. ſays, "In Hutton v. Simpſon, it is ſaid, that annexing a codicil to a will, if it relates only to perſonal eſtate, will not operate as a republication: but I am o opinion, that either the re-port is miſtaken, or that it is not law. The principal queſtion was not, Whether the codicil was a republication of the will? but, Whether the ſenſe of the words, *heirs of the body*, could be altered by the death of the teſtator's daughter in his lifetime? and the teſtator afterwards ma-king a codicil, held, they could not; as in Stead v. Bernier, 2 Jon, 135." His lordſhip there-re was of opinion, that a will of lands would be republiſhed by a codicil that related wholly to erſonalty. provided it was atteſted by three witneſſes, grounding himſelf upon this, as Lord Thurlowe

Thurlowe obſerved, that where the teſtator annexes a codicil to his will, he treats them as one *inſtrument*; and makes them *ſo from that time*. Lord Thurlowe therefore thought, that where a teſtator ſpeaks of a codicil to be annexed to his will, *he ſpeaks again of his will*, and at leaſt in caſes of perſonal eſtate, it amounts to a republication. Coppin v. Fernyhough, 2 Br. Ch. Rep. 296.

(55 *It has*) Ambl. 93. S. C.

(59 *J. S. by a will*) 3 Br. P. C. 107. S. C.

In the principal caſe, however, it is clear that Lord Macclesfield did not adhere to the rule he laid down in Lord Lanſdown's caſe, becauſe the will was there (in the principal caſe) held to be republiſhed without re-execution, and conſequently muſt have been republiſhed, notwithſtanding the ſtatute of frauds, by implication. *Per* Lord Commiſſioner Eyre, 4 Br. Ch. Rep. 9.

Potter and Potter, 1 Vez. 437.

So, one deviſed his manors to *A. B.*, and *C.*, and all his meſſuages, lands, tenements, and hereditaments, in the county of——, or elſewhere in any part of *England*, ſubject to an annuity, to the uſe of *P.* for life, remainder, *&c.* and, afterwards, entered into an agreement for the purchaſe of lands; and then made two codicils, the latter of which was on a *ſeparate paper*, and though not dated, was agreed to have been made about four or five days before his death; and recited therein that, having in his will appointed ſeveral limitations and remainders of his eſtate, ſome of which were not agreeable to his preſent intent, he revoked ſo much as ſhould be found inconſiſtent with that codicil, ratifying and confirming the other parts which ſhould not interfere therewith. This paper was atteſted as "ſigned, ſealed, and publiſhed, and *declared* by the teſtator, as a codicil "to his laſt will and teſtament." It being contended, that the firſt codicil would not amount to a republication of the will as to the lands newly purchaſed, the agreement reſpecting them not being to be carried into execution until ſubſequent to the date thereof; the queſtion was, Whether the laſt codicil, which was ſubſequent to the time ſtipulated for carrying the agreement into execution, was a republication of the will as to theſe lands? And it was contended, that it could not be a republication, becauſe it was not by way of indorſement, or annexed to the will, or ſhewn that the will itſelf was at that time before the teſtator. But Sir *John Strange*, Maſter of the Rolls, was of opinion, that notwithſtanding theſe objections the latter codicil amounted to a republication; becauſe it was an expreſs declaration, that the reſt of his intent, not inconſiſtent therewith, ſhould continue and be confirmed; and his Honour ſaid, that it might be miſchievous to hold that no republication could be, but by the teſtator's taking the will in his hands and republiſhing it by an indorſement on it, or annexing the codicil to the will itſelf; the perſon intending to republiſh might be at a diſtance from the will itſelf, or might not have *it* in his power, by its being in cuſtody of another; and the teſtator might know the ſubſtance, though he could not repeat the particulars.

Gibſon v. Montfort, 1 Vez. 489. 493. & Potterv. Potter, *ſupra*.

And it was admitted by the counſel, in the caſe of *Gibſon* and *Montfort*, that if there was, in a codicil, a general clauſe of confirmation of a will, as if the teſtator therein ſay, "*I confirm my will*," this would make the codicil amount to a republication; becauſe it would be the ſame as if the teſtator had republiſhed every deviſe in the will over again. And of this opinion was Lord *Hardwicke*.

Doe ondem Pate v. Davy, Cowp. 158.

This point was alſo ſo decided in the caſe of *Doe* on the demiſe of *Pate* againſt *Davy*. There *D.* by will, in 1767, after giving ſeveral legacies, ma

ade the following reſiduary deviſe: "And, as to all the reſt and reſidue of my eſtate, of what nature, kind, and quality ſoever, I give, deviſe, and bequeath the ſame unto *W. P.*, &c. according to the nature of the reſpective eſtates." The teſtator *then* purchaſed ſome cuſtomary eſtates, d afterwards ſurrendered them to ſuch uſes, intents, and purpoſes as he hould by his laſt will and teſtament in writing thereof direct, limit, and ppoint. He then made a codicil, by which, reciting that he had, by is will, deviſed all his fee-farm rents in manner therein mentioned, he eviſed the ſame to *C. D.* &c., and then proceeded as follows: "I do hereby ratify and confirm all and every the gifts, deviſes, and bequeſts contained in my ſaid will, except what I have hereby altered. And I do deſire, that this preſent writing may be annexed to, accepted, and taken as a codicil to my will, to all intents and purpoſes." And the queſtion was, Whether the execution of the codicil, ſubſequent to the urchaſe and ſurrender of the copyhold eſtates, amounted to ſuch a republication of the will as to paſs them? In favour of the heir at law, an attempt was made to diſtinguiſh this caſe from that of a deviſe of freehold, upon the ground that at the date of the will the teſtator had no copyhold ſtate, clearly then he had no intention to paſs any eſtate of copyhold to e deviſee. Then he afterwards purchaſed the lands in queſtion, and rrendered them to *ſuch uſes as he ſhould declare by his laſt will*, not to the USES DECLARED or *to be declared by his laſt will*. He then made a codicil, by which he ratified and confirmed every gift in his will, except what e had particularly altered by it. This then, it was ſaid, was a ratification only of what he had before expreſsly given by his will. But the will ontained no gift or deviſe of any *copyhold* lands, nor did the codicil refer any; on the contrary, it was clear that the only object the teſtator had adding the codicil was, to make the particular alteration there mentioned; conſequently the copyhold lands were undiſpoſed of, and the heir law was entitled to them by deſcent. *Sed per curiam*—The caſe of *Scherley* and *Vernon* is in point, that the codicil, *reciting* that the teſtator d made his will, and *ratifying and confirming it* in the alterations aforementioned, was a republication of the will, and both together ade but one will, whereby the lands purchaſed after the will paſſed.

And Lord *Hardwicke*, in the above mentioned caſe of *Gibſon* and *Montfort*, thought that if the propoſition there admitted was law, then by other words that amounted to a confirmation of a will would do as well as words expreſsly confirming it. And, therefore, that the codicil in the principal caſe reciting, that "whereas the teſtator had, by his laſt will of ſuch a date, given and deviſed to his executors a ſum of money in truſt for *A.* and another in truſt for *B.* he revoked thoſe legacies, and DESIRED that writing ſhould be a further part of his ſaid laſt will and teſtament," amounted to a republication to give the will operation upon lands *ſubſequently purchaſed*, under a ſweeping clauſe, "as to all the reſt, reſidue, and remainder of the teſtator's real and perſonal eſtate of what nature and kind ſoever," for, his lordſhip ſaid, though there were not the words, *I confirm my will*, yet there were the words I DESIRE, &c., between which and an actual confirmation there ſeemed very little diſtinction. But the caſe going off upon another ground, no judgment was given thereupon. Gibſon v. Montfort, 1 Vez. 484, 493. *et ſupra.*

A. B. by will deviſed his real eſtates to certain uſes. Afterwards, by deed, he conveyed them to the ſame uſes, until he married, and then to Jackſon v. Hurlock, Ambl. 487.

to new uſes. After the execution of the deed, but before marriage, t teſtator, by a codicil, atteſted by three witneſſes, and entitled, "*A codi* "*which I direct and deſire to be annexed, and taken and conſidered as pa* "*of my laſt will,*" makes a farther diſpoſition of a part of his perſonal and impoſes a forfeiture on any perſon who ſhould diſturb his wife; af the codicil he marries. Lord *Northington* was very clearly of opinion, th the codicil was a republication of the will, being declared to be part of and annexed to it.

Barnes v. Crow, 4 Br. Ch. Rep. 2.

W. B., being ſeiſed and poſſeſſed of real and perſonal eſtate, made h will duly atteſted to paſs real eſtates, and thereby gave and deviſed all h meſſuages, *&c.* and all other his real eſtate ſituate at *F.* or elſewhere to t plaintiffs in truſt to ſell, and diſpoſe of the money ariſing from the ſale the manner thereby directed: after making the will, the teſtator made codicil thereto, bearing date the 5th *November* 1785, *not* duly atteſted paſs real eſtates, by which he made ſome proviſions in conſequence of t marriage of one of his daughters. After the making and publication his will and ſuch firſt codicil, he bought the equity of redemption of eſtate then in mortgage for a term of 500 years; and the fee, ſubject the term, was afterwards conveyed to him. After this tranſaction, made another codicil to his will, dated 27th *October* 1788, whereby made ſome alterations in the ſtate of his affairs, and diſpoſed of a lea hold eſtate; but the codicil did not mention the lands purchaſed ſin the date of the will, and concluded thus: "In witneſs whereof I t "ſaid teſtator *W. B.* have to this my writing contained in this and part "the preceding ſheet of paper, which I declare to be a codicil to my ſa "laſt will and teſtament. and which is to be accepted and taken as p "thereof, ſet my hand, *&c.*" The execution of this laſt codicil was a teſted by three witneſſes. The firſt was begun, and partly written on t laſt ſheet of the teſtator's will, and was a continuation from the foot of t ſaid will, and the ſecond codicil was begun, and partly written on the l ſheet of the firſt codicil, and was a continuation from the foot of the ſa firſt codicil, and the will and codicils were annexed to each other by or the requeſt of the teſtator. It was determined, that the laſt codicil in th caſe amounted to a republication of the will, and acted upon the after-p chaſed eſtate. Lord Commiſſioner *Wilſon* obſerved, that the teſtator ſa ing, "I deſire the codicil ſhall be part of my will," was equivalent to ſa ing, "they ſhall be one inſtrument."

Heylin v. Heylin, Cowp. 130.

J. H. being ſeiſed in fee of certain freehold lands called *A.*, p thereof ſituate in the county of *E.*, and other part thereof in the cou of *C.*, and being likewiſe ſeiſed of certain other lands called *B.*, part freehold and partly copyhold, in the county of *E.*, duly made and p liſhed his laſt will, bearing date 13th *March* 1732, and thereby devi *all* his meſſuages, lands, tenements, and hereditaments, as well freeho as copyhold, ſituate, lying, and being in the counties of *S.*, *E.*, and *C* or either of them, to his wife for life, and after her deceaſe to vario uſes: and deviſed all the reſt and reſidue of his real and perſonal eſtate his wife, her heirs, executors, and adminiſtrators, and appointed her ſole executrix. The teſtator, at the time of making his will, w mortgagee out of poſſeſſion of three fifth-parts of certain copyhold premi holden of the manor of *D.* in the county of *E.*, which he afterwar purchaſed, and was admitted to on 20th *October* 1735, and in the ſame ye purchaſed one other fifth-part of the ſame premiſes: all of which he f rendered thus: "To the uſes, intents, and purpoſes, declared or to "declared in and by his laſt will and teſtament."—In the year 1736 direct

directed a 50*l.* legacy to be ſtruck out of his will, and ſubſcribed the following memorandum in the preſence of two witneſſes: "*September* 31ſt, 1736. The 50*l.* legacy to the poor of the pariſh of *W.* ſcratched out as above, was done in his preſence, and by his immediate order, he having paid it himſelf." The teſtator died the following year, without revoking or altering his will, or making any codicil thereto, except the codicil or teſtamentary declaration above mentioned. On a queſtion ſent out of Chancery, Whether the copyhold lands to which the teſtator was admitted the 20th of *October* 1735, and which he ſurrendered to the uſe of his will, were ſubject to any of the uſes mentioned in his will of the 13th *March* 1732? The court of King's Bench certified, that the ſurrender did by expreſs reference to the uſes declared by the will, adopt and apply the words of the will to theſe copyhold lands, as if the teſtator had been ſeiſed thereof at the time of making his will; and therefore they were ſubject to the uſes to which all the teſtator's copyhold lands in the county of *E.* were deviſed by his will. Lord *Mansfield*'s words in delivering the opinion of the court deſerve attention: "The ſtating the nature of a republication will go a great way in the conſtruction of this ſurrender. When a man republiſhes his will, the effect is, that the terms and words of the will ſhould be conſtrued to ſpeak with regard to the property he is ſeiſed of at the date of the republication, juſt the ſame as if he had had ſuch additional property at the time of making his will. Therefore, if one deviſes lands by the name of *B.*, *C.*, and *D.*, and purchaſes new lands, and republiſhes his will, the republication does not concern ſuch new lands, becauſe the will ſpeaks only of the particular lands *B.*, *C.*, and *D.* But, if the teſtator in his will ſays, I give *all* my real eſtate, a republication will affect ſuch newly purchaſed lands, becauſe it is then the ſame as if the teſtator had made a new will. Apply this rule to the caſe of a ſurrender, and I am of opinion that the ſurrenderor may expreſs himſelf ſo as to make it relate to a will actually made: and that the copyhold lands ſo ſurrendered will paſs by it. Suppoſe a teſtator ſeiſed of copyhold lands makes his will without a ſurrender, if he afterwards ſurrender them to the uſe of his will, ſuch ſurrender will clearly make his will good, and is effectual to paſs them: becauſe it only obviates the mode and form of conveyance. What has the teſtator done here? having made his will and declared his lands to uſes, he ſurrenders his newly-purchaſed copyhold lands to the uſes, intents, and purpoſes declared or to be declared in his will: it is preciſely the ſame thing as if he had ſaid,—'And whereas I have made a will ſo and ſo, and deviſed all my eſtate to *J. S* to ſuch and ſuch uſes, I mean theſe newly-purchaſed lands ſhould paſs to the ſame uſes.' I cannot poſſibly make a doubt as to the conſtruction: and there was no occaſion to ſtrike out the legacy of 50*l.*, unleſs he intended that particular part of his will ſhould be cancelled, and the reſt ſtand."

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(So it was) 5 Br. P. C. 45. S. C.

3. *What ſhall be ſufficient Proof of a Will.*

The doctrine above ſtated applies only to a will of perſonal eſtate; Ogle v. Cook, 1 Vez 177.
if a bill be brought to eſtabliſh a will of real eſtate againſt an heir, all Grayſon v Atkinſon, 2 Vez. 454.
the witneſſes, if living, muſt be examined as to the ſanity of the teſtator. And this rule is ſo ſtrictly inſiſted upon by courts of equity (*a*), that they will

Townshend v. Ives, 1 Wilf. 216. will not diſpenſe with it, though the heir at law, by his anſwer, ſtate, that he believes the will to have been duly made, &c.

(a) Potter v. Potter, 1 Vez. 274. The diſcovery of the inſanity of the teſtator has occaſioned the ſetting aſide of a will, even after 20 years poſſeſſion under it, and that too against a purchaſer. Squire v. Perſhall, 8 Vin. Abr. 169. pl. 13.

Hilliard v. Jennings, Com. Rep. 91. S. C. 1 Freem. 510. 1 Ld. Raym. 505. Ca. B. R. T. W. 3. 276. Carth. 514.

Nota. In the laſt reporter this caſe is miſ-ſtated in ſeveral points; particularly by ſtating that his credibility at ſigning depended upon his competency at law, without ſtating why the latter, *viz.* the competency at law was the criterion of the former, *viz.* the credibility at ſigning; namely, that no perſon who would be incompetent to prove a will on a trial could be credible to atteſt it upon the execution. And alſo by narrowing his concluſion to the very caſe before him, by ſaying "the will was void *quoad* the deviſe, and, as to the deviſe;" from whence it is natural to infer that it might have been good as to any other deviſe. Whereas, if he had ſtated the general proposition or principle, the reader could not have been miſled. The reaſon why the emphaſis is laid on that deviſe, is that, in fact, all the reſt of the will relates to perſonalty, reſpecting which the will was clearly good.

It has been a conſiderable queſtion, who thoſe witneſſes were that are deſcribed in the act by the word "credible," as will appear from the following caſes: *T. I.*, ſeiſed of hereditaments in fee, made his will, and thereby deviſed the ſame to *W. H.* and his heirs, and ſigned, ſealed, and publiſhed the will in the preſence of three witneſſes, who ſubſcribed the ſame. One of the witneſſes was *W. H.* the deviſee. It was objected that this deviſe was void, *W. H.* not being a credible witneſſes thereunder the ſtatute of frauds. On the part of the deviſee it was contended that the will was good notwithſtanding the ſtatute, for the deviſee was a man of indiſputable credit: that, though he could not be ſworn upon a trial, yet it could not be ſaid but that there were three witneſſes to the will, and that the will had been well proved by the other two witneſſes: that there was a difference between a matter which went to the credit of a witneſs's teſtimony, and a matter which went in bar of it; that the former excluded perſons from being witneſſes, as if a man were attainted of treaſon, or convicted of perjury or forgery, or any other matter of attaint; but that, where there was only an intereſt which barred him from being a witneſs, but did not touch his credit, it was otherwiſe: that the intent of the act was to prevent perjuries; but this could not be within the miſchief of the ſtatute; becauſe the deviſee, being a witneſs, could not be ſworn and examined upon it; and therefore the caſe was out of the ſtatute.

But it was argued on the other ſide, and ſo held by the court, that the will was not executed according to the ſtatute of frauds; for that a man who could not be a witneſs, which was the plaintiff's caſe, could not be a credible witneſs: that the intent of the act was to prevent frauds as well as perjuries; which intent would be evaded if the deviſee ſhould be admitted to be a witneſs, for he, being a party intereſted, might be induced to uſe fraud; and it was ſaid. that the ſtatute appoints three witneſſes, &c., to the end that the tranſaction might be in ſuch a ſolemn and notorious manner, that they might ſee that the deviſor, being infirm as well in underſtanding as in body, as all men generally *in extremis* were, did not ſuffer any impoſition; but that, *if perſons who cannot give evidence of their ſubſcription* ſhould be admitted to be credible witneſſes, it was to admit ſo many dead letters to be witneſſes, which entirely evaded the intention of the act; and upon this point judgment was given againſt the deviſee.

(67 *Where*) 2 Str. 1253. S. C. This cauſe was afterwards carried on appeal to the Exchequer-chamber where there was a difference of opinion among the judges; but the parties compounding it, it was never determined, 1 Vez, 503.

On a bill for eſtabliſhment of a will in the caſe of an infant, the objection taken was, that it appeared, on examination on the interrogatories, that one of the witneſſes to the will was a creditor for a bill of fees and diſburſements, and had not releaſed. It was inſiſted, that, on an account taken, he would be found not to be a creditor. The Lord Chancellour ſent it to the Maſter, to enquire whether he was ſo: then it was objected, that the condition of the witneſs, as was determined in the caſe of *Anſley* and *Dowſing*, muſt be taken to be at the time of atteſtation; and that if intereſted then, he could not be a good witneſs. It was anſwered, that, if that doctrine prevailed, it would overturn many wills, for ſervants were often made witneſſes, who generally had legacies given them. But, on the Maſter's ſpecial report, it appeared, that the witneſs to the will, at the time of the ſecond examination, was not a creditor of the teſtator; and it not appearing, at the time of atteſtation, that he was, Lord *Hardwicke* ſaid, he would not enter into a minute inquiry whether he was or not.

Price v. Loyd, 1 Vez. 503

Price v. Loyd, 2 Vez. 374.

But, notwithſtanding this ſtatute, the queſtion reſpecting the credibility of witneſſes was again brought under conſideration in the court of King's Bench on a ſpecial verdict, in the caſe of *Wyndham* and *Chetwynd*. In that caſe, *W. C.* being ſeiſed of lands, *&c.* made his will and a codicil thereto, bearing dating 14th *May* 1750; and after deviſing certain parts thereof in the will, charged the reſidue of his real and perſonal eſtates with the payment of all his juſt debts, legacies, and incumbrances. The will and codicil were duly executed in the preſence of, and ſubſcribed by, *S. S.*, *R. B.*, and *I. H.*—*S. S.* and *I. H.* were attornies at law, and had been employed by *W. C.* in or about the year 1747 to ſolicit a private act of parliament, and charged him as debtor in their books for the fees and expences of ſoliciting thereof, the ſum of 318*l.*, and the charge continued ſo until and after the death of *W. C.* Some time after which *S. S.* and *R. B.* delivered a bill for paſſing this act to the truſtees appointed in the act for the purpoſes therein mentioned: there was a clauſe in the act for payment of the expences attending the ſame, and before the examination of *S. S.* and *R. B.* as witneſſes on this ejectment, there was received from the truſtees the ſum of 302*l.* 4*s.* 8½*d.*, and the truſtees were willing to have paid the remainder of the demand, if it had not been for a miſcalculation. There was likewiſe a current account open and ſubſiſting between *S. S.*, *R. B*, and *W. C.* for other buſineſs, on the balance of which account, if ſtated at that time, *S. S.* and *R. B.* were indebted to *W. C.* 138*l.* 14*s.* 10*d.* Alſo, at the death of *W. C.* there was due and owing from him to *I. H.* the other ſubſcribing witneſs, who was his apothecary, 18*l.* 5*s.* 5*d.*, 11*l.* whereof were due on the 25th *December* 1749, on ſimple contract; *W. C.* dieth on 17th *May* 1750. There were mortgages upon *W. C.*'s eſtates at the time of his ſigning the ſaid will and codicil, and of his death, to the amount of 24,000*l.* And at the time of his death he owed 1600*l.* upon bond, and 2874*l.* upon ſimple contract. His perſonal eſtate then amounted to 13 972*l.*, and was ſufficient to pay all the ſimple contract and bond debts. The eſtates in mortgage were of ſufficient value to diſcharge the incumbrances thereupon. The executor of *W. C.* paid *I. H.*, one of the witneſſes, the ſum of 18*l.* 5*s.* 5*d.* after *W. C.*'s death and before his examination in the cauſe. Upon theſe facts the queſtion was, Whether theſe paper-writings, or either of them, were or were not duly executed, ſo as to paſs lands? This depended upon two queſtions; firſt, Whether the facts, as ſtated, did make *theſe* intereſted witneſſes, and render them not credible? Secondly, if ſo, Whether the

Wyndham v. Chetwynd, 1 Bur. 414.

ſubſequent circumſtances did not remove the objection, and re-eſtabliſh their credibility? On the firſt it was argued for the deviſee, that theſe witneſſes were no legatees, and derived nothing from the gift or bounty of the teſtator; that they were juſtly entitled to payment of their debts, though no will had ever been made; that the perſonal aſſets were the proper fund for them to reſort to, and that it was ſufficient to pay their demands, therefore they were not intereſted in the charge on the real eſtate. On the ſecond, it was contended that they were competent witneſſes at the time of the examination, their debts being then diſcharged. That the word *credible* in the ſtatute 29 *Car.* 2. *c.* 3. was an ambiguous expreſſion, and capable of many ſenſes, but there ſeemed to be a parliamentary expoſition thereof in the ſtatute of the 4th and 5th *Anne*, *c.* 16. § 14. whereby three witneſſes were required to authenticate a nuncupative will, and it was declared, that ſuch as were good witneſſes in trials at common law, ſhould be deemed good witneſſes to eſtabliſh a nuncupative will. Now allowing the ſame expoſition to take place on the ſtatute of frauds, then, as theſe witneſſes would be unexceptionable on a trial at law in reſpect of intereſt, ſo they would be competent, and, therefore, credible witneſſes to the preſent deviſe. On the other ſide, it was argued for the heir at law, that, at the time of the atteſtation, the witneſſes were intereſted, and therefore incompetent; and that *then*, and not the time of examination, was the proper time of inſpecting their credibility, elſe it would open greater opportunities of fraud and perjury than exiſted before the act; that it would be ſetting up witneſſes to hire, and would put the validity of a will in the power of the witneſſes, by releaſing or not releaſing their intereſt. That if a witneſs was unexceptionable at the time of atteſtation, and afterwards became infamous or inſane, the will was nevertheleſs a good will, which proved that his condition at the time of atteſtation was alone to be regarded; that the word credible meant ſomething more than competent; that the law required competency before, and it was not to be imagined that the learned compiler of this ſtatute, Lord *Hale*, would put in a word that at beſt was ſuperfluous; that in the ſtatute of the 13th *Car.* 2. againſt deer-ſtealing, and in all the game laws, the expreſſion of credible witneſſes was uſed, which had always been underſtood to mean more than competent, and to give the juſtices a diſcretion, whether they would convict upon ſuch teſtimony or not, though the witneſſes were, in law, ſtrictly admiſſible; and the caſes of *Hilliard* and *Jennings*, and *Anſtey* and *Dowſing*, were cited. After the court had taken ſome time to conſider of it, they all agreed, that the will was *duly* atteſted by three credible witneſſes. And Lord *Mansfield* * delivered a very elaborate judgment, in which he took occaſion to enter very fully into the diſcuſſion of the meaning of the word "credible" in the ſtatute of frauds; which his lordſhip conſidered as capable of being conferred on an intereſted witneſs by payment or a releaſe.

* In a ſubſequent caſe, it is ſtated, that Lord Mansfield, previous to his delivering his opinion in the laſt mentioned caſe, declared, that *it* was *his own*, and he was *perſonally* anſwerable for all its errors; the judgment of the court being *general*, that they held the will duly executed according to the ſtatute. Lord Camden arg in Doe v. Kerſey, *infra*.

Doe on dem. of Hindſon v. Kerſey. 4 Burn's Eccl. L. 88.

John Knott, by a paper-writing purporting to be his will, deviſed his real eſtates to his wife for life, and after the deceaſe of his wife deviſed certain hereditaments, therein particularly deſcribed, to truſtees and their ſucceſſors for ever, upon truſt to apply the rents and profits thereof to ſuch poor people within the lordſhip of *Maulſmeaburn* as he therein named, viz. indigent orphans under ten years of age, unable to labour, poor aged people

eople utterly paſt labour, poor impotent people lame or blind and who ould not labour; and to put out the children of ſuch poor people as bove, either ſons or daughters, apprentices as ſoon as they were fit for it. This paper-writing was ſigned, ſealed, and publiſhed by the ſaid *John Knott*, in the preſence of *Henry Holme*, *Robert Burra*, and *John Mitchell*, who ſubſcribed the ſame in the preſence of the deviſor. *Henry Holme* and *Robert Burra* were two of the truſtees above named, and they, and alſo *John Mitchell*, the other ſubſcribing witneſs, were, at the time of atteſting, and long afterwards, ſeiſed in fee ſimple of lands, *&c.* within the lordſhip and townſhip of *Maulſmeaburn* aforeſaid, and during the time aforeſaid were poſſeſſed of and occupied the ſame, and inhabited within the lordſhip; the lordſhip of *Maulſmeaburn* was a large diſtrict, and maintained its own poor, and the witneſſes to the will were chargeable and taxable, and were actually charged, aſſeſſed, taxed, and paid towards the poor, and all other taxes of the ſaid lordſhips. It appeared that *Henry Holme* and *Robert Burra* had, previous to the time of the trial, releaſed all their intereſt under the ſaid paper-writing, purporting to be the will of the ſaid *John Knott*, to the other truſtees therein named; and alſo that they, and *John Mitchell* the other witneſs, had ſeverally conveyed away and diſpoſed of all their reſpective eſtates and intereſt lying in the within lordſhip and townſhip of *Maulsmeaburn* before the trial. And the queſtion was, whether this paper writing, purporting to be the will of *John Knott*, was ſufficient to paſs the hereditaments in manner abovementioned? which depended upon the queſtion, Whether the releaſe and diſpoſition of their reſpective eſtates and intereſts had reſtored the credit of the witneſſes? or, if not, it muſt fall to the ground, as the objection to it was not cured by the act of the 25 *George* 2. And it was held by *Clive*, *Bathurſt*, and *Gould*, againſt the opinion of *Pratt*, Chief Juſtice, that a witneſs, incompetent at the time of atteſtation, might purge himſelf afterwards either by releaſe or payment, and become competent by the rule of rule. But the caſe was afterwards, to avoid any further litigation, adjuſted by agreement, and the parties divided the eſtate between them. *Ibid.* *Ibid.*

But a legatee may be a witneſs againſt a will; for the reaſon why a legatee is not a witneſs for a will being, becauſe he is preſumed to be partial in ſwearing for his own intereſt; it follows that a legatee, when he bears againſt a will, ſwears againſt his intereſt, and ſo is the ſtrongeſt evidence. Oxendon v. Penrice, Salk. 691. 5.

And if it ſtand indifferent to the witneſſes, whether the will, under which they are legatees and to which they are witneſſes, be valid or not; the witneſſes, though legatees, are credible.

Thus, a deviſee died on the 10th of *February* 1746, having made a will, dated 15th of *May* 1746, of his whole eſtate real and perſonal, charged with debts and legacies; the three ſubſcribing witneſſes, as being in his ſervice at his death, had legacies; one 30*l.* a-year for life, the two others pecuniary legacies; all three releaſed the 2nd of *February* 1746. The teſtator had alſo made a former will on the 20th of *December* 1744, atteſted by three diſintereſted perſons, under which the three ſubſcribing witneſſes to the will of 1746 would have had the ſame legacies. A bill was brought in Chancery to have the latter will eſtabliſhed. It was contended, that notwithſtanding the will of 1744, (which the teſtator had revoked, as he thought, effectually, and might probably have cancelled,) was a benefit to the witneſſes, *at the time of ſubſcribing*, to have a legacy under the latter will. But the Lord Chancellour was clearly of opinion, Lord Aileſbury's caſe, cited 1 Burr. 427.

that

that these were good witnesses; for, at the death of the testator, it was indifferent to them which will prevailed; and his lordship declared the will of the 15th of *May* 1746 to be well proved, established it, and decreed the trust.

Pendock v. Mackender, 4 Burn's Eccl. Law. 93. H. 28 G. 1.

The question, on a special case reserved at the assizes, was, Whether a person who before the time of attestation had been indicted, tried, and convicted for stealing a sheep, and was found guilty to the value of ten pence, and had judgment of whipping, was a sufficient witness within the statute?—The whole court of Common Pleas were clearly of opinion after three arguments at the bar, that he was not a competent witness.

Hudson's case, Skin. 79. Pike v. Badmerino. 2 Str. 1096. Lowe v. Jolliffe, 1 Bl. Rep. 365.

The attesting witnesses may, upon examination, deny the facts, which upon the face of the instrument, they are presumed to have attested. But in this case, the devisee may produce evidence to contradict the testimony. Where, on an ejectment brought upon a will, a woman had sworn against her own attestation, Yates, J. said, that she ought not to have been admitted to give that evidence. And Lord Mansfield observed, that this would not invalidate the will; for that there were cases where one witness had supported a will by swearing *that* which the other two witnesses attested, although those two had denied that they did so. And in the principal case, a new trial was granted, the verdict having been given against the devisee apparently upon this ground. Goodtitle v. Clayton, 4 Burr. 2224.

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(68 *Witnesses*) So, Mallabar v. Mallabar, Ca. temp. Talb. 79.

(F) How Wills shall be construed.

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(3 *That*) 2 Vez. 277. S. C. by the name of Boon v. Cornforth.

(4 *A having*) 1 Vez. 189. & Ambl. 557. S. C. by the name of Parsons v. Lanoe.

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(12 *That though*) 2 P. Wms. 137. 1 Vez. 231. 1 Atk. 411. 2 Vez. 216. 1 P. Wms. 6[illegible] P. Wms. 142. Ambl. 175. 3 Vez. jun. 148 Parol averments are admitted to aid the exposition of a written will, not only where there is an ambiguity as to the person, or as to the subject-matter devised, but also where words of equivocal import are used expressive of the quantity of interest, or extent of the subject matter of the devise. Thus, a testatrix, by her will, gave the following bequests: "I give to *M. P. the sum of* 500*l. stock in long annuities.* I give *M. H. the sum of* 500*l stock in long annuities*; I also give unto Miss *I. B. the sum of* 200*l. stock in long annuities, the* interest thereof *to accumulate until she shall attain twenty-one, and then the whole* to be transferred *to her by my executors.* Also, *I give unto Miss* H. D. *the sum of* 100*l. stock in long annuities*, the interest *thereof to accumulate, until she attains twenty-one, and then the whole* to be transferred *to her by my executors*—And all the rest and residue of my estate and effects, both real and personal, whatsoever and wheresoever, I give, devise, and bequeath the same, and all every part thereof, unto my said two nephews *M. F.* and *T. F.* their heirs, executors, administrators, and assigns for ever." It turned out that the testatrix had only 120*l.* a year long annuities. And the question was, Whether the legatees should have the respective sums given them raised by sale of so much of the stock as would produce the same; or whether they were entitled under the will to annuities of the sums respectively given them, and consequently to divide the 120*l.* a year between them, leaving nothing to the residuary legatees? And this depended upon the question, Whether, in this case, the court could let in averments of the state of the testatrix's property at the time of her decease? Upon the first hearing of the cause, Lord Thurlowe was of opinion, that parol evidence could not be admitted; because, the testatrix having used words so near those a man of business would make use of to dispose of so much *per annum*, the court were bound to declare the legatees entitled to the things as described, viz. annuities. But on a rehearing of the cause, his lordship changed his opinion. He said he should have thought that, had the will stood clear of all other criticisms, although it were not an accurate description of 500*l.* joint interest in the annuities, yet it was a sufficient one of 500*l.* stock in the long annuities; at the same time, it was impossible not to observe that the expression "the sum of 500*l.* was going out of the way. But accurate phrases were not called for; and if the words were [illegible]

expreſs the intention of the teſtatrix, that was ſufficient, and if it had ſtood by itſelf, it was ſufficient to ſhew what the words meant "an annual ſum of 500*l.*" The difficulty occurring was this, that ſhe had been ſpeaking of a ſum of 500*l.*, which expreſſion, if ſtanding alone, ought not to be interpreted by any other context, but muſt take its *whole complexion* from the word *ſtock*: but, if it ſtood with the context to admit of any other conſtruction upon it, he muſt conſider what the teſtatrix meant by the whole of the words "the ſum of 500*l.* &c." and the additional words "the intereſt thereof *to accumulate*." According to the natural ſenſe of the words "ſum of 500*l.* given to A. *at twenty one, and the* intereſt *thereof to accumulate*," he muſt ſuppoſe the firſt ſum to be the principal ſum, and the ſecond the intereſt of the principal ſum. It had been contended that the word "*ſtock*" in the annuities could not mean the annuity; becauſe it would extend to the *per cents.*, which were annuities, but there the ſtock was denominative of the *capital* ſums; otherwiſe as to the long annuities, they were denominated ſo by the annuity; and the circumſtance of their being both annuities made it very probable, that if a perſon were to ſpeak of it as a groſs ſum, he would ſpeak of the ſtock, and not of the annuity merely. So far practice might warrant, but if the words had ended with annuities, without ſpeaking of intereſt, there would have been no neceſſity for evidence to have controuled them: but the ſecond part of the ſentence, "and the intereſt thereof to accumulate," raiſed a doubt whether *ſhe meant a ſum* as producing intereſt, or the ſtock itſelf. The term intereſt was not a proper phraſe, but this was not a groſſer inaccuracy than thoſe in the reſt of the will: the word transferred had been relied on as a technical phraſe, but it weighed nothing, becauſe the thing to be bequeathed was not the ſtock, but the produce of the ſtock together with the ſtock itſelf. The intereſt, which was the growing produce of the legacy ſhe meant to give, was to be laid out in order to accumulate, ſhe muſt have meant by the word *annuity* ſomething. There was no doubt if the word *ſtock* had been left out, but the meaning would be that the ſum of 500*l.* *was to be diſpoſed of in long annuities, and to make a* purchaſe, and that produce to accumulate until the legatee ſhould attain twenty-one. This being a doubtful interpretation upon the face of the will, the queſtion aroſe, Whether the ſtate of the teſtatrix's fortune was not applicable to the conſtruction of the will? It appeared by ſome other parts of the will, that ſhe was extremely anxious to make an ample proviſion for the family of the *Fonereaus*; conſidering then the ſituation of her fortune, it was perfectly inconſiſtent to ſay, that ſhe could mean to give *ten times more than ſhe was worth* in legacies. His lordſhip's opinion therefore was, that the judgment muſt be reverſed, and that he could let in the evidence of the value of the eſtate, not to *controul the bequeſts* which the teſtatrix had made in words themſelves diſtinct, nor to controul a bequeſt which ſhe had made of a ſubject which ſhe had accurately deſcribed, but, becauſe the words ſhe had uſed in the deſcription were, upon the whole of the context, uncertain *whether ſhe intended it as the intereſt of the groſs ſum to accumulate*, or 500*l. per annum*. The peculiarity of this will furniſhed ſufficient doubt to warrant the admiſſion of collateral evidence to explain it, and, if ſo, the ſtatement of the teſtatrix's fortune, was applicable to the purpoſe of ſuch an explanation. Fonereau v. Pointz, 1 Br. Ch. Rep. 472.

(G) How Wills may be avoided.

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(5 *Per Hardwicke*) 3 Atk. 798 and Ambl. 224. S. C. *Vide* 2 Vez. jun. 432-3.

(7 *So where*) 2 Atk. 593. and 2 Vez. 418. S. C. *Note;* in this caſe there were two leaſes; as to the diſpoſition of one of them the Chancellour held, that the will remained valid, becauſe the leaſe was incomplete at the teſtator's death, for although he had ſurrendered and accepted a new leaſe, yet it was not ſealed with the college ſeal, till after his death.

A teſtatrix deviſed all her lands, tenements, and hereditaments at *W.* Rudſtone v. Anderſon. 2 Vez. 418 *Yorkſhire*, and all her tithes and eccleſiaſtical dues out of *W.* aforeſaid, or any other town or places near the ſame. At the time of making the will, ſhe was poſſeſſed of a leaſe of theſe tithes under the archbiſhop of *York*. After making the will ſhe ſurrendered this leaſe, and took a new one, of which ſhe was poſſeſſed at the time of her death. The queſtion was, Whether the renewal was a revocation of the will? And the court held, that it was; for there is no real diſtinction between the words *all my tithes at* W. and the words *all my leaſe or intereſt in my leaſe at* W.; becauſe both muſt refer to the intereſt ſhe had at the time of making the will. Then that intereſt did not remain at the death of the teſtatrix; for, by the ſurrender, ſhe ſo far altered her intereſt, that what were her tithes under the

the leaſe at making the will, could not be conſidered, under the foot of th clauſe, as being the ſame at the time of her death; but ſhe acquired a ne eſtate in them, to commence at and run out to a different period of ti It muſt then be conſidered, that the teſtatrix acquired a new intereſt ſu ſequent to the will, and, conſequently, ſuch an intereſt as would not p by the words uſed.

Hone v. Medcraft, 1 Br. Ch. Rep. 261.

Again, *S.* by his will, among other deviſes, gave and deviſed unto *the perpetual advowſon and diſpoſal of the living or rectory of* W. *for* e *together with the tithes of all ſorts thereof.* The rectory of *W.* was he by the teſtator by leaſe from *New College, Oxford,* for the term of t years. After the will made, the teſtator ſurrendered up that leaſe, a took a new leaſe from the college for ten years more, and was poſſeſſed the rectory, by virtue of that leaſe, at the time of his deceaſe. And t queſtion was, Whether the deviſe of the advowſon was revoked by t ſurrender and renewal? And it was held, that the ſurrender and renew were a revocation.

Powell on Deviſ. 589. *Vide* Bunter and Cooke, Salk. 237. 1 P. Wms. 575. 2 Atk. 599. 3 Atk. 177.

It is neceſſary here to obſerve, on theſe caſes of revocations of wi reſpecting leaſes by ſubſequent ſurrender and renewal of the leaſe, that th turn merely on the penning of the will, *viz.* whether the words are ſuf cient to paſs the ſubſequent renewed intereſt, and not on any inability point of law to give by will an after-taken leaſe; and therefore, if ſu leaſe be diſpoſed of by will by a proper form of words, it will paſs no withſtanding any ſubſequent renewal. As, if a teſtator give "all h "eſtate, right, and intereſt he ſhall have to come in ſuch leaſe at t "time of his death:" ſuch right of renewal will paſs by a general dev of the reſidue; or by a deviſe of the leaſe together with a right of renew And in the latter caſe, if the deviſor do nothing, the expiration of the o term will not bar the deviſee; becauſe the deviſe carries the right of renc al as well as the leaſe itſelf.

Sterling v. Lydiard, 3 Atk. 199.

Upon this principle Lord *Hardwicke* held, in the caſe of *Sterling* v. *Lydiard*, that where the teſtator clearly meant to diſpoſe of his whole p ſonal eſtate, a renewal of a leaſe, after the will made, was no revocat of it. In the caſe alluded to, the teſtator deviſed in the following m ner, *viz.* "As to *all and ſingular my leaſehold eſtate*, goods, chatte "and *perſonal eſtate* whatſoever, I give the ſame to my daughter *A.* and if ſhe died without iſſue living, then he limited it over in the ſa manner to *B.* In the reſiduary clauſe the teſtator repeated the wor "*all and ſingular*, &c." After making this will, he renewed a leaſe w *the dean and chapter of* Windſor. And on the queſtion, Whether this newal was a revocation of the will as to the leaſe? Lord *Hardwicke* h there was no doubt but the leaſehold eſtate paſſed by the will. The le here was not a ſpecifick legacy. It was nothing like it. The clauſe only an enumeration of the ſeveral particulars of the teſtator's perſonal tate, but the deviſe was general of the whole.

Carte v. Carte, 3 Atk. 174.

Again, *C.* in right of a prebend, in 1714, demiſed certain eſtates indenture to one of his children for twenty-one years, and afterwards ſurrender was yearly made thereof, and a new leaſe granted by *C.* T leſſee always executed a declaration of truſt, declaring that his or her n was made uſe of in ſuch leaſe, in truſt for the father for ſo many ye as he ſhould live of the term, and then for ſuch perſon or perſons as ſhould by deed or will appoint; and in default thereof, to and among children equally. In *January* 1735, *C.* made his will, and, after gi ſeveral legacies, bequeathed to his ſon *T. all the reſt of his goods,* c

d eſtate, whether real or perſonal, in poſſeſſion and reverſion, and made him ecutor. And then came this ſupplemental clauſe; "*Item*, It is my mind and will, that *T.* ſhall have the diſpoſal of the leaſe of my prebend of made to my daughter *S.*, and that he ſhall receive to himſelf all the *profits* and *advantages* ariſing from it." Afterwards, in *uguſt* 1739, a ſurrender and new leaſe was made to *S.*, and a declaration truſt delivered as before-mentioned. Then *C.* died; and Lord *Hardicke*, upon that part of the caſe which related to the operation and extent the words in the will, ſaid that the queſtion was, Whether the benefit the renewed leaſe in 1739 paſſed to *T.* by the will of 1735? which epended upon the queſtion, Whether the will of 1735 was ſufficient to ſs not only the truſt of the leaſe then in being, but alſo the benefit of e ſubſequent renewals? And he took the conſtruction of this clauſe in extenſive a manner, as if the teſtator had particularly recited and reated the leaſe and declaration of truſt, and given it to his ſon; the effect which would have been to have given him the whole truſt, not the truſt the then exiſting term only, but alſo all the renewals; and therefore tended to all future leaſes as well as thoſe in being. The word *advanta-* r was undoubtedly ſufficient to take in all the advantages and benefits beonging to the truſt. It comprized not only the profits but the renewals, hich were conſequential. The words of the will were very ſufficient to ſs not only the truſt and beneficial intereſt then ſubſiſting, but alſo the enewed leaſe.

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(9 *It was*) For caſes on this point ſee vol. 3. tit. Legacies (D).

A teſtator, (who had for two months together frequently declared him- Bibb v. Thomas, 2 Bl. Rep. 1043.
lf diſcontented with his will,) being one day in bed near the fire, ordered *M. W.*, who attended him, to fetch his will, which ſhe did, and delivered it to him, it being then whole, only ſomewhat eraſed. He pened it, looked at it, then gave it ſomething of a rip with his hands, nd ſo tore it as almoſt to tear a bit off, then rumpled it together, and rew it on the fire, but it fell off. It muſt ſoon have been burnt, had ot *M. W.* taken it up, which ſhe did, and put it in her pocket. The ſtator did not ſee her take it up, but ſeemed to have ſome ſuſpicion of it, he aſked her what ſhe was at; to which ſhe made little or no anſwer. he teſtator at ſeveral times afterwards ſaid, that was not and ſhould not e his will, and bid her deſtroy it. She ſaid at firſt, "So I will, when ou have made another;" but afterwards, upon his repeated inquiries, ſhe old him that ſhe had deſtroyed it, though in fact it was never deſtroyed; hat ſhe believed he imagined it was deſtroyed. She aſked him who his ſtate would go to when the will was burnt? he anſwered, to his ſiſter and er children. He afterwards told a perſon that he had deſtroyed his will, nd ſhould make no other until he had ſeen his brother *J. M.*, and deſired he perſon would tell his brother ſo, and that he wanted to ſee him. He fterwards wrote to his brother, ſaying, "I have deſtroyed my will which I made; for, upon ſerious conſideration, I was not eaſy in my mind about that will;" and deſired him to come down, ſaying "If I die inteſtate, it will cauſe uneaſineſs" The teſtator, however, died without making another will. The jury, with the concurrence of the judge, thought this a ſufficient revocation of the will; and ſo it was held to be by Lord Chief Juſtice *De Grey* and the whole court, on a motion for a new trial, and the rule diſcharged: the Chief Juſtice obſerving, that this caſe fell

fell within two of the ſpecifick acts deſcribed by the ſtatute of frauds; was both a burning and a tearing: and that throwing it on the fire, wi an intent to burn, though it was only very ſlightly ſinged and fell off, w ſufficient within the ſtatute.

Seymour *et al.* v. Noſworthy *in Scac.* Hard. 374. S. C. Show. Par. Ca, 146.

On a ſpecial verdict in ejectment, the jury found, that *A.*, ſeiſed in f of the lands in queſtion, made his will, and thereby deviſed them in m ner therein ſtated, and after making that teſtament, *viz. &c.* he made a *teſtamentum in ſcriptis*, but what were the contents thereof, or its purpo or effect they did not know. The queſtion was, Whether the latter w ſo found, was a revocation in law of the deviſe of lands in the former And the court declared their opinion, that they were not ſatisfied the ſ cond will did revoke the former; becauſe it was not found that any lan were deviſed by the ſecond will, ſo that it might or might not be conſiſte with the former: and when the matter ſtood indifferent, the court wou not ſuppoſe a revocation of a will ſolemnly made. And this judgment w affirmed on appeal to the Houſe of Lords.

S, C. by the name of Hitchins v. Baſſet, *in Banco Regis* 3 Mod. Rep. 203. Comb. 90. 2 Salk. 592 1 Show. 537.

On a ſpecial verdict in ejectment, the jury found, that *L.* ſeiſed in f of *chambers*, and having a conſiderable perſonal property, in 1748, b will, *duly atteſted to paſs real property*, gave and deviſed all his real and pe ſonal eſtate of what nature or kind ſoever, or whereſoever, unto his de friend *H.*; that, afterwards, in the year 1756, *L.* made and publiſh *another* will and teſtament in writing, *in the preſence of three ſubſcribing wi neſſes who duly atteſted the ſame;* that the diſpoſition made by *L.* in th will of 1756 was different from the diſpoſition in the will of the year 174 *but in what particulars was unknown to the jurors; but they did not find th the teſtator cancelled his will of the year* 1756, *or that the defendant deſtroy the ſame; but what was become of the ſaid will, the jurors ſaid they were together ignorant.* The queſtion was, Whether the latter will, being ex preſsly found by the jury to be *different* from the former, was a revocati of it? Thoſe who argued, that the laſt will, thus found, revoked the fir attempted to diſtinguiſh this caſe from that of *Hitchins* and *Baſſet*, upon th grounds that, in this caſe, the jury were ſo far from being totally ignora of the contents of the ſecond will, that they were enabled to find, and di find, that the diſpoſition in 1750 was *different from* that in 1748; an they contended, that the fact that it concerned lands was ſufficiently foun by the mode of deviſing, and that it extended to the eſtate in queſtion, w inferred from the teſtator's having *no other eſtate* which required the ſo lemnities of the ſtatute of frauds. But, on the other ſide it was contend ed, that, before a latter will could be determined to revoke a former, i muſt be ſhewn to contain an inconſiſtent diſpoſition, or circumſtances ma be made out from whence that might be preſumed, as ſpoliation, or th like; but here the jury expreſsly found, that they did not know in wh the difference conſiſted, though they found it different; that nothing could b preſumed upon a ſpecial verdict; nothing ſpecifically appeared touching th will in 1756; and the arguments for its being a revocation were fallacious for it did not appear what were the contents thereof, *et de non apparentibus & non exiſtentibus eadem eſt ratio:* that preſumptions were always in the affirmative there could not be any negative preſumption; that no preſumption could ari from a diverſity, unleſs that diverſity were ſhewn and found; that there fore a ſecond *will* in the dark, which neither the jury nor the court ev ſaw, and were *wholly ignorant* of the contents of, ought not to be ſet up for, if it were, an heir might avail himſelf, by deſtroying the ſecond wi

Seymour *et al.* v. Noſworthy *in Scac.* Hard. 374. S. C. Show. Par. Ca, 146. S, C. by the name of Hitchins v. Baſſet, *in Banco Regis* 3 Mod. Rep. 203. Comb. 90. 2 Salk. 592 1 Show. 537. Goodright v. Harwood, 3 Will. 497. 2 Bl. Rep. 937. Cowp. 87. 7 Br. P. C. 344.

defeat both wills. And upon theſe grounds it was adjudged, in the urt of King's Bench, on a writ of error from the court of Common eas, that the latter will, ſo found, was not a revocation, and the judg- ent below reverſed; and that reverſal was afterwards affirmed in the ouſe of Lords.

A teſtator made a will of his lands, and afterwards gave the ſame lands the ſame perſon by a latter will, but omitted to cancel the former, and erwards cancelled the latter, and both wills were in the teſtator's cuſto- at the time of his death, the ſecond cancelled, the firſt uncancelled. he queſtion was. Whether, under theſe circumſtances, the firſt will was be conſidered as revoked, and the deviſor conſequently dead inteſtate. *per curiam*—A will is ambulatory till the death of the teſtator. If the ſtator let it ſtand till he die, it is his will; if he do not ſuffer it to do ſo, is not his will. Here though the teſtator made two wills, yet the ſecond ill never operated; for it was only intentional, and the teſtator changed s intention, and cancelled the ſecond, ſo that it had no effect; it was no will at all, being cancelled before his death; then the former, which as never cancelled, ſtood as his will; for none of the caſes of revoca- ons in law, by alteration of circumſtances, applied to this ſort of caſe, d it was clearly not a revocation within the meaning of the ſtatute of uds, none of the circumſtances delineated in that ſtatute exiſting in this ſe. Goodright v. Glazier, 4 Burr. 2512. *ctvid.* Perk. fol. 210. § 479. 44 Aſſ. pl. 36. M. 44 E. 3. 33. *Vid.* § 6.

N., in 1759, duly executed his laſt will and teſtament, and alſo a du- icate thereof, but at the ſame time declared that it was not a will to his ing, and that he ſhould alter it. Afterwards, in 1761, he made another ill, which was alſo duly executed, the deviſes in which were different om thoſe in the will of 1759, and at the end of it there was a declaration which he revoked all former wills. After executing the latter will, took one part of the old will in his hands, tore off the name and ſeal, d directed the perſon who had made the new will to cut off the names of e witneſſes to the old one, which he did in *N.*'s preſence. *N.* at the me time ſaid, that a duplicate of the former will was in the hands of ., a deviſee therein. He then delivered the new will to the perſon, who ade it, requeſting him to take it away with him to his houſe, and keep for reaſons which he mentioned. Afterwards a principal deviſee in the ſt will died, ſoon after which the teſtator ſent for the laſt will, and in 762 had this will returned him. The teſtator, before his death, ſent r an attorney to make a new will, but became ſenſeleſs before he ar- red. On his death, one part of the will of 1759, and alſo the will of 761, were found together in a paper, both cancelled, The other part the will of 1759 was found uncancelled in the teſtator's room among her deeds and papers; how it came there did not appear; but *W.* a de- ſee therein, was in the houſe when the ſearches were made. And the ueſtion was, Whether the teſtator died inteſtate, or not; that is, whe- er the will of 1759 was revoked? And it was held, that the will of 759 was clearly revoked: firſt, by the new will of 1761, which was a mplete, legal, and effectual will, and would have revoked the former hether it had been cancelled or not. becauſe at the end of it, there was a eclaration, by which he revoked all former wills: ſecondly, becauſe the ſtator had actually cancelled the will of 1759. Burtonſhaw v. Gilbert, Cowp. 49.

M., by his will, gave particular lands, and his perſonal eſtate to be id out in lands, to charitable uſes; and then by a codicil, reciting his ill, and that he had deviſed his lands to ſuch uſes; "but that there had "been Attorney General v. Lloyd *et al.* 3 Atk. 552.

S. C. 1 Vez, 32.

" been an act of parliament, intituled, the mortmain act," and being in doubt " whether the deviſe made by him to ſuch charitable uſes would be good " or not, and being ſtill deſirous, as far as in him lies, to confirm his ſaid " will, nevertheleſs if, by the act of parliament, or by any conſtruction of " law thereupon, the eſtate is not well deviſed, and cannot go to thoſe " uſes, then and in ſuch caſe he gave the lands to *B.* and his heirs." Afterwards *M.* made another codicil, reciting as before, and " that being " *adviſed the deviſe of his lands would be void*, and it being his intention " the charity ſhould be continued, *and being adviſed his perſonal eſtate could* " *be given*, he did therefore, by this codicil, give his perſonal eſtate to " the charitable uſes before mentioned, and he did thereby give his real " eſtate to *B.*" Between the time of making the will and the codicil the mortmain act paſſed; and the queſtion was, Whether, upon the conſtruction of all the inſtruments, the laſt codicil was a revocation of the firſt will? which turned upon the point, whether the laſt codicil, as to its revoking the will, was put ſingly upon the point of law, whether the deviſe was valid or not under the mortmain act; or whether the teſtator, having been adviſed that his perſonal eſtate had been ſo much increaſed as to be ſufficient to ſupport the charity, (for the codicil was made a conſiderable time after the will,) taking the whole into his conſideration, viz. the point of law upon the ſtatute, *viz.* that the deviſe of the real eſtate would be void, the fact that he might make a good diſpoſition of his perſonal eſtate to the uſes of the charity, and that it would be ſufficient for the purpoſe, meant an actual revocation of the will as to the real eſtate in all event. And on a caſe ſent from the court of Chancery to the court of King's Bench, they certified that the real eſtates were well deviſed to *B.* by the laſt codicil; the neceſſary concluſion from which is, that it was a revocation of the will.

Willet v. Sanford. 1 Vez. 178. 186.

One made his will, deviſing the bulk of his real eſtate to three truſtees on certain truſts, and ſome particular lands to charitable uſes. He then made a codicil, which he publiſhed and declared ſhould be annexed to and be taken as part of his will; and making ſome alterations thereby in the diſpoſition of the truſt of the bulk of his eſtate, *after reciting the deviſe to the charity*, he deviſed the ſame lands, together with another piece of land, to the ſame three truſtees and two others, and their heirs, upon the ſame ſpecial truſts and confidences as in the will, and concluded with confirming *all other parts* of his former will. Upon theſe inſtruments it became a queſtion, Whether this truſt for the charity could take effect? The doubt aroſe from the circumſtance of the mortmain act having paſſed in the time that intervened between the making of the two inſtruments. If the codicil revoked the will as to the charity, it was clear that it could not take effect; becauſe the deviſe to it in the codicil, that being made after the act paſſed, was void. It was therefore contended by thoſe who oppoſed the deviſe to the charity, that by the codicil, the deviſe both as to the legal eſtate and truſt was revoked; for the whole fee, at law, was certainly altered, by the deviſe to five truſtees inſtead of two. It paſſed to different perſons in different manners; the truſtees muſt claim under the codicil; an ejectment muſt have been brought in their five names; they muſt have joined in any conveyance: the adding more land alſo ſhewed an intent to make a new regulation. But Lord *Hardwicke* was of opinion, that the beneficial intereſts and profits to the charity, were not revoked but confirmed by the codicil; and one ground of his lordſhip's opinion was, from the nature of the inſtrument which effected a deviſe only in the degree expreſſed

ſſed, and therefore, though the codicil effected a new deviſe of the gal eſtate by giving it to the ſame truſtees and two others, and an alter-on of the truſt eſtate by a variation of the deviſe of the ſurplus ofits, it left the truſt for the charity exactly the ſame as under the ill.

S. being ſeiſed in fee of a houſe at *Bath*, and of other freehold eſtates of the yearly value of 300*l.* and of other eſtates of the value of 500*l* a year remainder after the death of his father, made his will, and thereby gave his lands in poſſeſſion, reverſion, or remainder, *except the houſe at* Bath, *on truſt to ſell* and diſpoſe of the ſaid lands; and to place the money iſing therefrom upon real ſecurity, and out of the intereſt and produce ereof, to pay his wife *four hundred pounds* a year, in lieu of ſo much a ar which ſhe would be entitled to by their marriage-ſettlement. And e gave to his wife, *in ſatisfaction of the remaining* 50*l.* which ſhe could aim by the ſettlement, *his houſe in Bath* for her *life*, and, after her death viſed it to his eldeſt ſon. After reciting his wife's being *enſeint*, he gave ſuch child, whether ſon or daughter, 3000*l.* to be paid out of the monies iſing by the *ſale* of the lands, and to be paid at his or her age of 21. e did further by his will direct, that, when the eſtates directed by him be ſold were actually ſold and the monies ariſing from them inveſted in e ſaid ſecurities, 100*l.* a year ſhould be given to his wife for the bring-g up of his daughter *M.*, *and any after-born child:* and if his ſaid daughter, *ſuch after-born child*, ſhould happen to die before his or her legacy ſhould come due, that then ſuch legacy ſhould ſink into the *reſiduum* for the be-fit of his ſon. After ſome pecuniary legacies he gave the reſt, reſidue, d remainder of his eſtate, *&c.* to his ſon; but, in caſe he ſhould die fore twenty-one without iſſue, he then gave and bequeathed the ſame re-duary eſtate *to the child with which his wife was enſeint, if a ſon, as his n for ever; but, in caſe ſuch child ſhould prove a daughter*, then he gave e ſame reſiduary eſtate between his two daughters as tenants in com-on. At the time of making his will the teſtator had *a ſon* and a ughter, and his wife was *enſeint* with another child (a daughter) after-rds named *J. M.* After the date of the will the teſtator *ſold his houſe Bath*, and had two daughters born, *J. M.* and *A. S* After the ſale the houſe in *Bath*, and the birth of his two daughters, the teſtator, in own hand, made the *following alterations* in his will; but the making ereof was not atteſted, nor the will republiſhed.—In the deviſe to the ſtees *the exception of the houſe at Bath was ſtruck out*—In declaring the ſts of that deviſe, ſo far as related to his wife's annuity, he *interlined* e word "*fifty*," ſo that the annuity was altered to 450*l.* *The bequeſt his wife of the houſe in* BATH *was* STRUCK OUT, *and the remainder to ſon.* The *recital of his wife's being enſeint, and the legacy of* 3000*l.*, *re* STRUCK OUT, and, inſtead thereof, he inſerted theſe words "*I give to my two daughters, J. M.* and *A. S.* 2000*l. each.*" In the di-ction for bringing up his daughters he made the word "daughter" *ghters*, and inſtead of the words "*after-born child*," he inſerted the mes "*J. M.* and *A. S.*" In the clauſe reſpecting the lapſe of the acies, the word "*daughter*" was made *plural*, the words "*after-born child*" were STRUCK OUT, and inſtead of "*his or her*" the word *their*" was inſerted. He alſo made alterations as to his pecuniary le-ies. The *reſiduary deviſe* to the child *of which the wife was enſeint* was ewiſe STRUCK OUT, and inſtead of the word "*two*" before DAUGHTERS" he ſubſtituted the word "THREE. The queſtion re-

Sutton v. Sutton, Cowp. 812.

ferred

ferred to the opinion of the court was, Whether, by the will of the te
tor, as *altered*, *obliterated*, and *interlined* by him, any, and what part,
the real eſtate therein mentioned, paſſed thereby to any perſon, and
whom? Which depended upon whether the alterations and obliterati
in the will amounted to a *total revocation of it* with reſpect *to the real* eſ
And the court, (declining to give any opinion as to the legacies to t
daughters, recommending the deciſion of that point to be deferred un
the ſon, then an infant, ſhould come of age,) as to the deviſe to the truſte
to ſell, were clearly of opinion it was not revoked but continued in force
and they certified accordingly.

Per Lord Mansfield, Cowp. 90.

So, if a teſtator deviſes an abſolute eſtate in fee to *A.*, and afterwar
by a ſubſequent deviſe, gives him only an eſtate-tail in the ſame land;
is a revocation only to the extent of the difference between an eſtate-t
and an eſtate in fee.

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(27 *But in*) "This court," meaning a court of equity, "has no authority, nor has e
"attempted to exerciſe an authority to determine that revocations of wills are ſubject here to dif
"ent rules from thoſe that would govern at law." By Lord Ch. Loughborough, 2 Ves. jun 4
"With regard to all the doctrine of revocation as applied to legal eſtates in courts of law, cou
"of equity will apply the ſame doctrine in equity." By the Maſter of the Rolls, 2 Ves. j
598.

Brudenell v. Boughton, 2 Atk. 268.

B. by will duly executed purſuant to the ſtatute of frauds, and dated
October 1738, gave and deviſed 800*l.* to his ſiſter *E.*, and alſo 400*l.*
his ſiſter *L.*, and other ſmall pecuniary legacies, and then gave all h
real and perſonal eſtate, not otherwiſe therein diſpoſed of, after payme
of his debts and legacies, to *S.* his brother, and appointed him execut
Afterwards *B.* by a ſubſequent will, dated *May* 1741, and revoking
former wills, gave and bequeathed 100*l.* to his ſiſter *L.*, and 400*l.* to h
ſiſter *E.* and the reſt and reſidue of his eſtate, real and perſonal, he diſp
ſed of as before. But the latter will was not executed according to t
ſtatute of frauds. Lord *Hardwicke* being of opinion, that theſe legaci
being to be taken originally as perſonal, becauſe although the latter wor
created a charge upon the land, yet they were in their primary intenti
perſonal; the next queſtion was, Whether the legacies given by the fi
will were revoked by the ſecond *in toto*, they being given differently a
to different perſons; or, whether the legacies given by the ſecond will we
to be conſidered as only modifications of the firſt, and, conſequently,
revocations of them *pro tanto* only; the conſequence of which would b
that the latter legacies would continue a charge upon the land; And L
Hardwicke was of opinion, that the legacies given by the ſecond will we
to be conſidered as part of the money given by the firſt, only new-mode
led or qualified; and that the ſecond will, therefore, was a revocation
the firſt *pro tanto* only; and, accordingly, decreed the raiſing of the l
ſums out of the real eſtate of the teſtator.

Burgoyne v. Fox, 1 Atk. 576.

B. in 1714, by leaſe and releaſe, conveyed certain eſtates in *H.* to hi
ſelf for life, remainder to his firſt and other ſons in tail, remainder to
for life, remainder to his firſt and other ſons in tail, remainder to the ri
heirs of *B.*, ſubject to a power of revocation by any deed or writing und
his hand and ſeal, *&c.* ſo as that, at the time of ſuch revocation, he ſh
tled other land in *Yorkſhire* free from incumbrances to the ſame uſes.
afterwards made his will in 1729, and thereby, among other things,
viſed *all* his lands in *Yorkſhire* and elſewhere to truſtees upon truſts there
mention

ntioned. Then *B.* in 1730, by leaſe and releaſe, intended by him as execution of the power of revocation reſerved in the former deeds, nveyed a *diſtinct* eſtate in *Yorkſhire* to the uſes of the former ſettlement in 14, but this eſtate was deficient in value and ſubject to a term for ſecu- g children's fortunes, and, therefore, the ſettlement of it not a good ecution of the power reverſed in the former deed. But the leaſe and eaſe, in 1730, being made ſubſequent to the will of 1729, was clearly ld to be a revocation of the will *quoad* the deviſe of the *Yorkſhire* eſtate, part of all the teſtator's lands, *&c.* in *Yorkſhire* mentioned to be deviſed the will; and that eſtate therefore was not ſubject to the truſts created ereby.

So where a man by his will gave an eſtate in fee to one of his ſiſters, d after this made a marriage-ſettlement, wherein he limited the eſtate ſtrict ſettlement, remainder to his own right heirs; that ſettlement s held, notwithſtanding the remainder was limited to his own right irs, and ſo the old uſe, to be a revocation of the whole deviſe to the er. Martin v. Savage, Barnard. 189 S. C. cited 1 Vez. 440.

Again, it was held by Lord *Hardwicke*, in the caſe of *Bennet* and *Wade*, t a recovery ſuffered of land after a will made, gave a new eſtate there- to the tenant to the *præcipe*, although the limitations were to the old s; and, conſequently, that a will thereof made previouſly was revoked it. Bennet v. Wade, 2 Atk. 325.

Again *A.* being under his marriage-ſettlement, tenant for life, with re- inder to truſtees to preſerve contingent remainders, with remainder to firſt and other ſons in tail, remainder to himſelf in fee, made his will, thereby deviſed the ſettled eſtates as in his will mentioned; and then, indenture of leaſe and releaſe, conveyed the ſame hereditaments to *B.*, heirs and aſſigns for ever, and, afterwards, by another indenture, re- ing the foregoing leaſe and releaſe, and that the ſame was to make *B.* ant to the *præcipe*, for ſuffering a recovery, the uſes whereof were rein declared, as to the lands in queſtion, to be to himſelf and his heirs. en a recovery was ſuffered, after which *A.* the teſtator died without ubliſhing his will, and without there having been any iſſue of the mar- ge. The queſtion was, Whether the deeds executed and the recovery ered were, under the circumſtances of this caſe, a revocation of the ? The counſel for the deviſee argued that, in this caſe, the deeds and overy did not amount to a revocation, the ſame being executed and ſuf- d by *A.* without any intention appearing upon the ſtate of the caſe to r or revoke his will; that a recovery by tenant for life, remainder to ſtees, *&c.* was a nullity, an innocent recovery, and in this caſe nuga- y, that *A.*'s eſtate for life was not deviſable; that all he could deviſe his reverſion or remainder in fee, and that thereof he could not ſuffer ecovery: that the recovery therefore only operated on his life eſtate, ich amounted to nothing. But the court of Common Pleas afterwards tified, that the deeds executed, and the recovery ſuffered, were a revo- on of the will, but did not give their reaſons for this deciſion. But ground thereof ſeems to have been that, by the recovery, *A.* drew the le intereſt in the land into himſelf, and got one entire fee, a total new te in fee which could not be defeated but by the entry of the truſtees reſerve contingent remainders; and that his former eſtate for life, with tingent remainders, *&c.*, and remainder over in fee, were all gone, il the truſtees ſhould enter for the forfeiture, which they never did ſo *A.* died ſeiſed of an eſtate in fee in poſſeſſion of the lands compriſed in Darley v. Darley, 3 Wilſ. 6. S. C. 7 Br. P. C. 177.

the

the ſettlement, which was a *different* eſtate from that which he had wh
he made the will.

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(34 *J. S. being*) Upon the principle which the Maſter of the Rolls went upon in Brown
Thompſon, it was decided in the Exchequer, upon a will. made by one in the lifetime of a fo
mer wife who died without iſſue, whereupon he married a ſecond wife by whom he had iſſ
that the teſtator's ſecond marriage, *and having iſſue* by that marriage, was a total revocation of
will made in the lifetime of the firſt wife. Chriſtopher v. Chriſtopher, cited in 4 Burr. 2182.
Scacc. 1771. See alſo Wellington v. Wellington, 4 Burr. 2171.—The ſame queſtion occurred
the caſe of Spragge againſt Stone. In this caſe there were two wills. The firſt will was made
Jamaica in 1764, by which the whole eſtate, real and perſonal, was deviſed to a ſtranger. T
teſtator married in 1765, and had iſſue in 1766. Afterwards on the 10th of October 1766,
teſtator made another will, which was in his own hand-writing, but not duly atteſted accord
to the ſtatute of frauds, by which he deviſed his eſtate, real and perſonal, to his wife in truſt
his ſon. It had been decreed in the court of Chancery in Jamaica, that the marriage and birth
a child, and the ſecond will, amounted to a revocation as to the perſonalty, but not as to the r
eſtate. But, on appeal to the privy council, (Parker, Chief Baron, De Grey, Chief Juſtice,
Sir Eardly Wilmot, being preſent,) the decree, as to the real eſtate, was reverſed, and it was
clared, that the ſubſequent marriage and birth of a child were, in point of law, an implied re
cation of the will of 1764. No notice was taken of the ſecond will in the order of reverſal. Spra
v. Stone, at the Cockpit, 20th March 1773, cited in Dougl. 35.

Brady v. Cubitt, Dougl. 31.

Thus, *J. N.* ſeiſed in fee, *inter alia*, of the eſtates in queſtion, in *J*
1770, being a widower without children, and his ſiſter *A.* being his h
at law, made his will in writing duly atteſted, and thereby deviſed the ſa
eſtates to truſtees, to the intent that the Chancellour, Maſter, and Sch
lars of the Univerſity of *Cambridge*, and their ſucceſſors, ſhould rece
an annuity thereout upon truſt to be applied as directed in a book cove
with marble paper, of his own hand-writing, *&c.* by the will referred
and ſubject to, and chargeable with the ſaid annuity, and the powers
remedies for recovery thereof, in truſt for his own right heirs and aſſ
for ever. *The will did not contain any deviſe of any other part of the teſta
real eſtate.* After making this will the teſtator married, but, previous
the marriage and after making the will, he conveyed certain lands, of
annual value of 1230*l.* to truſtees for the purpoſe of ſecuring to his inten
wife a clear yearly ſum of 800*l.* in caſe there ſhould be no ſon of the m
riage, and 600*l.* if there ſhould be a ſon, by way of jointure and in ba
dower, with remainder to himſelf in fee. The eſtates *deviſed by the*
were *not* compriſed in this conveyance. The teſtator had iſſue of the
marriage one daughter. *After* her birth, he, continuing ſeiſed as afo
ſaid, ſubſcribed his name to another paper-writing in the preſence of th
witneſſes, who, at his requeſt, ſubſcribed their names thereto in his p
ſence and in the preſence of each other, the effect of which was as follo
viz. " Memorandum of what *J. N.* ſaid in the preſence of *A.*, *B.*,
" *C.* on the——day of——, that as his will was made before he mar
" a ſecond time, he had there deviſed his eſtate to his heir male;"
then after mentioning other circumſtances it ſtates, " that he alſo part
" larly deviſes, that the college gift may be paid and diſpoſed as he ha
" the ſaid will directed. The parchment book reſpecting the college
" is to ſtand. Mr. *B.* had inſtructions for this and drew it up." B
before the ſigning of this paper by *J. N.*, he ſtruck out this latter par
the memorandum by drawing his pen acroſs it, ſaying to the perſon w
reduced it into writing, " *You may draw your pen through what you h*
" *now written, for there is a parchment book with the will in the hand*
" B. *that mentions all about it.*" Soon after this the teſtator died.
one queſtion was, Whether this will, and the deviſe therein to the ch
ty, was revoked by the ſubſequent marriage and birth of a child? An

held that it was not; for a ſubſequent marriage and birth of a child ording a mere preſumption, which in this caſe, as in every other, might rebutted by every ſort of evidence, the declaration of the teſtator, as to wing the pen through the latter part of the inſtrument laſt executed, and *ferring to his will* as a ſubſiſting inſtrument, was deciſive evidence to re- the preſumption, that the change of his circumſtances furniſhed an in- to revoke.

But it does not ſeem, that either of theſe circumſtances, *viz.* marriage the having of children, would *ſingly* ſuffice to raiſe the preſumption of intended revocation.

A teſtator having made his will, after ſome ſmall legacies to his collateral relations, conſtituted his wife reſiduary legatee. After the making of the will, *viz.* in 1763, his wife was brought to bed of a daughter, upon whoſe birth the teſtator added a codicil, whereby he directed that the legacies ſhould be paid, and that an annuity of 300*l. per annum* ſhould be ſettled on the *reſiduum* and paid to his daughter. The codicil and will were read together. In 1765 another daughter was born, and in 1768 a ſon, who was a poſthumous child, the teſtator being dead about ſix months before his birth. And the queſtion, on a caſe ſent out of Chancery by Lord Camden for the opinion of Sir *George Hay*, was, Whether the ſubſequent birth of children was a revocation of this will? And it was determined, that the ſubſequent birth of children, even in caſe of perſonalty, did not amount to a revocation. Shepherd v. Shepherd, Dougl. 38. note (10).

A., being at variance with his wife, by his will, made in 1739, and executed at a tavern, gave all his eſtate real and perſonal to his brother, and made him executor. And in 1740, *A.* by a deed poll gave and granted to his wife *all his ſubſtance* which he then had or might thereafter have. The queſtion was, Whether this will was revoked by the deed poll? *Et per* Lord Chancellour, the latter inſtrument cannot take effect as a grant or deed of gift to the wife; becauſe the law will not permit a man to make a grant or conveyance to his wife in his lifetime, neither will a court of equity ſuffer the wife to have the whole of the huſband's eſtate while he is living; for it is not in the nature of a proviſion, which is all the wife is entitled to. But then, another conſideration remains, *viz.* though it cannot take effect as a grant to the wife, yet, whether it be not an act ſo inconſiſtent and repugnant to the will, that it may, though an act not ſtrictly legal amount, to a revocation? And his lordſhip ſaid, that he was of opinion it was, and declared, that the will was revoked as to all *the perſonal* eſtate by the deed poll. Beard v. Beard, 3 Atk. 72.

Nota, The deed poll only extended to perſonal eſtate.

M. made her will, and thereby deviſed a meſſuage in *L.* to her ſiſter for life, and after her deceaſe to truſtees to ſell the ſame, and to apply 200*l.*, part of the produce thereof, to *A.*, and other parts to other perſons, and give the reſidue to *C.* After the making of the will, the teſtatrix ſold the eſtate for 2500*l.*, part of which was left on mortgage of the eſtate, and the remainder laid out in the purchaſe of ſtock. Then the teſtatrix died without republiſhing the will; and the queſtion was, Whether this ſale was a revocation of the will? And it was held that it was, for there was an abſolute diſpoſition made by the will, and, before that could take effect, another abſolute diſpoſition inconſiſtent with it. Arnold v. Arnold, 1 Br. Ch. Rep. 401.

(*as J. S. by his will*) *Vide ſupra*, vol. iv. tit. Legacies (D). Page 532.

(*as A. and B. were*) So Swift v. Roberts, 3 Burr. 1490. Brydges v. Dutcheſs of Chandois, Ves. jun. 429. Page 534.

But, if the conveyance, by which a partition is made, be for any other purpoſe except merely that of partition, though it be nothing more than conveying the eſtate to ſuch uſes as the party may appoint, it will operate as a revocation of a will previouſly made.

Titner v. Titner, cited 1 Wilſ. 309. & 3 Atk. 742, 745. 750. So, Brydges v. Ducheſs of Chandois, 2 Vez. jun. 429.

Thus, where *T.* died in 1741, ſeiſed in fee of lands which were gavelkind leaving two ſons *R.* and *H.*, who both entered therein upon their father's death, and were each ſeiſed of an undivided moiety thereof; and they being ſo ſeiſed, *R.* made his will, and deviſed all his lands and tenements and all his moiety to his wife: afterwards a deed of partition was made and executed by and between *R.* and *H.*, and the lands in queſtion were allotted to *R.*, and it was covenanted therein that they and their wives ſhould all join in levying a fine, (which was done,) and that the ſame, as to the lands in queſtion, ſhould enure to the uſe of *R.* and ſuch perſon and perſons, and for ſuch eſtate and eſtates, as he ſhould, by deed or will limit, direct, or appoint: and, in default of ſuch appointment, to the uſe of *R.* in fee: Lord Chief Juſtice *Lee* held this to be clearly a revocation of the will, and not like the caſe of a *bare* partition only unattended by a fine or conveyance to a new uſe, which would not have been a revocation.

(47 *By marriage*) 3 Atk. 741. S. C. Ambl. 116. S. C. 1 Wms. 341. S. C. The introductory part of this argument is thus ſtated by Lord Loughborough in 2 Vez. jun. 431. from my Lord Hardwicke's notes: "It is admitted, that if the teſtator had been ſeiſed in fee at the date of the will, "and had afterwards ſuffered a recovery, that would be a revocation; and yet the objection would "have held equally there of the alteration being made only for the particular purpoſe of enabling "him and his wife to diſpoſe without any other form of conveyance. There are a great variety "of caſes, and nice and artificial diſtinctions, upon the favour to the heir. One rule, however, "is certain; that if a man is ſeiſed in fee, and diſpoſes by will, and afterwards makes a convey-"ance, taking back a new eſtate, that is a revocation: ſo, if he deviſes the land, and levies a "fine without any uſe declared, this is a revocation, and yet he takes back the old uſe unaltered, "which is a prodigiouſly ſtrong caſe. But theſe caſes admit of limitations and diſtinctions: and "therefore if a teſtator makes a conveyance for life or years, that being a particular, *partial* pur-"poſe, no more than will anſwer that purpoſe is revoked; the line being drawn, and the purpoſe "ſpecified with a declared intent of going thus far and no farther. Theſe are the rules of law: "the counſel have doubted whether they extend to equitable intereſts, without citing authorities; "but I think, they hold in equity, and am of opinion, that what is a revocation at law ſhall be "in equity: as it would be very miſchievous, that the ſame ſort of conveyance ſhould not be a "revocation in both caſes. Therefore, if a man having an equitable eſtate makes his will, and "then executes a conveyance, and diſpoſes of it, or declares the uſes to himſelf, that will be a "revocation, if it would be ſo of a legal eſtate at law. But ſtill this revocation follows the rule "of law; and therefore if the conveyance be of part only, and for a particular, *partial* purpoſe, "it ſhall be a revocation *pro tanto* only. Upon this principle is Vernon v. Jones; So Ogle v. "Cooke, that where the conveyance amounts only to a ſecurity, it is only a charge upon the "land, and no revocation; and as the heir may in all thoſe caſes have the ſurplus, ſo ſhall the "deviſee."

Thruſtout on the dem. of Gower v. Cunningham. 2 Blackſt. Rep. 1046.

S. in 1733 ſurrendered copyhold tenements to the uſe of *T.* and his wife, for their lives, remainder to the heirs and aſſigns of *T.*, they were accordingly admitted; and then *T.* ſurrendered to the uſe of his will. *B.* died, leaving iſſue by *T.*—*G.* the eldeſt, and *I.* the youngeſt ſon. In 1744, *T.* the father ſurrendered theſe tenements to the intent that the lord ſhould regrant them to the uſe of *T.* and his heirs upon his marriage with *S.*, and then to the uſe of *T.* and *S.* for their reſpective lives, remainder, to the heirs of their two bodies, *remainder to the right heirs of* T. No admiſſion was had by *T.* under this ſurrender. Afterwards, *viz* in 1757, *T.* deviſed the eſtates to *S.* his wife for life, remainder to *I.* his youngeſt ſon and *M.* his wife for their reſpective lives, and died, leaving *S.* his widow, and *G.* his eldeſt ſon and heir.

1759, *S.*

1759, *S.* was admitted for her life on the former ſurrender made on her marriage, and then *G.* the ſon was admitted to the reverſion expectant on her deceaſe. *I.* the youngeſt ſon died; then *S.* the tenant for life died. Afterwards *M* the widow of *I.* was admitted by virtue of the will of *T.* and the ſurrender to the uſe thereof. The queſtion was, Whether, by the ſubſequent acts, the ſurrender to the uſe of the will was at an end? It was argued that, by the ſurrender in 1744, every thing paſſed out of *T.* the deviſor, conſequently there was an end of the ſurrender to the uſe of his will in 1733; and, he never having been admitted, nor of courſe ſurrendered to the uſe of his will, in conſequence of the new limitation in 1744, nothing paſſed by the will of 1757. *Sed per curiam*, unanimouſly —The old uſe in fee granted to *T.* in 1733, to which he was then admitted, and which was ſurrendered to the uſe of his will, was not taken out of him by the new limitation and ſurrender of 1744. He had therefore no occaſion to be re-admitted to it for the purpoſe of ſurrendering to the uſe of his will, but ſhall be conſtrued to be in of his old eſtate.

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(50 *Though.*) But, if the huſband die in the lifetime of the wife, then the will, it ſeems, will revive, and on her death afterwards take effect as if no marriage had intervened. Therefore, ſaith Serjeant Manwood in Brett v. Rigden, Plowd. 343 a. if a feme ſole make her will the firſt day of May and give land thereby, and afterwards, the tenth day of May, ſhe take huſband, who dies the 20th day of May, and afterwards the woman die the 30th day of May, the deviſe is good; for it does not take effect until her death, at which time ſhe was diſcovert as ſhe was at the time of making the will.—And it is obſervable, that the caſe of Forſe v Hembling, 4 Rep. 61. wherein it was adjudged, that the will of a feme ſole was revoked by marriage, does not ſeem to impeach the caſe here put, for the reaſon given for that judgment is not only becauſe ſhe afterwards married, but alſo becauſe ſhe was covert baron at the time of her death. And it is to be noted, that it is only upon the authority of Forſe v. Hembling, that the Lord Chancellour King delivers in ſo unqualified a manner the doctrine in the text, that a woman's marriage is alone a revocation of her will.

By articles made in 1777, previouſly to the marriage of the Duke of *Chandois*, the duke covenanted that he would, within ſix months after the marriage, cauſe various freehold and copyhold eſtates to be well and effectually conveyed, ſo that he might be ſeiſed thereof, to the intent that, in caſe the ducheſs ſhould ſurvive him, ſhe might become intitled to dower, and alſo that he would, within twelve months after the marriage and after ſuch conveyances, ſettle the ſaid eſtates, ſubject to the dower of the ducheſs, to the uſe of himſelf for life, remainder to truſtees to preſerve contingent remainders, remainder, after the deceaſe of the duke and ducheſs, to truſtees for a term of years, to raiſe portions for younger children, and ſubject thereto and to dower, to the uſe of the firſt and other ſons in tail male, with remainder to the right heirs of the duke. The duke alſo covenanted, that in caſe the dower ſhould not be equivalent to 2000*l. per annum*, his heirs, executors, or adminiſtrators would make good the deficiency. By his will, bearing date *Jan.* 9 h, 1780, the duke confirmed the articles: and all the real eſtates, which he had by the articles agreed to ſettle, he deviſed, in caſe he ſhould die without iſſue male, or in caſe of failure of iſſue male in his wife's lifetime, to his wife for life, remainder to his daughters as tenants in common in tail, with other limitations. The duke afterward executed a ſettlement, by which he diſpoſed of the fee, and which purported to be in execution and performance of the articles; but in truth contained many clauſes and modifications

Brydges v. Ducheſs of Chandois, 2 Vez. jun. 417.

difications inconſiſtent both with the articles and will. Lord Chancellor *Loughborough* held, that as the ſettlement did not purſue the articles, it could not be referred to them, ſo as to form one inſtrument, and was therefore a revocation of the will.

Williams v. Owen, 2 Vez. jun. 595.

But where, by articles prior to marriage, the huſband being ſeiſed in fee, covenanted to convey his eſtates to truſtees, to the uſe of himſelf for life, remainder in truſt to ſecure an annuity to his wife in bar of dower, remainder to truſtees for years to raiſe portions, remainder to the ſons and daughters ſucceſſively in tail, remainder to his own right heirs, and afterwards made his will, and deviſed the reverſion in fee in the event of his dying without iſſue; and ſubſequent to the will executed a ſettlement in purſuance of the articles, by which he conveyed the eſtates to truſtees and their heirs, upon the truſts and to the uſes of the articles: it was holden with great clearneſs, that the will was not revoked by this ſettlement; that the ſettlement was nothing more than a mere legal execution of the articles; nothing more than giving the legal eſtate in lieu of the equitable eſtate, of which the teſtator was ſeiſed at the time of making the will; that the teſtator deviſed nothing more than the reverſion in fee; that his acquiring the legal intereſt made no difference; and that the perſon, to whom the eſtate was conveyed, was a truſtee for the purpoſes of the will.

Selwyn v. Selwyn, 1 Blackſt. Rep. 25 1 S. C. 2 Burr. 1131.

By deed, in 1750, *S.* was made tenant for life, remainder to his ſon in tail, and, in 1751, the father and ſon joined in a bargain and ſale to *W.* and his heirs, to make him a tenant to the *præcipe* in order to ſuffer a common recovery, the uſes of which were declared to be to *S.* the father for life, remainder to the ſon in fee-ſimple. *Trinity* term began the 7th of *June* 1751. On the 8th of *June* the ſon made a will, whereby he diſpoſed of all his real eſtate. In the ſame term a writ of entry was ſued out returnable *Quinden. Trin.*, *viz.* 16th of *June*, and the recovery was completed the ſame term. Soon afterwards the teſtator died. And a doubt ariſing as to the validity of the will, a caſe was ſent out of Chancery for the opinion of the court of King's Bench, and the queſtion was, Whether the lands in diſpute paſſed by this will made after the bargain and ſale, and after the beginning of the term, but before the return of the writ of entry? And the court of King's Bench certified that the will was valid. The foundation of which opinion ſeems to have been, that the court conſidered the whole tranſaction as one conveyance, each part whereof muſt relate to the date of the bargain and ſale, which was the principal part, and which was perfected, made abſolute, and delivered from objections by the ſubſequent ceremonies.

So explained by Lord Mansfield, 4 Burr, 1962. & S. C. 1 Blackſt. Rep. 706.

Roe on the dem of Noden v. Griffiths, 1 Blackſt. Rep. 605. S. C. 4 Burr. 1952.

So, in 1724, a copyhold eſtate was ſurrendered to the uſes of a marriage-ſettlement, which left, in the ſurrenderor, the reverſion in fee, and a power to deviſe the ſame by will; afterwards a ſurrender was made by him to the uſe of his will, and a will made accordingly. Then, in 1751, the ſurrenderor was called upon by the ſteward to be admitted to ſome of the particular eſtates created by the original ſurrender in 1724, which was done. And the queſtion was, Whether this admittance operated as a revocation of the prior will? And the court held that it did not; becauſe the whole tranſaction might be conſidered as one and the ſame, and then the admittance in 1751 would *relate* to the ſurrender in 1724, and be prior to the will.

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(53 *J. S. deviſed.*) 3 P. Wms. 344. S. C. 2 Eq. Ca. Abr. 241. pl. 30. 776. pl. 25. S. C.

This decree was affirmed on a re-hearing before Lord Hardwicke, 2 Atk. 148.

It has been held, upon the principle that *no actual* alteration is made in the thing deviſed, that the changing of truſtees, where the eſtate originally deviſed is only the truſt, will not amount to a revocation in law. Thus, where *A.* made his will and deviſed that his feoffees in truſt ſhould make a leaſe to *C.* and *D.* for eighty years, at a certain rent payable to his executors; and, being afterwards reſolved to change the feoffees in truſt, truſted them, or ſome of them, to join with him in a feoffment of the deviſed hereditaments to new truſtees and their heirs, to the uſe of *A.* and others until *A.* limited or ordered new uſes thereof, which he never did; it was held that the feoffment was, *in equity*, no revocation of the will. Bark v. Zouch, 1 Rep. Ch. 23. *& vide* Coles v. Hancock, 2 Ch. Rep. 109.

So, *W.* by his will deviſed all his real eſtate in *Berkſhire* to certain truſtees and their heirs, to the uſe of his firſt and ſecond ſons, *&c.* ſucceſſively in ſtrict ſettlement, with remainder to his own right heirs; and afterwards made a codicil to his will, by which, after reciting that ſince the publication thereof he had contracted for the purchaſe of certain lands, he directed the truſtees and executors in his will to pay the purchaſe-money out of the *reſiduum* of his perſonal eſtate; and that, on payment thereof, the ſaid purchaſed lands ſhould be conveyed, ſettled, and limited to the ſame uſes and on the ſame truſts, as, by his will, he had limited and declared concerning his other eſtates. Afterwards the teſtator himſelf completed the purchaſe referred to in the codicil, and took a conveyance of the purchaſed eſtates to certain truſtees, therein named, in fee, in truſt for himſelf and his heirs, ſoon after which he died. And the queſtion was, Whether the conveyance of the new purchaſed lands to the truſtees, ſubſequent to the will and codicil, was not, as to thoſe lands, a revocation? And it was decreed that this was no revocation; for, before the purchaſe completed the vendor was but a truſtee for the purchaſer, and the completion of the purchaſe was but taking the eſtate home. Fullerton v. Watts, cited Dougl. 692. Cane. T. 14 G. 3.

G. ſeiſed of manors and freehold lands in fee, by indenture mortgaged the ſame in fee; afterwards *G.*, on the marriage of his ſon, conveyed thoſe eſtates to truſtees, in truſt to ſecure an annuity to his ſon and his intended wife for and during the joint lives of himſelf and his ſon and the reſt thereto, to himſelf for life, remainder over, the ultimate remainder to himſelf in fee. Then *G.* made his will, by which he deviſed the reverſion in fee of part of theſe lands to truſtees in fee upon certain truſts and to certain uſes not material to be ſtated, and deviſed the reverſion in fee of the other part to the ſame truſtees and their heirs, in truſt to ſell and diſpoſe thereof, and, with the money ariſing from the ſale, to pay and diſcharge all principal and intereſt due on any mortgages or other incumbrances affecting theſe eſtates, and, from and after payment thereof, to pay the reſidue of ſuch purchaſe-monies in paying and diſcharging the legacies therein before given to his younger children. Then the mortgagee, in conſideration of the mortgage-money paid in, conveyed the mortgaged eſtates compriſed in the marriage-ſettlement to the truſtees by leaſe and releaſe to the uſes and truſts therein limited, freed and diſcharged from all equity, terms, proviſoes, and conditions of redemption. Afterwards, by leaſe and releaſe, reciting the above facts, the ſame eſtates, compriſed Doe v. Pott Dougl. 710.

compriſed in the marriage-ſettlement, were conveyed by the truſtees to truſtee in truſt for *G.* in fee. Then *G.* died without having done any oth act to revoke or alter his will. And one queſtion was, Whether theſe i ſtruments amounted in law to a revocation? And it was contended th they did; for, at the time of the will, the legal eſtate was in the mortg gee, and, after the will, was transferred from her and conveyed to a tru tee; and, though the equitable intereſt might have remained the ſame aft the conveyance to the truſtee, yet, there having been an alteration of t deviſe had after the will, that, it was ſaid, would operate as a revocatio *Sed per curiam*, unanimouſly, *G.* at the time of the deviſe, had merely t equitable fee in him, the mortgagee was his truſtee. Then, on payme of the mortgage-money, ſhe conveyed the legal eſtate in fee to the truſte which was merely transferring it from one truſtee to another; and the has been no determination or caſe in which the change of a truſtee has be held to revoke a will. Therefore the court thought the will was not voked.

Backwell v. Child, Ambl. 260.

Where one partner gave by his will to two of his partners one ninth one twelfth of the profits reſerved to him, over and above the ſhares ſerved to them by the articles of copartnerſhip; and afterwards, on t expiration of the partnerſhip under thoſe articles, renewed it with th ſame partners, and gave them a greater intereſt than they had under t former articles; Lord *Hardwicke* held, that the renewal of the artic was not a revocation of the will.

2. In what caſes the Court will ſet aſide a Will for Fraud.

Bennett v. Wade, 2 Atk. 324.

So, Lord *Hardwicke*, in the caſe of *Bennett* and *Wade*, ſaid, that, far as the bill ſought to ſet aſide the will there in queſtion, it was imp per; for, the court could not make a decree of that kind, but only dir an iſſue *devisavit vel non*.

Id. 424. Webb v. Claverden,

And, in the caſe of *Webb* and *Claverden*, which aroſe on a bill brou by the heir at law, charging fraud and circumvention in obtaining a wi Lord *Hardwicke* ſaid, that the court would not determine a fraud procuring a will, without directing a trial at law, which was done acc dingly.

Anon. 3 Atk. 17.

A bill was brought to ſet aſide a will for fraud, on ſuggeſtion that teſtator was incapable of making it, by being perpetually in liquor, particularly when he executed the will. And the defendant plea that the will was duly executed, and that it ought to prevail, upon an iſſue at law, it ſhould be found to be otherwiſe. *Per curia* The plea muſt be allowed; for you cannot in this court ſet aſide a will fraud.

(59 *A bill.*) 1 P. Wms. 548. S. C. cited. But this decree of Lord Parker was afterwards verſed by the lords. 3 Bro. P. C. 358.; and ſo, it ſeems, was another of his decrees of a kind in Andrews v. Powys. 8 Vin. Abr. pag. 548. 11 Vin. Abr. pag. 59 and 66. For L Hardwicke in Barnſley v. Powell, 1 Vez. 287. ſays, "*It is certainly now ſettled by the Lor* "Bransby v. Keridge, *that this cannot ſet aſide a will of perſonal eſtate for fraud, nor will I infring*

"*what is laid down there, and in* Powys v. Andrews, *and in the case of Mr.* Hawkins's *will*;" and in Bennett, v. Wade, Lord Hardwicke speaks of the case of Andrews v. Powys in like terms. But, where a will was both of real and personal estate; and as to the former it had been found by the jury to be forged, and the plaintiff's content to probate had been procured by fraud; Lord Hardwicke, upon the ground of this fraud, and not upon any supposition of a right to examine the validity of the will in contradiction to the probate, relieved against the will, and ordered the defendants to consent to a revocation of the probate, and intimated, that if this should not be consented to, he should go further and make the executors trustees. Barnsley v. Powell, *ubi supra*. So too in Sheffield v. Duchess of Buckingham, 1 Atk. 630. Lord Hardwicke granted an injunction to restrain the duchess from further controverting the will of her husband, but he founded this injunction on an admission of the will by the duchess in a former suit, in which it was agreed to be well proved; and he admitted, that *in an adversary way the court of Chancery or a court of law could not determine on the validity of a probate.* See Mr. Hargrave's learned argument *on the effect of sentences of courts ecclesiastical in cases of marriage.*

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